Ombudsman
Fairness for all

Case note

Determination of ineligibility for publicly funded healthcare was wrong

Legislation	Ombudsmen Act 1975, New Zealand Public Health and Disability Act 2000, Immigration Act 2009
Agency	Ministry of Health
Ombudsman	Peter Boshier
Case number(s)	545577
Date	May 2022

Complaint about a determination by the Ministry of Health that a person was ineligible for publicly funded healthcare as they did not meet the time criteria prescribed in the Health and Disability Services Direction 2011 – the Ministry took a generic approach to calculating the 'two-year' time criteria and omitted to include the last day of the person's work visa in its calculation – Ombudsman found that the way the Ministry calculated the time criteria was wrong, that the person had met the time criteria using a numeric day count and was therefore eligible for publicly funded healthcare.

Ombudsman recommended that the Ministry apologise to the complainant, facilitate a refund and take steps to prevent a recurrence. In addition, Ombudsman recommended the Ministry publish a statement on its website inviting any similarly affected parties to come forward.

Background

The complainant arrived in New Zealand on 1 March 2016 on a student visa. They were then granted a 'job search' visa and subsequently held a work visa valid until the end of February 2018. In late 2017, the complainant received medical treatment at a hospital and was charged (around $23,000) by the District Health Board (DHB).[1]

Eligibility for publicly funded healthcare is determined by the Health and Disability Services Direction 2011 (the Direction), which is made under section 32 of the New Zealand Public Health and Disability Act 2000.

[1] District Health Boards were replaced by Te Whatu Ora – Health New Zealand on 1 July 2022.

The complainant applied to the Ministry of Health for a determination as to whether they were eligible for publicly funded healthcare. The Ministry considered the application under clause B5(b)(ii) of the Direction which states that a person is eligible to receive services funded under the Act if the person is the holder of a work visa and is entitled to work in New Zealand for a specified period of time that, together with the period of time the person has already been lawfully in New Zealand immediately before obtaining the work visa, *'equals or exceeds two years'.*

The Ministry determined that the complainant was not eligible as they did not meet the time criteria of *'equal to or exceeding two years'*. The Ministry calculated the complainant's time in New Zealand for the purposes of their eligibility under the Direction to be to one year and 364 days.

The Ministry's position was that the complainant was not entitled to work for the full two-year period as defined in the Direction. It stated that because the complainant's visa started on 1 March 2016, the two-year requirement would require them to have a right to be working in New Zealand until 1 March 2018 – the date two years later.

It also excluded the final date of the complainant's work visa from its calculation because they would have had to leave New Zealand on that day because that is when the work visa expired.

Investigation

The investigation concerned two related issues:

- the Ministry's interpretation of what a 'year' is; and
- whether the Ministry was correct to exclude the last day of the complainant's work visa in its calculation.

In the absence of a definition of a 'year' in the Direction, the Act or the Legislation Act 2019, the Chief Ombudsman considered the dictionary definition, which stated that a year is a 365-day period (or 366-days in a leap year) that starts on one date and runs through until the preceding date of the following year.

The Ombudsman formed the opinion that the Ministry's approach of focusing on the overall years rather than the number of days – 1 March 2016 plus two years equals 1 March 2018 – to be incorrect. He considered that the *'two years'* specified in the Direction must mean two periods of 365 days, or 730 days total.

Visa expiry dates are defined in section 63 of the Immigration Act 2009. Section 63(1)(a) provides that a visa expires on the beginning of the day after the date specified in the visa as the expiry date. Immigration New Zealand's website stated that *'visa expiry'* is *'the last day you can stay in New Zealand'*.[2]

[2] Check your visa conditions | Immigration New Zealand

The Ombudsman observed that the complainant would have been entitled to work up until the last day of their visa at the end of February 2018. The Ombudsman acknowledged that without securing another visa, the complainant would have been required to leave New Zealand before their visa expired to ensure they did not overstay. However, he did not consider that was relevant to determinations made under clause B5 of the Direction.

The Ombudsman noted that if the final date of the complainant's visa was included in the calculation of numeric days in a two-year period, then they would have met the *'two-year'* time criteria under the Direction. The first year of eligibility started on 1 March 2016 on their arrival in New Zealand, and ended on 28 February 2017. The second year started on 1 March 2017 and ended on 28 February 2018 – a total of 730 days and equal to *'two years'*.

Outcome

The Ombudsman formed the opinion that the Ministry's determination that the complainant was not eligible for publicly funded healthcare was wrong, because of the way it calculated the time criteria required by clause B5(b)(ii) of the Direction. The Ombudsman recommended that the Ministry:

1. apologise to the complainant for its incorrect determination of their eligibility and the impact of this decision on them;
2. work with the DHB to:
    a. facilitate a lump sum refund of the money already paid in respect of the relevant treatment.[3] This was on the basis that, if the Ministry had correctly calculated the time criteria at the time of their application, the complainant would have been eligible for publicly funded healthcare and would not have incurred the debt; and
    b. ensure any remaining debt owed in respect of the relevant treatment was cancelled.
3. adopt a numeric interpretation of what constitutes a *'year'*, and include the final day of an applicant's work visa in all future eligibility cases considered under the Direction;
4. update its website guidance, and its guidance to DHBs and practitioners who are required to apply the Direction;
5. publish a statement on its website inviting similarly affected parties to have their eligibility determination reconsidered, where relevant.

The Ministry accepted the Ombudsman's opinion and recommendations. The Ministry implemented the recommendations, in conjunction with Health NZ.

[3] Approximately $15,000

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