

- (1) ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS OR IDENTIFYING PARTICULARS OF AGGRIEVED PERSON
- (2) ORDER PREVENTING SEARCH OF THE TRIBUNAL FILE WITHOUT LEAVE OF CHAIRPERSON OR OF THE TRIBUNAL
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IN THE HUMAN RIGHTS REVIEW TRIBUNAL

[2013] NZHRR 35

Reference No. HRRT 024/2013

UNDER SECTION 50 OF THE HEALTH AND
DISABILITY COMMISSIONER ACT 1994

BETWEEN DIRECTOR OF PROCEEDINGS

PLAINTIFF

AND NORTHLINK HEALTH (formerly Rodney
North Harbour Health Trust)

DEFENDANT

AT AUCKLAND

BEFORE:

Mr RPG Haines QC, Chairperson

Ms GJ Goodwin, Member

Mr BK Neeson, Member

REPRESENTATION:

Mr A Martin, Director of Proceedings

Ms W Hawkings for Defendant

DATE OF DECISION: 3 October 2013

DECISION OF TRIBUNAL

[1] These proceedings under s 50 of the Health and Disability Commissioner Act 1994 were filed on 13 September 2013.

[2] Prior to the filing of the proceedings the parties resolved all matters in issue and the Tribunal has now been asked to make a consent declaration. The parties have filed:

[2.1] A Consent Memorandum dated 11 September 2013.

[2.2] An Agreed Summary of Facts, a copy of which is annexed and marked "A".

[3] The Consent Memorandum is in the following terms:

MAY IT PLEASE THE TRIBUNAL

1. The plaintiff and defendant have agreed upon a summary of facts, a signed copy of which is filed with this memorandum.
2. The plaintiff requests that the Tribunal exercise its jurisdiction in respect of the following matters:
 - (a) A declaration pursuant to s 54(1)(a) of the Health and Disability Commissioner Act 1994 ("the Act") that the defendant has breached the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996 ("the Code") in respect of Right 4(1) by failing to provide services to the aggrieved person with reasonable care and skill.
3. In relation to the declaration being sought in paragraph 2(a) above, the parties respectfully refer to the agreed summary of facts. The parties are agreed that it is not necessary for the Tribunal to consider any other evidence for the purpose of making the declaration sought. The parties request that the agreed summary of facts be published by the Tribunal as an addendum to the decision.
4. The defendant consents to the Tribunal making the above declaration based on the facts set out in the agreed summary of facts.
5. In the statement of claim the plaintiff also sought the following relief:
 - (a) Damages pursuant to s 57(1)(c);
 - (b) Costs.
6. These other aspects of the relief claimed by the plaintiff have been resolved between the parties by negotiated agreement.
7. There is no issue as to costs.
8. The plaintiff seeks a final order prohibiting publication of the name of the aggrieved person in this matter. The defendant consents to such a final order being granted.
9. The defendant does not seek any order prohibiting publication of the defendant's name.

[4] Having perused the Agreed Summary of Facts the Tribunal is satisfied on the balance of probabilities that an action of the defendant was in breach of the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996 and that a declaration should be made in the terms sought by the parties in paragraph 2 of the Consent Memorandum.

DECISION

[5] By consent the decision of the Tribunal is that:

[5.1] A declaration is made pursuant to s 54(1)(a) of the Health and Disability Commissioner Act 1994 that the defendant has breached the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996 in respect of Right 4(1) by failing to provide services to the aggrieved person with reasonable care and skill.

[5.2] A final order is made prohibiting publication of the name, address and any other details which might lead to the identification of the aggrieved person. There is to be no search of the Tribunal file without leave of the Tribunal or of the Chairperson.

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Mr RPG Haines QC
Chairperson

.....
Ms GJ Goodwin
Member

.....
Mr BK Neeson
Member

“A”

This is the Agreed Summary of Facts marked with the letter “A” referred to in the annexed decision of the Tribunal delivered on 14 November 2013.

BEFORE THE HUMAN RIGHTS REVIEW TRIBUNAL

HRRT No. 024/13

UNDER Section 50 of the Health and Disability Commissioner Act 1994

BETWEEN **DIRECTOR OF PROCEEDINGS**, designated under the Health and Disability Commissioner Act 1994

Plaintiff

AND **NORTHLINK HEALTH (formerly RODNEY NORTH HARBOUR HEALTH TRUST)** of 20 Auckland Road, Warkworth, Disability services provider

Defendant

AGREED SUMMARY OF FACTS

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INTRODUCTION

1. The plaintiff is the Director of Proceedings, a statutory position created by s 15 of the Health and Disability Commissioner Act 1994 (“the Act”). The aggrieved person is “Mr B”.
2. At all material times the defendant was a disability services provider within the meaning of s 3 of the Act, and was providing disability services to the aggrieved person.
3. On 17 July 2009 the Health and Disability Commissioner received a complaint about services provided to the aggrieved person.
4. On 23 October 2012 the Deputy Health and Disability Commissioner (appointed under s 9 of the Act) finalised her opinion that the defendant had breached the aggrieved person’s rights under the Health and Disability Commissioner (Code of Health and Disability Service Consumers’ Rights) Regulations 1996 (“the Code”) and in accordance with s 45(2)(f) of the Act, referred the defendant to the plaintiff.

BACKGROUND

About the defendant

5. The defendant is a home-based support services provider in the Waitemata and Northland DHB regions. It is a not-for-profit organisation governed by a Board of Trustees elected from the local community.

The aggrieved person

6. Mr B has severe cerebral palsy. He requires assistance with all personal cares. He uses a wheelchair and communicates using a computer with a head pointer. His mother cared for him at home until she moved into a rest home in 2000. Mr B is a fiercely independent person who has fought hard to live as independently as possible in a family home near his mother's rest home, and to choose his own lifestyle.

Overview of claim

7. Mr A made a complaint to the Office of the Health and Disability Commissioner (HDC) about the poor standard of care provided by Mrs Z to his half-brother, Mr B. Mr A claimed Mr B was being unduly influenced by Mrs Z and he raised concerns about the quality and quantity of care being provided to Mr B.
8. Mr B supported Mr A's complaint and raised further concerns about financial impropriety by Mrs Z.
9. Mr B had been assessed as being eligible for 63 hours carer support per week to implement an agreed support plan. Mr E, a relative of Mrs Z, had been employed as one of Mr B's caregivers. Services were initially provided by a social service provider. The arrangement ceased in August 2005 and service provision had been transferred to the defendant.
10. The defendant provided disability support services to Mr B from August 2005 to August 2008. Throughout this time Mrs Z acted as, and was widely known as, the agent for Mr B's care. Mrs Z had been appointed Enduring Power of Attorney for Mr B over varying periods of time. She asserted she was acting under the Enduring Power of Attorney, despite Mr B remaining

competent. She was also listed by a Needs Assessment and Service Coordination organisation (“NASC”) as Mr B’s next of kin.

11. Following the transfer of service provision to the defendant, Mr E was employed by the defendant as Mr B’s carer to provide the full 63 hours of care to Mr B over a seven-day working week. Mr E was later joined by two other members of Mrs Z’s family (Ms F and Ms G) who were also employed by the defendant. Because Mrs Z selected the carers, with Mr B’s apparent acceptance, the defendant did not feel it necessary to follow the usual rules of good practice related to the employment, orientation, training or supervision of the carers.
12. The carers, aided by Mrs Z who countersigned their timesheets, falsified their timesheets by claiming for hours worked at times when there is evidence that they were overseas, and at times that witnesses state the care claimed for was not provided.
13. Mr B was left unattended for extended periods, provided with inadequate meals, and neglected, even when he was ill and his mobility had become greatly reduced. Management of his pain, bowel and urinary problems was not satisfactory. Concerns were raised about Mr B’s personal hygiene and living conditions by the management of a rest home where he went to visit his elderly mother and by the organisation responsible for administering the house that he lived in.
14. Mr A had initially made a complaint to the NASC in September 2007 about the quality and quantity of the care being provided to Mr B. The defendant reviewed the care being provided to Mr B, but no changes were made to his service provision.
15. The defendant was aware that Mr B was vulnerable and that he was in a close relationship with Mrs Z. It allowed the carers’ timesheets to be

countersigned by Mrs Z, with a mark "X" apparently made by Mr B. Communication with Mr B was via Mrs Z. Her statements were uncritically accepted.

16. Although Mr B had a right to express a preference as to who would provide services and have that preference met where practicable, this did not mean the defendant no longer had any responsibility for his quality of care.
17. In June 2008, following further complaints from various parties, the defendant reviewed Mr B's situation, which led to changes in service provision. The defendant, rather than Mrs Z, assumed direct responsibility for the staff working with Mr B. In July 2008 the defendant notified the NASC that it intended to withdraw services as Mr B was not happy with the changed approach to his service provision. He disliked the new carers employed to work with him. Service provision to Mr B was subsequently transferred to another disability services provider.

Employment of staff

18. When the defendant took over the contract to provide Mr B's care, Mr B (through Mrs Z) elected to choose his own carers, advising the defendant that he did not want anything to change and that he was happy with the care he was receiving from his chosen care workers and Mrs Z. Mr B gave specific instructions to the Trust that he wished to retain Mrs Z as his agent and that she would be responsible for the management of his care.
19. Mrs Z was not employed by the defendant. However, it was commonly accepted that she acted as Mr B's advocate and communication in relation to Mr B's care was with Mrs Z.

20. Mr E had been employed by another service provider and had transferred his employment agreement to the defendant in August 2005 when Mr B's care was transferred.
21. During a review of Mr B's care in December 2007 the defendant discovered that Mr B's records were incomplete and that the 63 hours Mr E was employed to provide was in fact being worked by more than one person. The defendant insisted that these other workers be entered onto the defendant's payroll and that they must submit separate timesheets which accurately reflected the hours each were working. Ms F and Ms G commenced employment with the defendant as Mr B's carers in December 2007.
22. At this time the defendant completed a "waiver" for clients who select their own workers. The waiver acknowledged that the carers may not have completed the defendants' standard carer orientation programme and as a result "the service may not meet the required quality and safety standards". This was signed by Mrs Z, purportedly on Mr B's behalf, on 4 December 2007.
23. The three carers employed by the defendant to provide care to Mr B (Mr E, Ms F, and Ms G) were all "found" by Mrs Z and she acted as their "agent". Care was also provided by Mrs Z's ex-husband Mr Z, although he was never employed by the defendant.

SERVICE FAILURES BY DEFENDANT

24. As a service provider, the defendant had a duty to ensure Mr B was provided with an appropriate standard of care.

Supervision and monitoring

25. Mr B was left unmonitored for approximately two years without even an initial assessment or support plan being completed. The defendant simply took Mrs Z's word that Mr B was satisfied with his current arrangements and did not want any changes. This, despite the defendant having had concerns that Mr B's allocated 63 hours were being worked by more than one carer.
26. Because no concerns were raised during the December 2007 review, which was conducted in Mrs Z's presence, Mr B was not scheduled for any further review until December 2008.
27. The defendant says it was not aware that there were any concerns in relation to Mr B's care until it was contacted by the NASC following the receipt of Mr A's complaint in June 2008.
28. Concerns were raised directly with the defendant by a social worker at North Shore Hospital at the beginning of June 2008. At this time a visit was completed, with Mrs Z present and speaking on Mr B's behalf. No concerns were identified. It was not until later that month, when a visit was conducted by the NASC in response to Mr A's complaint, that a contrasting assessment was made. This assessment then prompted a meeting between the NASC and the defendant and it was agreed that "frequent monitoring of [Mr B's] service would take place". In addition to this, Mr B was allocated two new carers. Because concerns were also raised about the propriety of having Mrs Z advocate for Mr B, an independent advocate was appointed to assist with Mr B's affairs.

Mrs Z and her family

29. The defendant had concerns about the relationship between Mrs Z and Mr B's carers. While the defendant questioned them about this, it accepted their word that none of them were related to Mrs Z, despite there being obvious information that they all had a close relationship. The defendant continued to

allow all communication to be through Mrs Z. It also allowed Mrs Z to countersign the carers' timesheets. Furthermore, the carers' timesheets continued to be accepted unquestioned despite the hours recorded being suspiciously regular.

30. As discussed above, Mr B was a very vulnerable consumer. Mrs Z interpreted that Mr B was happy with his care arrangements and did not want any change. Mrs Z's statements were uncritically accepted by the defendant with no recognition of her conflict of interests. No attempt was made by the defendant to see Mr B separately from Mrs Z, or to obtain other interpreters, such as the friends who were familiar with him. Despite identifying that Mr B's care was being provided by multiple carers who were not on their payroll — which clearly suggested that both Mr E and Mrs Z had been misrepresenting the situation on the timesheets — the defendant did not feel the need to carry out any further review of Mr B's care arrangements.

BREACH OF CODE BY DEFENDANT

31. By failing to provide appropriate monitoring and supervision and oversight of the care provided to Mr B, the defendant failed to provide Mr B with services with reasonable care and skill and breached Right 4(1) of the Code of Health and Disability Services Consumers' Rights. The defendant also failed to have in place appropriate policies and procedures for ensuring adequate monitoring and supervision of services.

Service Improvements

32. As a result of this complaint the defendant has made a number of changes to its service: The defendant has learnt a great deal from this experience and has implemented new policies and procedures to ensure a similar situation never occurs again. There are now no exemptions in relation to the defendant's policies in regard to staff orientation, client monitoring, staff employment

procedure, staff supervision and training. All staff and client policies apply to all [the defendant's] clients, including those who personally select their own workers. The defendant now takes a firm stance if a client does not want to comply with the defendant's policies they will be referred back to the NASC. More specifically, the defendant advised that the following changes have been made to its policies and procedures:

- Applicant Evaluation
 - Prior to employment, all applicants (including volunteers and assistants), must give authorisation to the defendant to enable a police clearance check to be carried out.
 - Applicants must provide contact details of a minimum of two referees so that suitability for their prospective roles can be determined.
- Staff induction — All care worker staff, including client selected workers, are required to complete the defendant's full orientation programme and the required level of training to meet client needs.
- Staff Supervision
 - All care workers are supervised by qualified members of the defendant's staff and monitored to ensure that they attain the necessary competency levels to provide services to individual clients.
 - Staff supervision and quality trials are now carried out by registered nurses employed by the defendant.
 - Care workers are supervised more frequently if they provide support for clients with complex care requirements or there are concerns with their work performance.
 - In situation where a service has to start immediately for a client who has selected a care worker and that care worker has not yet completed the full orientation programme, the worker is more frequently

supervised and spot checks are carried out to ensure quality and safety standards are being met. Client selected workers cannot be allocated to any other clients until their competency to provide services has been determined.

- Service Monitoring

- When a client selected worker has completed the defendant's full orientation programme and competency to provide services has been confirmed, routine monitoring of the service will commence.
- All long term clients are provided with a Client Day Book in which the details of each and every visit made by their care workers must be recorded i.e. the date, time of the visit, a brief description of the tasks undertaken and with each entry signed off by the worker. Day Books provide a useful service monitoring tool helping to ensure that services provided are consistent and meet expected quality and safety standards.

Aaron Martin
Director of Proceedings

Northlink Health (formerly Rodney North Harbour Health Trust agrees that the facts set out in this Summary of Facts are true and correct.

for and on behalf of **Northlink Health** (formerly Rodney North Harbour Health Trust)

Date: