[2015] NZSSAA 102

Reference No. SSA 062/15

IN THE MATTER of the Social Security Act 1964

AND

IN THE MATTER of an appeal by **XXXX** of Eketahuna against a decision of a Benefits Review Committee

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

Ms M Wallace - Chairperson
Mr K Williams - Member
Lady Tureiti Moxon - Member

HEARING at WELLINGTON on 9 September 2015

APPEARANCES

Mr N Ellis for the appellant
Mr R Signal for Chief Executive of the Ministry of Social Development

DECISION

Introduction

[1] The appellant appeals against a decision of the Chief Executive allegedly confirmed by a Benefits Review Committee to pay Special Benefit at 30% of allowable costs rather than the deficiency rate produced by the formula assessment. The date of the decision was 12 March 2015.

[2] The primary issue outlined in the appellant's notice of appeal to the Authority is the problems he experienced with the Benefits Review Committee.

Background

[3] The appellant is in receipt of Supported Living Payment paid at the single rate. He also receives Accommodation Supplement, Disability Allowance and Special Benefit.

[4] A report from a registered psychologist completed in September 2013 indicates that he suffers from Post Traumatic Stress Disorder which has left him with extreme hypervigilance issues.

[5] In February 2015 he moved to the Eketahuna area. He entered into a tenancy agreement for a property at 503 XXXX Road with a rental of $250 per week. The property is a two-bedroom house apparently located some 500 metres from the road. The appellant says it meets his need for a stand-alone home in a quiet rural area. The house has no neighbours and is the last house on the road. The appellant was adamant that he had kept a lookout for a suitable rental property for a significant period of time and this was the only one available. He says there have been some positive spinoffs in terms of free wood and meat from the landlords.

[6] The appellant's entitlement to Special Benefit was reviewed on 12 March 2015 to take into account his new accommodation costs. As a result of this review, the appellant's entitlement to Special Benefit was reduced from $94 per week to $79 per week. The appellant sought a review of decision.

[7] Following the appellant's request, a further review took place. From this, it was noted that a previous decision directed the inclusion of a basic telephone rental in the assessment of the appellant's Special Benefit. An amount equivalent to the basic standard telephone monthly rental of $50 per month was then included as an allowable cost in the assessment of the appellant's Special Benefit. The rate of Special Benefit paid to the appellant was increased to $82.50 a week from 1 March 2015.

[8] The matter was then allegedly reviewed by a Benefits Review Committee. The written Benefits Review Committee decision upheld the decision of the Chief Executive. The appellant subsequently appealed to this Authority.

[9] The appellant's notice of appeal focused primarily on deficiencies in the Benefits Review Committee process, but at the hearing the appellant also addressed the issues relating to the matters apparently considered by the Benefits Review Committee.

[10] The appellant says that while his accommodation meets his needs, there are some issues with its location which affect his finances and should be taken into account in assessing his Special Benefit entitlement. The appellant says that he needs an internet connection. In addition because his house is so far from the road the rural delivery contractor will not leave CourierPost parcels in his letterbox and this necessitates the appellant travelling 10 kilometres (return) to the local Post Shop to collect any mail from Work and Income which is delivered by CourierPost. The appellant points out that this is uneconomic for him.

[11] As a result, he says that having the internet in his home is essential and not reasonably avoidable. He spends $75.35 per month on a combined telecommunications internet package. He also has a cellphone.

[12] The appellant apparently has significant skill with computers and in the past had his own business designing wireless networks. He is not specifically looking for work at the present time but hopes to be able to do so in the future.

[13] The appellant submits that the United Nations regards access to the internet as a basic human right. Following the hearing, he provided a variety of information from the internet which he says supports his claim.

[14] A further matter affecting his finances is the cost of travel to Masterton. The appellant said that petrol and groceries are cheaper in Masterton than in Eketahuna. He can only afford to travel to Masterton once a fortnight. It is a return journey of approximately 100 kilometres.

[15] The appellant says that as a result of his poor financial position his diet is very limited. He has not been able to pay his last power bill or maintain his car. He has applied for assistance in relation to tyres and registration. Moreover, he has asked for a food grant but has received no response from the Ministry.

[16] It was submitted on behalf of the appellant that Special Benefit should be paid to him at a higher rate.

[17] On behalf of the Chief Executive it was submitted that the cause of the appellant's financial difficulty appears to be his high accommodation costs. Information from the Ministry of Business, Innovation and Employment website for the period 1 October 2014 to 31 March 2015 in respect of the Tararua District suggests that the cost of the appellant's accommodation is at the top end for rentals in the area. It was submitted that the appellant's rental costs are not essential or reasonably avoidable. It was also noted that the appellant has now been in receipt of Special

Benefit since 2001. It appears that he has come to regard Special Benefit as an entitlement.

Decision

Benefits Review Committee hearing

[18] The first issue that arises in this case is one of jurisdiction. This Authority has power to consider decisions of the Chief Executive which have been confirmed or varied by a Benefits Review Committee under s 10A of the Social Security Act 1964, or decisions made by the Chief Executive other than pursuant to a delegation. Section 10A(2) & (3) provide:

- The Minister shall establish at least one Benefits Review Committee for every office of the department where decisions or recommendations about the matters to which the Act applies are made.
- The Benefits Review Committee shall consist of a community representative appointed by the Minister and two Ministry staff appointed by the Chief Executive.
- At any meeting of a Benefits Review Committee the quorum shall be the total membership. No officer of the department shall act as a member of the review committee if that officer was involved in the decision being reviewed.
- Decisions must be in writing and the Committee must give reasons for its decision.

[19] In *Arbuthnot v Chief Executive of the Department of Work and Income*,[1] the Supreme Court found that, in effect, the Benefits Review Committee decision is a departmental decision and the Benefits Review Committee is effectively acting in the Chief Executive's stead.

[20] Although the Benefits Review Committee is not an independent tribunal, nevertheless the rules around its composition and process, including the quorum and the requirement that it should provide written reasons for its decision, indicate that it is a decision-making body established by statute to which the rules of natural justice apply.

[21] This is reinforced by the New Zealand Bill of Rights Act 1990 which provides that wherever a public authority has a power to make a determination in respect of a

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1 [2007] NZSC 55; [2008] 1 NZLR 13.

person's rights, obligations or interests protected by law, that Authority must apply the rules of natural justice.

[22] The appellant is a client of the Ministry of Social Development's Remote Client Unit. The Authority has been advised that this unit services clients who, due to exceptional behaviour or other exceptional reasons, cannot access services through their local Work and Income centre:[2]

> The unit is staffed by seconded Work and Income staff. Due to the nature in which the unit operates, security and safety of its own members is paramount. A number of security measures are in place including restricting knowledge of the unit's location, mail management, telephone system setup, threat management and protecting staff identify by the use of pseudonyms.

[23] It transpires that the Benefits Review Committees which hear reviews from the Remote Client Unit also have procedures and practices which are different from those of the Benefits Review Committees not attached to the Remote Client Unit.

[24] The appellant and his advocate pointed to a number of concerns in relation to the Benefits Review Committee hearing process in his case, as follows:

- The appellant was advised that the hearing would be heard on the papers only. He was not offered a hearing conducted by telephone with the appellant's advocate attending.
- The Benefits Review Committee failed to have regard to written submissions made by the appellant's advocate.
- Most significantly, the names of the members recorded on the Benefits Review Committee members' decision are pseudonyms.

[25] The failure to organise, at the very least, a telephone conference for the Benefits Review Committee hearing is unsatisfactory. The failure to consider the submissions of the appellant's advocate is a breach of the rules of natural justice. For the Committee members to use false names is alarming.

[26] As previously outlined, we are in no doubt that the Committee must act in accordance with the rules of natural justice. Three matters, in particular, arise as a result of the use of false names by Benefits Review Committee members:

(i) It is not possible to ascertain whether or not the members have been validly appointed. On raising this issue with the Ministry, the Authority has now been provided with a copy of the warrant of appointment of the

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[2] Submission from the Ministry, dated 2 November 2015.

community representative but has not been provided with copies of the appointments by the Chief Executive of the departmental appointees.

(ii) Coupled with the fact that the Remote Client Unit staff also use false names, it is not possible for the appellant or this Authority to be satisfied that the departmental members of the Committee meet the criteria of s 10A(7) of the Act; that they have not been involved in the decision being reviewed. We have been advised that usually departmental members of Committees dealing with Remote Client Unit decisions are drawn from a panel at the Ministry's National Office. On this occasion, a person who had recently been seconded to the Remote Client Unit was one of the panel members involved. We have been informed by letter that this person was not involved in the decision in the appellant's case.

(iii) A further consequence of the use of pseudonyms is that it is not possible for a beneficiary to be satisfied that the person making the decision in his case was not a person biased against him.

[27] In the Canadian case of *Wah Shing Television Limited & Partners v Canadian Radio-Television and Telecommunications Commission*,[3] the Commission declined to disclose which members had participated in a decision and whether any members had concurred or dissented. The Federal Court found:

> where there is a legal duty to provide a fair hearing, it is a corollary of that duty that the interested parties be able to ascertain which members of the tribunal have participated in making such a decision affecting them. If they cannot so ascertain they are effectively denied rights which they may otherwise have to attack this decision, e.g. for bias, real or apprehended …

[28] This decision was followed also by the Canadian Federal Court, in *0769449 B.C. Ltd (cob Kimberly Transport) v Vancouver Fraser Port Authority.*[4] This case involved a decision by the Port Authority to terminate a trucking licence and an initial refusal to name the decision-maker.

[29] Zinn J accepted the principle and rationale in *Wah Shing* and added: "failure to name the decision-maker also prevents an affected party from determining whether or not this decision-maker had the authority to make the impugned decision".[5]

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3 [1984] 2 FC 381 at para 2.
4 [2015] FC 252.
5 At [15].

[30] In the New Zealand decision Medical Practitioners Disciplinary Tribunal v *Parry*[6] in which the respondent sought to have the dissenting member of a tribunal identified, the High Court directed that a party was entitled to know the name of the dissenting member of the tribunal.

[31] The rules of natural justice and their standards of fairness are flexible, and depend on the nature of the power being exercised and the effect of the decision on personal interest[7]. If the standards around anonymous witnesses were to be followed; we would expect that the normal obligations could only be overridden by exceptional circumstances and would generally involve an immediate threat to the physical safety of one or more members of staff or a Benefits Review Committee. Such a threat would need to be considered on a case-by-case basis, rather than the blanket approach currently adopted by the Ministry. An attempt to intimidate a staff member would be unlikely to reach the high threshold required. There was no suggestion of an immediate physical threat in this instance. Indeed, Mr Signal on behalf of the Ministry said he was unaware of why the appellant was a client of the Remote Client Unit.

[32] Anonymous decision-makers making decisions about a person's entitlements are not a common feature of jurisdictions which subscribe to the rule of law. We appreciate that staff at the Ministry can find themselves working under difficult conditions, with threats and attempts to intimidate staff from clients becoming increasingly common, including both physical threat and written threats including cyber bullying. Nevertheless, the Chief Executive must deal with clients in ways which do not undermine or otherwise infringe the rules of natural justice, in the absence of express statutory authority or exceptional circumstances.

[33] A further matter of concern in this case is the failure of the Benefits Review Committee to give reasons for its decision, as required by the legislation. The lack of reasons for the Benefits Review Committee decision to uphold the decision of the Chief Executive raises a question as to whether the review of the appellant's case was properly considered or was simply a "rubber stamping" of the Chief Executive's decision.

[34] These various deficiencies mean that the Benefits Review Committee process in this case was seriously flawed. It is questionable whether a Benefits Review Committee hearing in accordance with the legislation has occurred and whether the Authority has jurisdiction to consider the substantive issues.

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6 *Medical Practioners Disciplinary Tribunal v Parry* HC Auckland AP49/SW01, 11 May 2001.
7 See *Laws of New Zealand* Administrative Law: Procedural Impropriety (online ed) [29].

[35] At the 11th hour the Chief Executive has now indicated a willingness to hold a further Benefits Review Committee for the appellant. The appellant has indicated he would like the matter to be referred back for a further Benefits Review Committee hearing provided the members of the Committee are not anonymous.

[36] In the circumstances this matter is referred back for a further Benefits Review Committee hearing which should be convened, bearing in mind our findings in this decision.

[37] The appeal as it relates to the Benefits Review Committee process is allowed.

DATED at WELLINGTON this 18th day of December 2015

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Ms M Wallace
Chairperson

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Mr K Williams
Member

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Lady Tureiti Moxon
Member

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