LIMITED EMPLOYMENT LOCATIONS: A CRITICAL ASSESSMENT OF AN UNNECESSARY POLICY

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Introduction

In August 2003 the Government released details of the 'Jobs Jolt', a package designed to "help people get off benefits and into employment".[1] One facet of this package was the Limited Employment Locations policy (the Policy). The Policy was designed to discourage unemployed persons from living in areas with few employment prospects. Instead, by living in areas with greater employment opportunities, "unemployed people [would be given] the maximum chance of securing a job".[2]

This paper begins in Part A by examining how the Policy operates. It is shown that it functions within sections 89 and 102 of the Social Security Act 1964 (the Act), and applies a fixed "blanket" rule to all beneficiaries. At Part B the consequences of operating as a blanket rule are assessed, concluding the Policy to be unlawful, arbitrary, unnecessary and ineffective. Finally, in Part C, the Policy is critiqued to assess if it produces fair results. Although the Policy has some redeeming features, its detrimental effects on designated areas and discriminatory effects on beneficiaries lead to the assessment that the Policy is unduly burdensome. Consequently, the paper concludes that the Policy should be abolished, especially given that any perceived benefits from the Policy can already be obtained through the existing framework of the Act.[3]

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1 Hon Steve Maharey, Minister of Social Development and Employment "Jobs Jolt will get more New Zealanders into work" (4 August 2003) Press Release.

2 Hon Rick Barker (4 March 2004) 615 NZPD 11586.

3 As explained in Part B (2).

A. The Policy and Legislative Scheme

The Policy derives from the Job Jolt package announced by the Ministry of Social Development (the Ministry) under the Labour Government and thus has no legislative framework of its own.[4] However, it is incorporated into the unemployment benefit (the Benefit) eligibility test through the statutory requirement that applicants must take "reasonable steps" to obtain employment.[5] The requirement to take reasonable steps to obtain employment is present in the "job search"[6] requirement in section 89(1)(a) of the Act.[7] Indeed, when assessing whether this criteria has been satisfied, caseworkers are advised to examine whether an applicant has, without a good reason "moved to an area where there is no work available".[8] However, in practice the Policy has been more regularly used under section 102(2)(a) of the Act, to help assess whether the duty to take reasonable steps to find employment, as required by the ongoing work test obligations,[9] has been fulfilled. It does not apply to other benefits under the Act.

Under the Policy, a "Limited Employment Locations Alert Sheet" is circulated by the Ministry, which lists areas deemed "limited employment locations" (LELs). Whether an area is designated as an LEL depends on a range of factors, including the availability of work,

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[4] Hon Steve Maharey, above n 1.

[5] Social Security Act 1964, s 89(1)(a)(iv) and s 102(2)(a).

[6] See Ministry of Social Development *Manuals and Procedures* "Job Search Requirements" <http://www.winz.govt.nz> (last accessed 8 April 2007), where this term is adopted by the Ministry to describe the statutory requirements of section 89(1) of the Social Security Act 1964.

[7] This sets out that to be eligible for the Benefit, an applicant must not be in full-time employment, but be seeking, available, willing and able to undertake it, and have taken reasonable steps to find it. Note this is not the only test for eligibility however, as section 89(2)-(4) of the Social Security Act 1964 sets out further requirements concerning thresholds of age, residency and income.

[8] Ministry of Social Development *Manuals and Procedures* "Meeting job search requirements" <http://www.winz.govt.nz> (last accessed 8 April 2007). Note however, this is in the context of the Unemployment Benefit Student Hardship.

[9] Mazengarb's Employment Law (looseleaf, LexisNexis NZ Limited, Wellington, Social Security Act 1964) para 6989.14 (last updated March 2007). See also Ministry of Social Development *Manuals and Procedures* "Limited Employment Locations" <http://www.winz.govt.nz> (last accessed 8 April 2007), which refers to the relevant legislation as being section 102(2)(a) of the Security Social Act 1964.

size of the local labour market, and public transport accessibility.[10] If an area is designated as an LEL, there are three categories of obligations and restrictions imposed on beneficiaries living, or intending to live, in that area.[11]

The first category requires that a person receiving the Benefit who consequently moves to an LEL "must have access to reliable transport and be willing and realistically able to commute to a nearby town or centre where there is employment available", or else they will not satisfy the work test obligations of section 102 and be unable to continue to receive the Benefit.[12] Secondly, where a person is already living in an LEL yet not receiving the Benefit, they too must satisfy the above criteria if at any time they apply for the Benefit, otherwise the section 89 eligibility requirement of taking reasonable steps may not be satisfied and therefore an applicant may not be entitled to the Benefit.[13] Thirdly, while persons already living in an LEL who receive a Benefit will not be expected to relocate nor automatically lose their Benefit, they will face increased attention from caseworkers.[14] This information is most easily summarised in a table:

[10] Ministry of Social Development *Job Jolts Factual Information: Limited Employment Locations Factsheet* <http://www.msd.govt.nz> (last accessed 6 April 2007).

[11] See also the discussion of the impacts of being designated an LEL in Part C (2).

[12] Ministry of Social Development, above n 9.

[13] Ministry of Social Development, above n 9. Note however, that this is only implied from the guidelines rather than an explicit directive as the other tiers are.

[14] Ministry of Social Development, above n 9.

	Receiving Benefit at time of policy announcement	Not receiving Benefit at time of policy announcement
Live in LEL when policy announced.	Do not automatically lose Benefit nor forced to relocate, but will experience increase attention from caseworkers.	If consequently apply for a Benefit, must have access to reliable transport and be willing and realistically able to commute to a nearby town or centre where there is employment available to satisfy section102(2)(a).
Move to LEL after policy announced.	Must have access to reliable transport and be willing and realistically able to commute to a nearby town or centre where there is employment available to satisfy section 89(1)(a)(iv).	No impact.

If analysed properly, it can be seen that the Policy applies as a fixed rule to all applicants. That is, if a person receiving the Benefit moves to an LEL or consequently applies for the Benefit when living in an LEL, they *must* meet the criteria imposed by the Policy in order to continue to receive the benefit, rather than merely providing guidance for caseworkers as they assess whether the reasonableness tests have been met on a case-by-case basis. This characteristic of the Policy poses several problems.

B. Effects of Blanket Application

1. Unlawful

First, the Policy may be unlawful. The courts have ruled that neither section 89 nor section 102 confers a general discretion on the Ministry.[15] Instead, the Ministry must simply assess whether the circumstances of the individual fit the specific criteria as set out in the sections.[16] Therefore, even without its blanket application, it could be argued the Policy is ultra vires, as the Act does not permit extraneous

[15] *Blackledge and Others v Social Security Commission* (17 February 1992) HC AK CP 81/87, adopting the analysis in *Green v Daniels* (1977) 13 ALR 1.

[16] *Blackledge and Others v Social Security Commission*, above n 15.

policies to be used when applying the sections, as the sections themselves are directive enough.

However, the wide wording of the operative terms of sections, such as "willing", "reasonable", and "seeking",[17] appear broad enough to imply that a limited discretion must be used to determine whether an applicant's efforts meet the criteria. Therefore it is arguable these sections are covered by what Tipping J described a second class of discretionary powers: that "the nature of the subject-matter [justifies] the establishment as a matter of discretion of a carefully formulated policy".[18]

Nonetheless, even if such discretions were considered permissible — which seems likely given that the courts have upheld the validity of some discretionary polices[19] — the Policy may still be unlawful. This is because, as Tipping J outlined, a discretion must not be blanket in its application.[20] Indeed, it has been held that cases must be individually considered to assess whether, on their facts, they warrant a departure from a general policy.[21] This reflects a long-established principle that the blanket application of guidelines without regard for individual circumstances is a fundamental violation of the exercise of discretionary powers.[22] Yet, as outlined above, the Policy provides no such individual outlook: if a beneficiary moves to an LEL or applies for the Benefit when living in an LEL, and does not have access to reliable transport, or is not able to commute to a centre where employment is available, he or she *must* have the Benefit terminated.[23] By imposing this fixed rule, which does not allow individual circumstances to be taken into account, the Policy may therefore be unlawful. Such an outcome would be consistent with the stance previously taken by the Social Security

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[17] Social Security Act 1964, s 89(1)(a).

[18] *Practical Shooting Institute (NZ) Ltd v Police* [1992] 1 NZLR 709, 718 Tipping J.

[19] See *SSAA Decision No 74/03*; *SSAA Decision No 124/2000* which impliedly accept policy guidelines regarding self-employment under section 89 of the Social Security Act 1964.

[20] "… no case is to be rejected automatically because it does not fit the policy": *Practical Shooting Institute (NZ) Ltd v Police* [1992] 1 NZLR 709, 718 Tipping J.

[21] *Practical Shooting Institute (NZ) Ltd v Police*, above n 18, 718 Tipping J.

[22] *British Oxygen Co Ltd v Board of Trade* [1971] AC 610.

[23] Ministry of Social Development *Manuals and Procedures* "Clients moving to a limited employment location" <http://www.winz.govt.nz> (last accessed 8 April 2007).

Appeals Authority who, in the context of strike action, ruled there should be no blanket refusals of the Benefit, instead "inquiries should [be] made in each case to ensure that no person [is] penalised unjustly".[24]

2. Arbitrary, unnecessary, and ineffective

(a) Arbitrary

Related to this inflexibility, the blanket application creates a second, more patent, problem: by its very nature the Policy fails to allow for the consideration of individual circumstances. Accordingly, there may be persons who ordinarily would satisfy all the job search and work test requirements, and perhaps after a time find employment in an LEL; yet they will be unable to receive the Benefit during their period of unemployment. That a person, doing all he or she reasonably can do to seek employment, is denied the Benefit merely because of their decision to live in a specific location seems to run contrary to the clear words of the Act,[25] as well as being undesirably arbitrary. This is especially apparent concerning the class of people who may have always lived and worked in an LEL, however consequently losing their job: even if they do all that is possible to find employment in the area, they will be denied the Benefit. This is true even if the choice to remain in the area is due to, for example, family or historic ties, or because of an inability to fund a relocation.[26] Yet, the same person living in an area that is not an LEL, and exercising the same efforts to seek reemployment, would be eligible for the Benefit. That a person is denied the Benefit on the basis of their location is, in this respect, hugely arbitrary.[27] Indeed, the desire to eliminate such arbitrary outcomes is the rationale behind "blanket rules" being prohibited under discretions.[28]

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[24] SSSA Decision No 452.

[25] As the specific criteria are set out in Social Security Act 1964, s 89(1)(a) and s 102(2).

[26] In this regard, it is difficult to see the decision to remain as a "choice", as there may be no option but to remain.

[27] It is also unfair and discriminatory, as further developed in Part C (2)-(3).

[28] *British Oxygen Co Ltd v Board of Trade* [1971] AC 610.

(b) Ineffective

Further, the "one-size-fits-all" nature of the Policy means it fails to achieve its stated purpose. That purpose was to move those people who receive the Benefit into employment.[29] Yet, it does not appear there is a rational connection between the Policy and its purpose. First, it cannot be assumed that such a policy will modify behaviour. Many factors affect a person's decision about where to live, which may not be influenced by economic reasons such as benefit entitlement.[30] As a result, while it is true such people will "move off" the Benefit, they may not find employment, thus creating a gap in the welfare net. Secondly, encouraging people to live in areas with greater employment opportunities does not necessarily lead to the conclusion that beneficiaries will have a greater likelihood of finding employment. There are often institutional factors which may contribute to a person's inability to find work, such as discrimination and skill shortages; or even individualistic factors, such as lack of experience, skills, motivation, or education.[31] Therefore, the rationale of the Policy is flawed: while it is likely to reduce the number of people receiving the Benefit, it is ineffective at ensuring those people actually find employment. This is because it does not allow for individual circumstances to be taken into account, instead it adopts a blanket approach to welfare.

(c) Unnecessary: utilising the existing framework

This author believes that the essence of the Policy, to not offer the Benefit to people who live in areas with minimal employment prospects, can be attained more effectively — by taking into account individual circumstances — within the existing framework of the Act, thus making the Policy itself redundant. This is because the widely worded requirements of the Act allow for caseworkers to individually take into account the effect location has on an applicant.[32] For example,

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[29] See Hon Steve Maharey,above n 1; Hon Rick Barker, above n 2, 11587.

[30] See, for example, the list of reasons given in Part B (2)(a).

[31] Andrea Cullen and Darrin Hodgetts "Unemployment as Illness: An Exploration of Accounts Voiced by the Unemployed in Aotearoa/New Zealand" (2001) 1 Analyses of Social Issues and Public Policy 33, 35.

[32] See the operative terms of sections 89(1) and 102 of the Social Security Act 1964,

a person who appears to be moving to an LEL with intent to avoid work could be neither construed as seeking nor taking reasonable steps to find employment.[33] Accordingly, that person would not be eligible for the Benefit. This would alleviate the operational problems outlined above and produce a result whereby those people who do not truly fulfil the legislative criteria be ineligible for the Benefit, whilst retaining eligibility for those who have a genuine reason for seeking work in an LEL.[34]

C. Fairness of the Policy

1. Theoretical Fairness

Conceptually it can be argued that the Policy is intrinsically fair. Under a reciprocal view of welfare, if the State is offering the unemployed financial assistance, the State has a right to set conditions which a beneficiary must fulfil.[35] Under such a view, any obligation — as long as it is not oppressive — must be inherently fair given the contractual nature of a benefit: a beneficiary receives money in return for fulfilling the obligations imposed by the State.

Furthermore, it is arguable that it is both fair and reasonable for the State to discourage beneficiaries from living in areas where it is unlikely they will find employment. This is because the purpose of the Benefit is to provide relief for those who are unable to find employment, not to fund a "lifestyle choice" of refusing to work;[36] if a person is living in an LEL, then they are unlikely to find employment, which is equivalent to making a "lifestyle choice" not to work.[37] Instead, the State should only

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where wide-meaning words such as "reasonable" and "seeking" are used.

[33] Social Security Act 1964, s 89(1)(a).

[34] This would allow for factors such as moving to an LEL because it has lower costs of living, familial ties or historic connections, to be taken into account.

[35] Jane Higgins "From Workfare to Welfare" in Jonathan Boston, Paul Dalziel and Susan St John (eds) *Redesigning the Welfare State in New Zealand – Problems, Policies, Prospects* (Oxford University Press, Auckland, 1999) 260, 261.

[36] This was recognised in *SSAA Decision No 29/2006*, where the Authority ruled that a decision to seek work from an LEL was a "lifestyle choice", which ran contrary to the Social Security Act 1964.

[37] Indeed this rationale was raised in parliamentary debate, that "if there are employment opportunities in a person's hometown, and they decide to move to a place where there

provide Benefits to those who are making an active effort to find employment, and those people who chose to move to an LEL by definition cannot be seeking or taking reasonable steps to find employment, as they are moving to an area with minimal employment opportunities.

Further, it can be argued that the policy has been designed to minimise unfairness, by excluding those already living in an LEL and receiving the Benefit. However, these arguments overlook the actual hardship and unfairness imposed on beneficiaries and LEL inhabitants, which this author believes are significant enough to deem the Policy unfair and unacceptable.

2. Unfair aspects of the policy

(a) Effects of LEL classification

To begin, the negative consequences of an area being designated as an LEL are extensive for its current and potential inhabitants. Not only does LEL status prevent the natural migration of people and the wealth they bring a community, but it tarnishes the public perception of a region by effectively declaring it economically stagnant.[38] Such a declaration is likely to adversely affect the existing population, both by demeaning the worth of their residence, and deterring future growth by preventing the accumulation of a labour force in the area.[39] Although the list of LELs is reviewed annually,[40] within such time an area may have suffered severe economic harm, and its reputation may take several years to restore. Further, the methodology adopted in assessing whether an area should be an LEL was undermined, as many local mayors were not consulted despite a promise from the Work and

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are not, then that is a lifestyle choice, and they should fund it, not the taxpayer" Hon Rick Barker, above n 2, 11586.

[38] See Hone Harawira (24 August 2006) 633 NZPD 4857 where it is stated that New Plymouth Mayor, Peter Tennent, claimed the Policy was unhelpful and undermined small communities.

[39] See Hone Harawira, above n 38, where it is stated that Marlborough District Mayor, Alistair Sowman "said the region was crying out for workers, and that the blacklist would put people off moving there".

[40] Ministry of Social Development, above n 10. Locations can also be reviewed at other times if employment opportunities change.

Income National Commissioner that they would be.[41] Without adequate consultation, it is likely that identification of some of the 259 LELs[42] will have been based on incorrect or incomplete information. For example, Kawhia was deemed an LEL despite strong demand for labour in the area given the widely held expectation that tourism and fishing initiatives are expected to develop rapidly in the future.[43] Such poorly informed decisions could be grounds for judicial review.[44]

(b) General discriminatory effects

The Policy also provides two prima facie breaches of the New Zealand Bill of Rights Act 1990 (the BORA).[45] The first is the right to freedom of movement.[46] By potentially preventing a person from being entitled to the Benefit if he or she moves to an LEL, it is arguable that this will inhibit a beneficiary's ability to move freely around the country. Although this not a direct barrier to movement, it could be argued that because of the level of welfare dependence, this nonetheless fits within the scope of the right,[47] thereby implying a breach of the BORA. Secondly, the right of freedom from discrimination may be breached, as the Policy specifically restricts the ability of the unemployed to choose where to live.[48] Indeed, even before the BORA was enacted the limitation on movement was criticised by the Royal Commission on

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[41] See, for example, Sue Bradford "No Truth in No-Go Consultation Claim" (3 March 2004) Press Release; "Blacklist Choices Puzzle Small Towns" (6-7 March 2004) *New Zealand Herald* Auckland; "Consultation Controversy" (11 March 2004) *The Jobs Letter* Taranaki; Ruth Berry "No Go Job Towns Jolt Councillors" (4 March 2004) *New Zealand Herald* Auckland. See also the commentary in John Huges "Jolt and Jive" (2003) 6 ELB 72.

[42] For a full list of the LELs, see Ministry of Social Development "Limited Employment Locations Alert Sheet" <http://www.msd.govt.nz> (last accessed 8 April 2007).

[43] "NKC No-Go Areas for Unemployed Draws Little Reaction" (11 March 2004) *Otorohanga District Council Newsletter* Otorohanga.

[44] *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374 (HL).

[45] The New Zealand Bill of Rights Act 1990 applies to the Policy as its implementation would be considered an act by the executive under section 3(a) of the Act.

[46] New Zealand Bill of Rights Act 1990, s 18(1).

[47] See *R v Allison* (9 April 2003) HC AK T002481 for a discussion of the extent of the right to freedom of movement.

[48] New Zealand Bill of Rights Act 1990, s 19(1), as being the recipient of the Benefit is a prohibited ground of discrimination under the Human Rights Act, s 21(1)(k)(ii).

Social Policy.[49] Alternatively, the Policy may be considered particularly discriminatory towards Māori, who could be prevented from returning to their papakāinga.[50] However, as the Policy is arguably designed to assist the unemployed as disadvantaged persons, by providing an incentive to remain in areas with greater employment, the BORA may not be breached.[51]

As the BORA is regarded as a basic protection of the rights that New Zealanders deem fundamental to a "free and democratic society",[52] if the Policy is in breach of either of these sections this would be strong evidence of its unfair application.[53] Further, even if the Policy does not breach NZBORA because of definitional technicalities, it seems to breach the spirit of these rights. This in itself illustrates the hardship it will cause beneficiaries, even if that hardship cannot be rectified through legal redress.

(c) Inconsistent Application

Finally, the application of relocation polices by the Social Security Appeal Authority (the Authority) has historically been inconsistent, leading to the unfair result that beneficiaries are uncertain as to the effect moving to an area with low employment opportunities will have on Benefit entitlement. The "remote areas policy", the predecessor to the Policy, was originally heavily criticised by the Authority who stated the policy was "difficult to sustain in times of high unemployment throughout New Zealand" and that the plain meaning of the work test obligations had been satisfied irrespective of where the appellant lived.[54] Later, however, the Authority accepted the policy fell within the

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[49] *Royal Commission on Social Policy* (Vol II, Government Printer, Wellington, 1998) 567. While this criticism was levelled at an earlier policy, not the LEL Policy, they are materially the same concerning discrimination on the unemployed.

[50] Land to which there is a direct tribal or ancestral connection. See John Huges "Jolt and Jive" [2003] ELB 72.

[51] New Zealand Bill of Rights Act 1990, s 19(2): if assisting disadvantaged groups, there will be no breach.

[52] New Zealand Bill of Rights Act 1990, s 5.

[53] Note that the discussion of the legal consequences of a breach of NZBORA is outside the scope of this paper.

[54] *SSAA Decision No 41/89*. Note that the statutory section referred to was s 58(1), the precursor to s 89(1), however the requirements are materially the same for this purpose.

discretion of the Benefit, and applied it almost unquestioningly.[55] Such reasoning fails to recognise that any such discretion must be properly exercised. Nonetheless, irrespective of which approach is adopted, the fact that inconsistent approaches have been applied leaves beneficiaries in a quagmire of uncertainty. Accordingly, there needs to be greater certainty as to the validity and operation of the Policy to ensure that it functions fairly.

Conclusion

These criticisms seem to outweigh any notion of theoretical fairness, as individual beneficiaries already face the hardship of unemployment (indeed the purpose of moving to an LEL may be to lower living costs) so when the consequences of limiting movement are added, as reflected in the BORA, the Policy becomes unacceptably unfair. Further, inhabitants of an LEL, even if they are not receiving the Benefit, suffer from the loss of dignity in their hometown and face future difficulties if they apply for the Benefit. The outcome of the law to be applied if an appeal is lodged for denied beneficiaries is uncertain, further contributing to the Policy's unfair application.

This unfairness, coupled with the operational problems of unlawfulness, arbitrariness and inefficiency that arise from the application of the Policy as a blanket rule, warrant the retraction of the Policy. Any perceived advantages of assessing the impact a person's location has on his or her ability to find work could be obtained through the wide words of sections 89 and 102 of the Act. In a free and democratic society, individuals should be entitled to welfare based on their individual need, rather than on an arbitrary rule. Accordingly, the Policy should be abolished.

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[55] *SSAA Decision No 26/97*.