

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 Christchurch, against a decision of the Chief Executive that has been confirmed or varied by a Benefits Review Committee.

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

R Palu (Deputy Chairperson)

J Ryall (Member)

Hearing: 4 February 2022

Representation: XXXX presenting her own appeal.

L Collinson, counsel, and N Jaura, appeals officer,
for the Ministry of Social Development

FINAL DECISION

Introduction

[1] XXXX's appeal is against the Ministry of Social Development's (the Ministry) decision of 8 July 2019 to decline her application for home help domestic emergency support (DES), also referred to as 'home help', for the period 1 August 2019 to 10 November 2019.¹

[2] XXXX has also made subsequent applications for DES for periods after 10 November 2019. These are the subject of a later review process and subsequent appeals filed with the Authority and are not addressed in this appeal.

¹ The decision was made by Ministry staff under delegated authority from the Chief Executive.

Indicative decision

- [3] This appeal was the subject of an initial indicative decision. The appeal was then heard in an oral hearing at the request of XXXX. The oral hearing was convened by telephone as COVID-19 restrictions, health issues and system requirements prevented XXXX from attending a hearing in person or via audio visual link.
- [4] This decision was expected to be released considerably earlier. That has not occurred and I, the Deputy Chair, apologise to the parties for the ongoing delay.

Background

- [5] We understand XXXX's essential circumstances are not controversial. Since March 2014 XXXX has been in receipt of a benefit due to health issues. She suffers from various medical conditions, including chronic fatigue, anxiety, muscular-skeletal issues and post-traumatic stress disorder.
- [6] In July 2018 XXXX gave birth to twins, born prematurely, and they have suffered health conditions; including skin and digestive system disorders. XXXX received sole parent support with various supplementary payments. XXXX had limited support and required assistance with cooking, cleaning and other tasks.
- [7] Between 11 July 2018 and 8 March 2019 XXXX was granted DES for three consecutive periods of three months. This is provided under the Home Help Programme (the details of the Home Help Programme are set out below). This provided approximately \$844 per week for 45 hours per week of home help. When XXXX applied for a further fourth period the Ministry was not prepared to provide DES. However, the Ministry continued DES for various periods while alternative support was being explored.
- [8] By 8 July 2019 the Ministry decided that DES would only continue until 1 August 2019 and would be replaced with home help domestic support which provided domestic support of \$301.95 for 15 hours of home help per week. XXXX also received other supplementary assistance from 1 August 2019. This included Temporary Additional Support (TAS) payments which took into account claimed childcare costs. Later XXXX received Early Learning Payments for her dependent children to receive childcare services.
- [9] XXXX sought a review of the decision to stop DES. The matter was reviewed internally and by a Benefits Review Committee (BRC). The

BRC issued its decision in September 2019 and upheld the decision of the Ministry. XXXX then appealed to this Authority.

XXXX's position

[10] In her notice of appeal, XXXX asserts that the Ministry relied on mostly internal policy and not the relevant legislation, before declining and ceasing her DES assistance. She considers that the Ministry has confused its internal policy with law.

[11] XXXX considers that the Ministry was wrong to decline her application solely because she had already received the specified three periods of three months of DES. She contends that while she had three periods of three months of DES, further assistance of that type is allowed in "exceptional circumstances" which apply to her situation. In support of this XXXX submitted:

[11.1] The Home Help Programme is a guideline or allowance subject to exceptional circumstances.

[11.2] The Home Help Programme requires interpretation similar to other special assistance programmes such as the Special Needs Grant Programme.

[11.3] Similar to all special assistance programmes the Ministry has a discretion in extreme circumstances to grant DES for more than the allowance period specified in clause 9(2) of the Home Help Programme.

[11.4] The purpose of the timeframes provided for in the Home Help Programme is to give an allowance period, so assistance is not granted indefinitely. Like main benefit rates the rate of home help in clause 9(1) cannot be increased but the guided allowance period can be reapplied for.

[11.5] This is supported by s 13 of the Social Security Act 2018 (the Act) which provides that all guides in the Act are explanatory and do not limit provisions.

[11.6] Such an interpretation is sensible otherwise it would read that home help was only available once in a person's lifetime.

[11.7] This interpretation is also consistent with other programmes such as the Special Needs Grant Programme, TAS and main benefits which can be extended if exceptional circumstances exist.

- [11.8] Further, the interpretation is consistent with the purpose of the Home Help Programme being temporary as it involves both a new application to verify eligibility and to verify exceptional circumstances.
- [11.9] Exceptional circumstances can be easily verified through the application form. The Ministry's own records can also confirm if not receiving a grant would cause serious hardship.
- [11.10] Under the legislation, special assistance programmes such as Home Help payments are to be treated as a benefit payment as per s 101(2)(b) and can be reapplied for. This is consistent with the purpose of the Act in ss 3(1)(a)(ii) and 3(1)(b). This means ss 317, 332, 334 and 336 apply. Those provisions allow the Minister to backdate a benefit, provide for a benefit to be exempt from expiry, and allow a benefit to be regranted.
- [11.11] The Chief Executive in administering DES must make decisions that are consistent with the general objects and intentions of the Act and consistent with the Human Rights Act 1993, the Privacy Act 2020 and the New Zealand Bill of Rights Act 1990.
- [11.12] As evidence of this the Ministry extended her DES on several occasions outside of the guidelines.
- [12] For the meaning of exceptional circumstances XXXX referred to the High Court decision in *Atanasovski v Chief Executive of Social Development*.² That decision considered exceptional circumstances in the context of a special needs grant for food. It referred to earlier High Court decisions, which considered exceptional circumstances to be those which are not run of the mill and go beyond special or unusual circumstances and denote a rare occasion or event.³
- [13] XXXX considers that the Ministry has applied the Act incorrectly. In doing so it has required her to find appropriate assistance elsewhere when such assistance does not exist, is not applicable or does not meet her needs.

² HC Auckland CIV 2006-404-002423, 18 August 2006, at [23] and [24].

³ *Hall v Director-General of Social Welfare* [1997] NZFLR 902; and *Rowan v Chief Executive of the Department of Work and Income* (HC Wellington, CIV 2003-485-1672, 5 July 2004).

[14] XXXX submits that the medical evidence provided established her circumstances, verified her exceptional circumstances and justified further support under the legal requirements. She says:

[14.1] Her medical practitioner confirmed through her signed medical certificate that she had a medical condition and a medical emergency and that she required home help. Such professional evidence is sufficient, and it is not to be questioned or redetermined by non-professional or unqualified Ministry staff.

[14.2] She had immediate need and no other sources to meet the need.

[14.3] The Ministry's records confirm that she would be in serious hardship if the grant was not provided.

[15] Further, XXXX considers that the Ministry's evaluation had wrongly considered at the BRC stage that an Oranga Tamariki social worker needed to be involved in the grant of further DES. Whereas the application form states that it can be signed by a social worker, or a medical practitioner. The Ministry also breached XXXX's privacy by acting on that false understanding and passing on extremely personal information to others without her consent.

[16] XXXX seeks an order that the home help is approved and backdated to the date of her application. She also seeks a written acknowledgement by the Ministry of its error, and an apology and costs incurred in relation to the appeal. XXXX also seeks clearer policy wording by the Ministry of a domestic emergency and requests that the BRC is reminded that its review powers are limited to the Ministry's written reasons for declining her request.

The Ministry's position

[17] The Ministry's position is that XXXX had been paid the legislated maximum of three periods of three months under the DES provision for her domestic emergency situation. This exhausted her entitlement to that assistance under clause 9(2) and schedule 1 part 2 of the Home Help Programme.

[18] The Ministry accepts that a person can have a new emergency. It says a domestic emergency requires a sudden and unexpected change in circumstances that creates a crisis. While it recognises XXXX's ongoing health issues it considers that a new emergency

has not been established. Consequently, XXXX no longer qualified for DES.

[19] In relation to the Home Help Programme, the Ministry says:

[19.1] The Home Help Programme is a legislative special programme and is binding on the Ministry. It is not a policy or guideline.

[19.2] Clause 9 of the Home Help Programme prescribes non-discretionary maximums; both as to amount of support, and period of support. Maxima apply to both “domestic emergency” and “domestic support” entitlements.

[19.3] Both types of support “must not exceed more than 3 such periods” and that limits the discretion the Ministry holds.

[19.4] There are no provisions in the Act which allow the Ministry to extend the number of periods of assistance provided for in clause 9.

[20] More particularly with reference to XXXX’s personal circumstances the Ministry says:

[20.1] It accepted that the premature birth of the twins gave rise to an emergency situation at the time of their birth.

[20.2] XXXX had exhausted her legal entitlement to DES for this emergency.

[20.3] When the Ministry terminated the DES she had got past an “emergency” situation so that form of assistance did not apply.

[20.4] The further grant of DES that was approved after the third period was outside of the scope of the Home Help Programme.

[20.5] There is no basis that XXXX is entitled to further grants going forward.

[20.6] The Ministry provided other forms of support that were permitted by law, and appropriate. This included support

from a disability allowance and “home help for domestic support”.⁴

The Law

[21] As was said in the Indicative decision, the regulation of social security is somewhat more complex than some of New Zealand’s legislative regimes. It includes statutes and conventional regulations and also other forms of subordinate legislation that have the status of regulations. In addition, the Minister and the Chief Executive have some powers to issue directions, which are not legislation and accordingly have a different status.

The function of the Authority

[22] The Authority is not confined to simply reviewing whether the Chief Executive’s decision was correct. The Authority has a duty to make the correct decision that should have been made when XXXX sought assistance.⁵

[23] When dealing with an appeal the Authority is not bound by earlier processes. It can and does look at the correct result in fact and law. The Authority considers the material legislative provisions against the evidence and information before it. The Authority does not consider conduct issues or other matters, except to the extent they bear on the correctness of the Ministry’s decision.

Home Help

[24] The Home Help Programme was created pursuant to s 124(1)(d) of the Social Security Act 1964 (the 1964 Act). When the Social Security Act 2018 (the Act) came into effect, clause 21 of schedule 1 of the new Act preserved the Home Help Programme. Its purpose is to provide financial assistance to people who require temporary part-time help to complete domestic tasks performed in their homes.⁶

[25] Section 101 of the Act now provides the Minister the ability to approve and establish welfare programmes. Under s 124 of the 1964 Act, the Minister was required to *Gazette* the Home Help Programme and lay a copy before the House of Representatives. Section 21 of

⁴ That refers to one of the grounds for providing assistance under the Home Help Programme.

⁵ *Crequer v Chief Executive of the Ministry of Social Development* [2016] NZHC 943, at [48]; *Margison v Chief Executive of the Department of Work and Income* HC Auckland AP.141-SW00, 6 August 2001 at [27]; *Arbuthnot v Chief Executive of the Department of Work and Income* [2007] NZSC 55.

⁶ “Home Help Programme” (13 May 2004) 52 *New Zealand Gazette* 1290, cl 3.

the Act preserves this process. The welfare programmes, including the Home Help Programme are subordinate legislation, and are construed consistently with the empowering Act.

[26] Section 101(2)(b) of the Act provides that a welfare programme may provide for any specified provision of the Act to apply to a welfare programme as if the special assistance authorised by the programme were a benefit under the Act.

[27] Clause 6 of the Home Help Programme sets out the eligibility requirements for home help assistance. The eligibility criteria are based on three types of assistance:

[27.1] Multiple births: births of twins where there is already a dependent child in the family under five years of age, or triplets.

[27.2] Domestic emergency: a family with dependents, where there is a domestic emergency, lack of family or community support, and the applicant meets a means test.

[27.3] Domestic support: a family with dependents, where there is a need for “domestic support”, one or more dependents, and the applicant meets a means test.

[28] A “domestic emergency” is defined in clause 4 as “a sudden and unexpected changes in circumstances (for example, the loss of a spouse or partner) that creates a crisis situation for the applicant”.

[29] Clause 9, which refers to a schedule to the Home Help Programme sets out the maximum rates and periods of home help under the Home Help Programme. The terms vary for twins (with a child under five), triplets (or more), a domestic emergency and domestic support.

[30] XXXX did not qualify on account of multiple births, as she had twins and her other child was never under five years of age at a material time. Accordingly, she could only qualify under the criteria for a “domestic emergency” or “domestic support”. The schedule provides:

[30.1] Domestic emergency is allocated for up to a maximum of 45 hours of assistance per week, for three months, for no more than three such periods; and

[30.2] Domestic support is up to 15 hours per week of assistance, for three months, for no more than three such periods within a two-year span.

[31] It appears that if there was a new domestic emergency then it would have its own cap for hours, and the three periods of three months.

Discussion

The Home Help Programme is subordinate legislation

[32] We cannot accept the primary ground in XXXX's argument. The Home Help Programme is not an administrative guideline, it is subordinate legislation with the same standing as regulations. The Chief Executive, this Authority and the Courts are obliged to apply its terms as law.

[33] It is necessary to interpret the Home Help Programme consistently with the Act, and the New Zealand Bill of Rights Act 1990. However, none of that derogates from the Home Help Programme being law. We are obliged to apply the provisions in the Home Help Programme.

The limits on support under the Home Help Programme

[34] We have already discussed the terms of the Home Help Programme, and generally its application to XXXX. She is potentially entitled to:

[34.1] For a "domestic emergency" up to 45 hours of assistance per week for three periods of three months; and

[34.2] For "domestic support" up to 15 hours per week for up to three months, for no more than three such periods in a two-year span.

[35] It appears clear that clause 6(1) of the Home Help Programme allows home help assistance if one of the criteria are met, and the level of assistance depends on the grounds.

[36] We do need to consider how the maximum periods in the schedule apply. The schedule simply lists the maximum support discretely when a person qualifies under the three categories that can be grounds for providing home help. In our view, we have no basis to say, for example, because a person received up to 240 hours in 12 months for twins, they are disqualified if they suffer a further domestic emergency. That is unsurprising.

[37] Materially, in XXXX's case we consider the schedule to the Home Help Programme has separate maximums for a domestic emergency and domestic support. XXXX exhausted the domestic emergency support, but in our view, she was then entitled to receive domestic support if she qualified for it. It appears that she did as XXXX received home help from 2 August 2019.

[38] The other point we need to consider is the domestic emergency. Clause 6(1)(c)(i) expressly refers to "a domestic emergency". Potentially there may be several domestic emergencies, and the view is at least open that the schedule had a maximum for each emergency. However, for "domestic support" the maximum appears to relate to a circumstance of need, which is not like the potential series of emergencies.

[39] Accordingly:

[39.1] XXXX could seek support for a new "domestic emergency" if she experienced one after the maximum support for a former emergency was exhausted;

[39.2] She was entitled to apply for and potentially receive support for "domestic support", immediately after exhausting the support for a "domestic emergency" and the separate maximum support would apply to that different ground for support.

[40] We disagree with XXXX's approach that the Chief Executive or this Authority has the power to extend support on a discretionary basis. We also agree that there are no provisions in the Act which allow the Ministry to extend the periods of assistance provided for in clause 9 of the Home Help Programme.

[41] The fact that the Ministry extended support beyond the time allowed under the Home Help Programme, does not alter the power we have. We must comply with the law.

Subsequent domestic emergency

[42] It is necessary to consider whether XXXX had a subsequent domestic emergency that would support a new entitlement to DES.

[43] XXXX submits that her GP's certificate is sufficient evidence and that a full comprehensive explanation of her domestic emergency for each period is not legally required, nor appropriate given the highly sensitive nature of the information and limited medical

understanding of the Ministry staff, who are not medical professionals. XXXX considers that her GP's certificate should be accepted without question.

- [44] However, it is necessary to consider all of the available information to determine if the criterion for a fresh domestic emergency is satisfied.
- [45] XXXX's fourth application for home help was submitted on 6 March 2019. Her requirement for home help was confirmed by her GP. In completing the section confirming a need for domestic support or the occurrence of an emergency and a need for temporary home help, the GP stated that the need was as per grounds stated in previous applications, nothing had changed, and help was still required for twin babies born prematurely at 35 weeks.⁷
- [46] XXXX's GP also signed off a prescribed declaration included in the form which declared that "there had been a sudden change to the applicant's health or family circumstances [which] is likely to have caused a crisis situation at home" and that the applicant's situation was not covered by home support provided by the District Health Board.⁸
- [47] In April 2019, with XXXX's verbal consent, the Ministry's Regional Health Adviser (RHA) contacted XXXX's GP to obtain more information to establish what the emergency need was. The GP confirmed that XXXX had continued to be unwell and required domestic support for another six months. Ultimately, DES was extended for various shorter periods to early June 2019 pending exploration of assistance via other agencies.
- [48] On 1 June 2019 XXXX made a fifth application for DES. Her application stated that her current situation had not improved, and no other organisations were able to provide the home help support required. She also stated that due to current complaints she had made to Police and Oranga Tamariki regarding inaccurate information or being ignored, her situation had escalated.
- [49] In confirming the need for home help her GP stated that XXXX's current situation had not improved, her need related to the

⁷ XXXX's earlier applications referred to the premature birth of her twin babies and were supported by clinical psychologist at the Mothers and Babies service – CDHB mental health service.

⁸ The New Zealand Public Health and Disability Act 2000 also funds home support for people needing it because of age, ill health, or infirmity.

combination of XXXX's high health and complex needs and high health needs of her babies, and there was no other organisation that funded the help required. In the GP's view continued funding of 45 hours per week was essential. The GP again certified that there had been a sudden change to her health or family circumstances which is likely to have caused a crisis situation at home.

- [50] XXXX has also provided extensive information in support of her position that her circumstances came within the definition of exceptional circumstances.⁹ She says that what has occurred in her life cannot be called "run of the mill". In short, XXXX's information provides a detailed account of ongoing events, trauma and struggles from when she was young to the time leading up to her pregnancy with her twins, an early labour and their premature birth and afterwards. This involves various agencies including ACC, Linkpeople, CDHB, Oranga Tamariki, Plunket, the Police, the Family Court and the father of her twins. It includes past assaults, stress, mental injury, PTSD, health issues arising from the birth, care of children issues, violence and abuse that she had reported to Police, protracted and difficult Family Court proceedings, various privacy breaches including the disclosure of personal information by ACC in 2018, unsuitable housing and issues with a social housing house, issues with Oranga Tamariki, abuse and lack of help from Government agencies, multiple health issues and the most excruciating of them all, the unnotified removal of her children in January 2021.
- [51] XXXX said that each thing was a serious issue, and she considers that a new application in exceptional circumstances amounts to fresh circumstances. She considers that the Ministry's efforts to find alternative assistance was motivated by a desire to tick her off their system. She considers that the agencies collaborated against her, and that fact also gave rise to a new emergency.
- [52] XXXX also considers that the Ministry was focused on the fact that DES could not be granted a fourth time and failed to explore if there was a fresh emergency. XXXX claims that in doing so it did not challenge the evidence of her medical professional.
- [53] From the Ministry's perspective XXXX's circumstances was an ongoing situation rather than a fresh emergency. It has referred to

⁹ Information filed with the Family Court could not be considered as consent to use those documents was not given by the Court under r 429 of the Family Court Rules 2002.

the fact that the application forms referred to the premature birth of her children.

- [54] The difficulties and stress that XXXX has experienced cannot be understated and it is clear that she has ongoing needs, and she is entitled to various types of support. However, the information does not establish that beyond the situation where XXXX gave birth to premature twins, there has been “a sudden and unexpected changes in circumstances” that created “a crisis situation” domestic emergency. Overall, the issues experienced by XXXX have been ongoing. This is consistent with the information from her GP.
- [55] XXXX also considers that her application was declined because there was an incorrect belief that it needed to be signed off by an Oranga Tamariki social worker. The evidence does not support this view. The application form is clear that it can be signed off by either a health practitioner or social worker.
- [56] We are therefore not satisfied that XXXX had a fresh domestic emergency justifying renewed entitlement to DES from 2 August 2019.

Privacy breach

- [57] XXXX also claims that the Ministry further contributed to her issues by breaching her privacy.
- [58] As discussed above the Ministry extended the DES to 1 August 2019. The Ministry granted extensions of DES while it tried to explore alternative assistance via other agencies. This led the Ministry’s RHA contacting Oranga Tamariki.
- [59] The material confirms that the Ministry discussed XXXX’s application for support with Oranga Tamariki in July 2019. The file notes disclose that the Ministry was of the view that XXXX was no longer entitled to DES, and it felt obligated to relay this to Oranga Tamariki, so it was aware of XXXX and her twin babies’ needs. The Ministry says it did so to assist XXXX to find alternative assistance.
- [60] XXXX became aware of the disclosure sometime after it occurred. XXXX considers that the Ministry’s contact with Oranga Tamariki constituted a serious breach of her privacy. She does not agree with the Ministry’s view that her application form gave consent to discuss her situation with Oranga Tamariki. She also considers that disclosure of her information to anyone that the Ministry works with would exceed criteria in the Privacy Act 1993. XXXX considers that

this breach of privacy had a significant flow on effect and triggered an investigation by Oranga Tamariki who in turn passed on information that was used against her in a custody proceeding in the Family Court concerning her twins. She had provided comprehensive information on this aspect. XXXX acknowledges that this is outside the scope of this appeal but considers that it is appropriate for the Authority to comment on the privacy breach taking a wholistic approach to the hardship caused by the Ministry to prevent it occurring again. She seeks an order that the Ministry's conduct was incorrect.

[61] We appreciate the importance of privacy in XXXX's overall circumstances and the distress that would arise from a breach. However, the Authority does not have power to either determine whether there has been a breach of XXXX's privacy, or any remedies associated with such a breach. Those are matters governed under the Privacy Act 1993, and associated legislation.

[62] The information also does not establish that the Ministry's contact with Oranga Tamariki amounted to a fresh domestic emergency.

Conclusion

[63] We acknowledge the significant stress that has arisen from XXXX's overall circumstances and the continued request, supported by her GP, for additional domestic support at the greatest level. However, we are bound to apply the relevant legislation as it stands with the inevitable result that XXXX exhausted her entitlement to DES for the domestic emergency associated with the birth of her twins. The only conclusion that we can reach is that the Ministry's decision not to continue DES from 1 August 2019 was correct.

Decision

[64] We accordingly dismiss the appeal.

Costs

[65] XXXX has sought an apology and costs in relation to the appeal. There are limitations around the ability to award costs. Clause 255 of the Social Security Regulations 2018 provides that when an appeal is allowed, either in whole or part, or if the matter is referred back to the Ministry, the Authority may allow the appellant the costs of bringing all or part of the appeal.

[66] As the appeal has been dismissed costs cannot be awarded. The Authority also has no jurisdiction to order a party to apologise.

Publication and evidence

- [67] XXXX has requested that her name is suppressed from publication. It is the practice of the Authority to order that decisions be published but removing identifying information of the parties concerned. We confirm that XXXX's name will be suppressed from the publication of this decision.
- [68] XXXX also requests that her submitted evidence is not retained by the Ministry. The Ministry has previously acknowledged the sensitivity of XXXX's information and expressed a view that her ACC sensitive claim did not require disclosure to determine the appeal. The Authority has also confirmed that information in the custody and control of the Family Court cannot be considered in this proceeding. It may be that XXXX's submitted evidence will be destroyed or returned to XXXX following determination of this appeal. However, the Ministry is to provide an update on how it intends to manage the evidence filed by XXXX. This is to be provided within 10 working days of the date of this decision. The Authority intends to issue a further direction on this aspect after this timeframe.

Decision

- [69] The appeal is dismissed.

DATED at Wellington 30 March 2023

Rachel Palu
Deputy Chair

John Ryall
Member