[2018] NZSSAA 12

Reference No. SSA 111/17

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

DECISION ON JURISDICTION

[1] This appeal was lodged on 1 September 2017. The Ministry argued that the Authority has no jurisdiction to consider the appeal and a timetable was set for the parties to file submissions on jurisdiction. It was agreed that the Authority would determine this preliminary issue on the papers and that, if the appeal is found to be within jurisdiction, a timetable will be set for hearing.

Background

[2] On 31 March 2017 XXXX (the appellant) attended the XXXX office of WINZ seeking a Special Needs Grant (SNG). An email sent at 10.45 a.m from the Area Manager to other offices states that XXXX clients will be seen at XXXX, and other clients of the Ministry will be referred to other offices. The appellant's application was not accepted and she was told to attend her 'home office' in XXXX because it was nearer to where she lived. It appears that the staff at the XXXX office considered they had more clients than they could manage at the time and the appellant was not given the option of waiting for someone to become available.

[3] On 7 April 2017, the appellant applied for a review of this decision. On 30 June 2017, a letter was sent to the appellant stating:

> Thank you for your application for a review of decision dated 7 April 2017 arising out of your visit to one of our service centres on 31 March 2017.
>
> We advise that we have looked at your application for a review of decision and we are not satisfied that a reviewable decision under s 10A of the Social Security Act 1964 was made during our interaction on 31 March 2017.
>
> Although we do not consider this as a reviewable decision, we have arranged for a Benefit Review Committee (the Committee) to hold an
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> initial hearing to consider whether or not it has the power to consider your review.

> If the Committee finds that it cannot consider your review (outside of its jurisdiction) that will be the end of the process. However if the Committee finds that they can consider your review, there will be a second hearing at a later date.
>
> If you have any questions …

[4] The Benefits Review Committee (BRC) conducted its review on 8 August 2017. As the BRC was scheduled to hear other applications for review on the same issue that day, and other applicants were represented by the same advocacy organisation, XXXX, the appellant's advocate asked the BRC to make the decision on the papers without requiring an appearance.

[5] In its report under the heading "Decision being reviewed" the BRC stated:

> The Ministry submits that the Committee must first consider if it has the jurisdiction to hear the applicant's application for a review of decision arising out of an interaction between the Ministry and the authorised representative on 31 March 2017.

[6] The BRC appears to have accepted the Ministry's submission that this was the issue it had to consider and conducted the review on this basis. Under the heading 'Case for the appellant' the BRC referred to the appellant's submissions as being attached to the report but did not summarise or record these submissions.

[7] The BRC considered that refusing to accept the appellant's application at the XXXX office was an operational matter, not a decision made in the exercise of any power, function, or discretion conferred by a delegation under the Social Security Act 1964 (the Act). Therefore, the BRC concluded that there was no decision made under s 10A of the Act which it could review.

Relevant law

[8] Section 10A(8) provides that:

> As soon as practicable after receiving an application for review the review committee shall review the decision and may, in accordance with this Act, confirm, vary, or revoke the decision.

[9] Section 12J(16) restricts the right of appeal from a decision of a BRC to decisions that have been confirmed or varied by a BRC under s 10A or made by the chief executive other than pursuant to a delegation.

The submissions for the appellant

[10] The appellant is represented by Mr Blair of XXXX.

[11] Mr Blair submits that s 12(1) of the Act requires every claim for a benefit to be investigated by the Chief Executive or an officer of the department. He says the duty to investigate the appellant's claim for a food grant was ignored and the claim was effectively declined by telling her that she had applied at the wrong office.

[12] Mr Blair contends that if a refusal to process an application is not treated as a decision subject to review, the Ministry could establish a "gatekeeping" tool that is contrary to its statutory duty to investigate.

Submissions of the Chief Executive

[13] The Ministry submits that asking a beneficiary to apply for a benefit at their local office is not a final decision under the Act that is amenable to review by the BRC. In submissions filed on 8 December 2017 Mr Stainthorpe, counsel for the Chief Executive, states that the Ministry relies on a letter to the Authority from the Appeals Officer dated 12 October 2017 to support its submissions.

[14] The Appeals Officer contends that asking an applicant for a benefit to attend a local office amounts to performance of an ancillary function under the State Sector Act 1988, not a decision. The officer cites s 32 of the State Sector Act which requires the Chief Executive to discharge his responsibilities for the efficient, effective, and economical management of the Ministry. The officer states that when the appellant was sent a copy of the BRC report, she was advised that she could complain to the Office of the Ombudsman if she wanted to take the matter further.

[15] Mr Stainthorpe reiterates this view. He says that the BRC 'effectively' decided that it did not have jurisdiction to consider the Ministry's request to the appellant to attend her local office. The substantive issue, the appellant's eligibility for a SNG, has not been considered and the Ministry has not received any information about why the appellant needed SNG at the time. Mr Stainthorpe terms this as an 'unresolved request' which could be referred back to the Ministry for the appellant to provide specific information.

[16] The Ministry relies on the decision of the High Court in *Bocxe v Chief Executive of the Ministry of Social Development*[1] to support its submission that not every

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[1] HC Auckland CIV 2008-485-1122, 1 October 2008.

decision of a BRC is open to appeal. In Mr Stainthorpe's view, the primary matters for the Authority to consider are the provisions of s 12J(16) of the Act and *Boxce*.

Discussion

[17] The issue in *Bocxe* was whether the Authority had jurisdiction to consider an appeal from a decision of the BRC to decline to extend time for a review of the decision. The jurisdictional issue was clear in *Bocxe*; only the BRC has the power to allow an application for review of a decision to be filed out of time and the Authority has no power to direct the BRC process. We do not accept that *Boxce* is authority that the BRC can decline to hear an application for review that has been accepted for filing.

[18] Neither the BRC nor the Ministry addressed the question of whether the BRC has the power to decline to hear an application for review on any ground other than a failure to meet the requirements for filing an application for review. We express concern at Mr Stainthorpe's comment that the appellant's submissions do not address jurisdiction but rather question the nature of the decision. Whether there is jurisdiction to review a decision turns on the nature of the decision. As Mr Blair correctly says, the nature of the decision made by the Ministry and the way it was then treated by the BRC is at the heart of this appeal.

[19] A situation similar to that of the appellant was considered by the Court of Appeal in *Commissioner of Inland Revenue v Alam & Begum*[2]. The Court considered whether the Commissioner of Inland Revenue had the power to decide if a notice of response met the requirements of the Tax Administration Act 1994, and could reject it if he considered it non-complying. A notice of response was an essential step in a challenge to a proceeding leading to an appeal, which the Taxation Review Authority or the High Court would determine. The Court of Appeal rejected the Commissioner's claim he could decide a taxpayer's notice of response was not in the correct form, or substantively deficient. That was a matter for the Taxation Review Authority or the High Court to determine. There are obvious policy reasons not to give one of the parties to an appeal the power to reject the other party's documents, and thereby prevent an independent decision-maker hearing an appeal.

[20] The Benefits Review Committee, like the Commissioner in the *Alam & Begam* case, was performing an administrative function regulated and proscribed by

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2 [2009] NZCA 273.

statute. The powers of the BRC are established in s 10A(8) of the Act; the BRC shall review the decision and may confirm, vary or revoke the decision. We cannot see any support for the Ministry's proposition that the BRC has the power to reject an application for review on the basis no decision was made or the decision is not amenable to review. Once the BRC receives an application for review, the only power it has is to address the substance of the decision that was made by the Chief Executive or his delegate. The BRC must then deal with that decision.

[21] In *Arbuthnot v Chief Executive of the Department of Work and Income* [2007] NZSC 55 the Supreme Court observed:

> It is apparent from the drafting of the provisions that the BRC is intended to act in the place of the chief executive. Its decision, either to confirm, modify or reverse the original decision, has the same standing as the decision the chief executive might have made if personally undertaking the review. It is a departmental decision. Naturally, a chief executive who does personally carry out a review cannot appeal against his or her own decision. And because a BRC is effectively acting in the chief executive's stead, the chief executive has no right to appeal the BRC's decision either.

[22] The Court went on to observe in relation to the status of a BRC:

> …when the decision-making body is purely an administrative body, no estoppel can arise from its decision. A BRC falls into this category. It does not have sufficient independence to be classified as a judicial body.

[23] Accordingly, the original Ministry delegate making the decision, and the BRC are both administrative decision-makers. The latter is in just the same position as the Chief Executive would be if he personally reviewed his delegate's decision. The outcome will be that the original decision is confirmed, modified or reversed. It is a pre-cursor that leads to the opportunity for an independent rehearing by this Authority, if the affected person lodges an appeal.

[24] The next step to consider is whether there is any decision before the Authority that is amenable to review. The Ministry's position is that the decision in issue is a direction for the appellant to go to a different office. That, the Ministry says, is an administrative action that is not amenable to review or an appeal to this Authority. However, we do not accept that is the decision that was made. The decision that we are concerned with is that the Ministry personnel received a request from the appellant for support, they declined to provide support. Their

justification for not providing support is that they directed the appellant to a different office. However, the decision under review is the failure to provide support to the appellant when she requested a SNG. The subject of the appeal is the failure to provide support.

[25] Implicitly it appears the Ministry assumes the appellant's request for a SNG did not constitute an application. We do not accept the Ministry's analysis, in our view there was a request. It follows, the only relevance of the instruction to go to a different office is any argument the Ministry presents regarding how that affects entitlement to a SNG.

[26] In *Scoble v Chief Executive of the Ministry of Social Development*[3] the Court acknowledged that the Act "does not specifically place a duty on the Chief Executive to invite application when no enquiry for assistance has been made". However, when a person does seek assistance, the Chief Executive is to consider what forms of assistance the person is or may be eligible to receive.[4] *Crequer v Chief Executive of the Ministry of Social Development* [5] is to similar effect.

[27] These duties were also reiterated in *Koroua v Chief Executive of the Ministry of Social Development*[6] where the Court observed:

> In general as McGechan J put it in *Hall v Director of Social Welfare* [1997] NZFLR 902 (HC) at 912, the Ministry should be "proactive in seeing to welfare, and not defensive or bureaucratic".

[28] The Court in *Koroua* also referred to *Taylor v Chief Executive of the Department of Work and Income*[7] noting that it was a question of fact whether an approach for assistance amounted to an application. The Court in *Taylor* said that:

> Those who are in need are not to be deprived of the benefits to which the law entitles them, by an overly prescriptive and bureaucratic approach, and the Department should be proactive in ascertaining needs. But that must be viewed in the light of the statutory scheme, which involves persons who are in need being required to make their needs, in a broad sense, known to the Department by way of a claim … In the light of that, there must in my view be a sufficiently clear

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3 [2001] NZAR 1011.

4 Paragraph 9-11 of *Scoble*.

5 [2016] NZHC 943.

6 HC Wellington CIV 2013-485-2957, 12 November 2013.

7 HC Wellington AP405/97, 9 August 2000.

> identification of the need to enable the Department to give consideration to that need, and the way in which it can best be met, before a claim or an application can be said to have been made (paragraph 16).

[29] It is clear from the Ministry's record, that the officers who took the appellant's verbal request for a SNG knew what assistance she sought. It is recorded that she had a 'food balance' of 'minus $829.24'. The reason for her application Is recorded as *'food (sent back to own office)'.*

[30] Although s 11D(1) of the Act states that a form must be completed when an application for a benefit is made, s 11D(5) allows an application to be accepted without a form if the appellant's file records are sufficient. If a form was required, one should have been given to the appellant. Either way, the appellant was entitled to have her application processed and we are concerned that the Chief Executive and the Ministry staff have ignored the authorities which establish their duty to assist those seeking assistance under the Act.

[31] Effectively, the BRC was standing in the role of the Chief Executive reviewing the decision of his delegate. The issue for the Chief Executive would be whether he as a statutory office holder was required to provide a SNG or other assistance. The Chief Executive, and in this case the BRC was required to confirm, modify or reverse the original decision not to give assistance. If they consider directing a person to a different office has a bearing on that, then that is simply one argument supporting their decision.

[32] Now the matter is before the Authority, the Authority's duty is to conduct a rehearing[8] that may open up for further consideration the whole of the decision[9] of the Benefits Review Committee. The appeal is against the result to which the original decision-maker and the BRC came[10], that is to decline support when the appellant asked for it. The appeal is not directly against the conclusions reached by the original decision-maker and the Benefits Review Committee which led to the decision to decline support[11], namely that a SNG or other support was not available as the appellant did not go to a different office.

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8 *Arbuthnot* [20], s 12M of the Act.

9 *Arbuthnot* [20].

10 *Arbuthnot* [25].

11 *Arbuthnot* [25].

Conclusion

[33] We are satisfied that the appellant's request for SNG met the threshold of an application for a benefit. The Ministry was obliged to consider this application, and either require a form to be completed or to establish whether it already had sufficient information to grant or decline the application without a form being completed. By failing to process the appellant's request, the Ministry declined the appellant's application. As the BRC did not revoke or vary the decision, it upheld it. Accordingly, the appellant is entitled to appeal the decision of the BRC and the Authority has jurisdiction to hear and determine her appeal.

Orders

[34] A telephone conference will be convened on 9 March 2018 at 10.00 a.m. to set a date for hearing and a timetable for filing submissions.

Dated at **Wellington** this 28th day of February 2018

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S Pezaro
Deputy Chair

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K Williams
Member