

[2018] NZSSAA 59

Reference No SSA 166/16

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

Mr G Pearson - Chairperson

Mr K Williams - Member

Mr C Joe - Member

Hearing at Auckland on 14 September 2017

Appearances

Mr P Blair, agent, for the appellant

Mr Stainthorpe, counsel, MSD, Auckland, for the Chief Executive

DECISION

Introduction

- [1] This appeal concerns the support available for a person who is homeless. The Ministry provided a recoverable advance payment of benefit to the appellant to provide him with accommodation. The appellant seeks to have the assistance provided as a non-recoverable special needs grant.
- [2] There is no substantial disagreement as to the appellant's circumstances, and the need for support. The Ministry did provide support, though it was not continuous, leaving the appellant to live in his car intermittently; the point of contention is whether the support can or should be provided on a non-recoverable basis.
- [3] The appeal does not deal with the correctness of the decisions not to provide continuous support, and leave the appellant to live in his car.

The hearing

- [4] The appellant was not able to attend the hearing in person due to his health, accordingly he attended by telephone.

Discussion

The issues and relevant regulatory provisions

- [5] As noted, the Ministry accepted that the appellant was entitled to the payment of advance benefit to provide temporary accommodation, in accordance with s 82(6) of the Social Security Act 1964 (the Act). That provision is a discretionary decision based on being satisfied an “advance payment of a benefit would best meet the immediate needs of a beneficiary”.
- [6] The Ministry noted there is a Ministerial direction that applies to an advance of benefit, the direction is issued under s 5 of the Act. The general effect of the direction relates to an assessment of immediate needs, including guidance regarding what is an immediate need, determining whether an advance would best meet the immediate need and factors to consider. In making the assessment of what best meets immediate needs, the primary position is that no more than the benefit payable to the recipient over 6 weeks should be advanced, and recovered over no more than 24 months. In exceptional circumstances, the limits on advances and recovery can be relaxed. The costs of providing temporary accommodation for the appellant greatly exceeded the usual limit.
- [7] The Ministry did not consider a non-recoverable special needs grant was appropriate. The legislative basis for a special needs grant is under s 124(1)(d) of the Act, which provides for Parliament to appropriate funds for welfare programmes. One of those programmes is the Special Needs Grant, and the Minister promulgated a programme that was in force at the material time (the SNG programme).¹
- [8] Aspects of the programme include:
- a) The objective of the programme is to meet immediate needs in emergency situations (cl 2(a)(ii)).²

¹ See <www.workandincome.govt.nz>.

² References to the clauses in this paragraph are to the SNG programme.

- b) The SNG programme is complementary to other forms of assistance (cl 2(c)), and provides for both recoverable and non-recoverable assistance.
- c) When considering a grant under the SNG programme, it is necessary to consider the applicant's resources, other assistance available and whether the applicant has contributed to the need (cl 5).
- d) Only one grant can be made, unless there are exceptional circumstances or there is a different directive in the SNG Programme for a particular case (cl 9.1).
- e) A grant can be made only if "an emergency situation exists", and regard must be had to foreseeability of the circumstances, and whether or not making the grant would risk the life or welfare of the applicant, or cause serious hardship to the applicant or the applicant's immediate family (cl 12.2).

The parties' contentions

- [9] The difference between the parties is simply whether or not the appellant met the then current criteria for assistance under the SNG programme. The key issue is the need to have an "emergency situation" to access the SNG Programme. It is necessary to review the meaning of that requirement, but the decision turns on an evaluation of the circumstances and how homelessness should be viewed in relation to this appellant.

The facts

- [10] As noted, the appellant was homeless at the material time. He had been living with his sister previously. He has a young daughter, who lives with her mother, but spent time with the appellant. Living with his sister became impossible for the appellant, as he and his daughter were threatened with a knife by a person living nearby.
- [11] At this time, the appellant was in poor health, he had circulatory issues that were severe enough for him to need a wheelchair some of the time. A key element in the appellant's condition was deep vein thrombosis, that is blood clots in the leg that can have fatal consequences. The appellant sought help from the Ministry, which provided temporary accommodation intermittently in motels, providing temporary relief from living in his car. The appeal concerns

the cost of that accommodation. The appellant was using blood thinners, and in pain. He should not have been driving, as he was taking strong pain medication. When he was in the car he could not spend time with his daughter, as he did not want to upset her by seeing the circumstances in which he was living.

- [12] The facts are mainly established from what the appellant said in his evidence. We are satisfied his account is accurate, and the elements we have identified were not put in contention in cross-examination. The contentious elements in the evidence were mainly directed at the Ministry's response to the appellant's situation. The decision has some relevance to that, as it appears the Ministry considered it should not treat the appellant's situation as an emergency. For the reasons we discuss, we do not agree with the Ministry's view. However, it is not appropriate or necessary to attempt to make findings regarding how the Ministry managed the various requests the appellant made for help which was not forthcoming. The outcome of the appeal turns on whether the assistance that was provided is recoverable.

The legal issues and how they apply in this case

- [13] The Ministry's key claim is that cl 12 of the SNG Programme requires that the Chief Executive must be satisfied that "an emergency situation exists" before making a grant, and there was no emergency. Clause 12.2 provides that the Chief Executive when deciding whether there is an emergency situation must have regard to:
- a) whether the situation was unforeseen;
 - b) whether the applicant could have made provision for the situation; and
 - c) whether not making a grant would worsen the situation, increase the risk to the life or welfare of the applicant (and related persons), or cause serious hardship.

- [14] The Ministry says that a dictionary definition of "emergency" points to a need for the situation to be "serious, unexpected and potentially dangerous", and requiring immediate action. It refers to *Foster v Chief Executive of the Ministry of Social Development*³ in support of using that definition. The *Foster* case

³ *Foster v Chief Executive of the Ministry of Social Development* [2009] NZCA 602.

considered a similar issue to the present case, in that the appellant in that case had been provided with money to buy shoes and a pullover. The Ministry paid the money as an advance of benefit, and the appellant wanted a non-recoverable grant under the SNG Programme. The decision refused leave to bring an appeal, and in doing so reviewed the principles to use when applying the SNG Programme. The Court emphasised that it was appropriate to use the ordinary meaning of “emergency”.

[15] In our view, what amounts to an “emergency” depends on the facts in any given case. The guidance provided in cl 12.2 of the SNG Programme largely reflects elements of the ordinary meaning of “emergency”. However, the factors are ones that must be considered, single factors are not necessarily determinative in a given case, and the list does not exclude other considerations in an appropriate case. For example, if someone’s heart stopped beating due to a known medical condition making that possibility foreseeable, the foresight would not make the situation less of an emergency. The seriousness of the potential harm and the importance of a timely response will usually be very relevant. These factors are relevant in the present case.

[16] We are concerned with the question of whether this appellant living in a car, given his ill-health and his calls for assistance, amounted to an emergency. We have no doubt it was an emergency for the following reasons:

- a) In this particular case, the appellant had a very serious health condition. Deep vein thrombosis is a notoriously serious condition that can lead to death or permanent harm. It was not the only issue affecting the appellant. The fact he had to use a wheelchair at times and kept it in his car provides some measure of his state of health.
- b) First, we consider this situation from the point of view of the appellant. The burden of living in a car in these circumstances was plainly very distressing, it also exposed the appellant to the risk of further complications or death. In our view, leaving the appellant to live in his car in these circumstances was incompatible with his human dignity. This is not a case where the appellant chose to live in his car, he regularly pled for assistance from the Ministry.

- c) Second, we consider the situation from the point of view of New Zealand society. To deprive an ill person seeking shelter in New Zealand's temperate climate is incompatible with the values of New Zealand society.
- d) In relation to the foreseeability of homelessness, it was foreseeable in the sense that the appellant knew he had no alternative to living in a car without assistance from the Ministry. He also knew the Ministry would not always help him find shelter. However, in no sense was the situation one of the appellant's own making which he could have averted with foresight, and sensible provision against the contingency. Foresight is not a factor that causes the appellant's situation to be other than an emergency.
- e) Unless the appellant was provided with reasonable shelter, his situation would likely worsen. There was a real risk to his life, a certainty living in his car gravely compromised his welfare, and no doubt doing so amounted to serious hardship.

[17] We are satisfied the appellant came within the scope of an emergency situation in respect of all of the days he spent in motels, and he could not avert the emergency or its consequences using his own resources or by calling on assistance other than what the Ministry chose to provide.

[18] There are a range of other restrictions in cl 9 of the SNG Programme, however the Ministry did not rely on them. It took the approach that if the appellant was to receive assistance, he had to come within one of the specific parts of the SNG Programme. We agree with that approach, particularly in relation to monetary limits and matters of that kind. We also agree that the Ministry correctly identified the provisions of cl 14 of the SNG Programme as the appropriate specific provision.

[19] In our view, cl 14 of the SNG Programme is intended to empower the Chief Executive to deal with a wide range of circumstances that are an emergency in the way we have already discussed. The relevant elements in this case are:

- a) The general provision is cl 14.1 which addresses the need for "special circumstances", and empowers the provision of recoverable and non-recoverable grants. We note that more recently cl 14A has been added, and it deals with emergency

housing. The provision was not in place during the period we are considering. Accordingly, we must apply the provision as it was, when it had no specific reference to “Emergency Housing”.

- b) There is a monetary limit of \$500, unless there are “exceptional circumstances” (cls 14.1A and 14.1B).
- c) The decision on recoverability or non-recoverability must have regard to the purpose of the grant, the nature of the need, equity with other applicants, and the effect of a repayment obligation on the applicant.

[20] We now deal with these requirements of cl 14, and its sub-clauses. The facts, and our evaluation of the seriousness of the appellant’s situation, are applicable to the first question of whether there were special circumstances. We are in no doubt that there were special circumstances. The appellant on each occasion had to live in his car in an emergency situation, there should have been some form of assistance available to provide him shelter (the Act establishes a regime intended to prevent harm and deprivation of that kind), and there was no other way to avert the situation by providing short-term accommodation. In our view, the absence of other options to relieve this ill man from having to live in his car is a special circumstance.

[21] The same reasoning applies to conclude there were exceptional circumstances, and accordingly the monetary limit of \$500 did not apply. While the phrases “emergency situation”, “special circumstances”, and “exceptional circumstances” have differing nuances and emphasis, a seriously ill man living in his car in contemporary New Zealand with no option other than a grant under the SNG Programme comes within each of the phrases.

[22] We must exercise the discretion in relation to recoverability of the costs of the housing provided. The cost of motel accommodation, which still left the appellant living in his car for some the time, cost \$10,657. The appellant was ill, and dependent on supported living payments. A suggestion that he could afford to pay for extended accommodation in motels has no connection with reality. The appellant was later placed in a Housing New Zealand property, and he pays \$65/week in rent. The rate for the motels varied, but much of it was a nightly cost that was multiples of the weekly rent he now pays. In our view, it would be a wholly inappropriate use of the discretion to make the grant

a recoverable grant. It would impose an unrealistic burden on the appellant. It is not a burden he should bear regardless; his homelessness was the result of lack of available housing at an affordable price, not the result of choices he made.

Conclusion

[23] We are satisfied all the payments to provide the appellant with accommodation in motels should have been provided as a non-recoverable grant under the SNG Programme. Accordingly, the appeal will be allowed.

Decision

[24] The appeal is allowed, the payments of \$10,657 are non-recoverable SNG Programme grants, as that was the correct category for payments when they were made.

Dated at **Wellington** this 19th day of November 2018

G Pearson
Chair

K Williams
Member

C Joe JP
Member