[2015] NZSSAA 105

Reference No. SSA 117/15

**IN THE MATTER** of the Social Security Act 1964

**AND**

**IN THE MATTER** of an appeal by **XXXX** of No Fixed Abode against a decision of a Benefits Review Committee

**BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY**

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

**HEARING** at WELLINGTON on 10 November 2015

**APPEARANCES**

Ms K Brereton assisted by Mr G Howell for the appellant
Mr G Moore for Chief Executive of the Ministry of Social Development

## DECISION

[1] The appellant appealed to the Authority against a decision of the Chief Executive to suspend the payment of Supported Living Payment to her on the basis that she had two outstanding arrest warrants relating to charges under the Animal Welfare Act.

[2] At the hearing of this matter Ms Brereton, on behalf of the appellant, submitted that the Chief Executive had not complied with the notice requirements in s 75B of the Social Security Act 1964. The appellant's benefit should not therefore have been suspended. She also raised questions regarding the adequacy of the notice given in respect of review rights. Ms Brereton also seeks costs in relation to this matter.

[3] Mr Howell raised issues regarding the Benefits Review Committee hearing.

[4] Following the hearing, Mr Moore on behalf of the Chief Executive conceded that the notice requirements contained in s 75B had not been complied with and a back-payment of benefit has been paid to the appellant.

*Ex gratia payment*

[5] While the appellant has now received a back-payment of benefit, she was in fact left without income for a lengthy period. On the one hand it could be argued that she could have remedied her situation reasonably easily, but that does not take into account her disabilities and the difficult circumstances she was living in. It is extremely important that notice requirements be strictly complied with before the drastic action of suspending a benefit is taken. Simply making a backdated payment of benefit does not restore the appellant to the position she would have been in if her benefit had not been cancelled.

[6] We recommend that the Chief Executive make an *ex gratia* payment to the appellant for the wrongful cancellation of her benefit.

[7] The remaining issues relate to the Benefits Review Committee hearing, advice of review rights on costs, and costs.

*Benefits Review Committee hearing*

[8] 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.

[9] 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.

[10] 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.

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

[12] 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.

[13] 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. In particular, members of the Committee use pseudonyms and beneficiaries are not offered a hearing in person. Hearings are either on the papers, or if represented by an advocate a telephone hearing may be arranged.

[14] In this case, although Ms Brereton was acting as an advocate for the appellant from an early stage, no telephone hearing was offered. The matter was heard on the papers. Moreover, it transpires that the Ministry staff sitting on the Committee have used pseudonyms. The community representative is named.

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1 [2007] NZSC 55; [2008] 1 NZLR 13.
2 Communication from the Ministry, dated 2 November 2015.

[15] As previously outlined, we are in no doubt that the Benefits Review 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.

(ii) Coupled with the fact that the Remote Client Unit staff also use pseudonyms, 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.

(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.

[16] Discourse by the courts on this subject appears to be limited, which is possibly a reflection of how unusual it is for decision-makers to remain anonymous.

[17] 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 …

[18] 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.

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

[19] 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]

[20] In the New Zealand decision of *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.

[21] 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 in 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.

[22] 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 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.

[23] A further concern in this instance is that although Ms Brereton had been acting as the appellant's advocate for some time, the appellant was not offered a telephone conference hearing at the very least.

[24] Finally, we note the failure of the Benefits Review Committee to give reasons for its decision, as required by the legislation. Had the Committee actually given consideration to whether or not the notice requirements had been complied with in this case, it is likely they would have realised that they had not been complied with. The

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5 At [15].
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) at [29].

consequences of the cancellation of the appellant's benefit are significant. Careful consideration of the decision was required. The lack of reasons for the Benefits Review Committee to uphold the decision of the Chief Executive raises a question as to whether the review of the appellant's case was ever properly considered.

[25] The result of these various failures, and particularly the use of pseudonyms by the Ministry staff on the Benefits Review Committee, makes it questionable as to whether a proper Benefits Review Committee hearing as envisaged by the legislation had in fact taken place, and whether the Authority therefore had jurisdiction to consider this matter.

[26] This is a matter which needs the Chief Executive's urgent attention.

*Review advice*

[27] Ms Brereton also drew to our attention the fact that the appellant was given notice of her right to review a decision of the Chief Executive in a 'fact sheet' sheet rather than in the letter notifying the decision. Mrs Brereton expressed concern about the potential for a fact sheet to not be included in any letter sent out or to be overlooked.

[28] Strictly speaking, the Authority does not have jurisdiction in relation to this matter, but the Authority shares Ms Brereton's concern as the practice will have implications for the Authority in some circumstances. It is easy to see many disputes arising as to whether notice of the right to review has been given. The Authority is also concerned that the right of review of a decision of the Chief Executive is included under the heading 'Review of Payments and Adverse Actions'. The right to review a decision of the Chief Executive appears to be combined with a notice about the Chief Executive's right to review benefit entitlement when circumstances change. It is difficult to understand why notice of the right to review has been taken out of the letter which contains the decision. The impression given is that the Chief Executive is attempting to obscure the notice of right to review a decision. We strongly recommend the Chief Executive give urgent attention to this matter.

*Costs*

[29] Although s 12(3) of the Act provides that a person commits an offence if they demand or accept from any applicant, or from any other person, any fee or other consideration for procuring or endeavouring to procure the grant of a benefit, s 12K provides that where an appeal to the Authority is allowed in whole or in part, or any

matter is referred back to the Chief Executive, the Authority may allow the appellant the costs of bringing the appeal or any part thereof.

[30] In addition, s 12O provides for an appellant to be represented by an agent.

[31] It is reasonable to infer, therefore, that the provisions of s 12K and s 12O override s 12(3) at least in relation to appeals to the Authority.

[32] In this case the appellant was represented primarily by Ms Brereton, an experienced beneficiary advocate. At least in the first instance, she offers her services as a volunteer. As the appellant is a person on an income-tested benefit it is reasonable to infer she does not have the ability to pay Ms Brereton for her work.

[33] That Ms Brereton has offered her service for free in the first instance does not mean that she does not have costs in providing her services or should not be remunerated for her work if she is successful.

[34] She has advised that she usually invoices the Ministry of Social Development $35 per hour. In addition to the hearing time she would have had preparation time, including all work related to this appeal from the time of the Benefits Review Committee hearing onwards.

[35] Because Ms Brereton was unable to attend this hearing in person, another experienced advocate, Mr Howell, attended the hearing primarily as a support person for the appellant. He also made submissions, particularly in relation to the Benefits Review Committee matter.

[36] We direct that an amount of $500 is to be paid in costs in this matter. The amount is to be paid to Ms Brereton in the first instance.

*Criminal proceeding*

[37] Finally, we note in passing that the appellant herself raised the issue of whether or not the proceedings against her could be regarded as criminal proceedings. The Act itself does not define “criminal proceeding”. Mr Moore on behalf of the Chief Executive offered no submission on how it should be defined. Section 132L of the Act provides for regulations to be made prescribing the types of offence which might be excluded from the operation of s 75B. This suggests that Parliament intended that not all offences (perhaps, for example, a traffic offence) should be regarded as a criminal offence. We strongly recommend that the Chief Executive give attention to this matter.

[38] The appeal is allowed.

**DATED** at WELLINGTON this 24th 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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