[2017] NZSSAA 052

Reference No. SSA 39, 46, 54, 59, 66, 88 & 134/16

IN THE MATTER of the Social Security Act 1964

AND

IN THE MATTER of an appeal by **X** of Z against a decision of a Benefits Review Committee

DATE OF MINUTE **Friday, 15 September 2017**

DECISION
(ON INTERLOCUTORY ISSUES)

Overview

[1] The appellant lodged these seven appeals during 2016. They are against seven decisions of the Chief Executive; each has been the subject of a decision by a Benefit Review Committee. The grounds in the appellant's notices of appeal pay little attention to the matters in issue in the decisions of the Benefit Review Committees; in large part, they make irrelevant assertions such as "I did not defraud WINZ", that this Authority is vindictive, nasty and biased, and that the Ministry has behaved improperly in a number of respects. The notices of appeal in some cases also go on to make assertions regarding the appellant's circumstances, including that she does not suffer from a mental illness.

[2] Each of the Benefits Review Committee decisions appears to be a routine decision; they have a formal heading, name the Chairperson and two panel members, say where the hearing took place, the date of hearing and set out a fully reasoned decision.

[3] This Authority intended to hear the appeals in March this year. On 1 March 2017, the Authority received a document written by Mr George Van Ooyen, General Manager, Contact Centre Services of the Ministry of Social Development. This memorandum was addressed to the Chair of this Authority. It was neither addressed to nor supplied to the appellant. On the contrary, the memorandum was headed with the statement "Security Level: In Confidence".

[4] At this point, for the first time, it became apparent to the Authority that the seven decisions of Benefits Review Committees may not be the true record of the decisions they appeared to be.

[5] Mr Van Ooyen's memorandum included the following information:

[5.1] The Ministry of Social Development would not be disclosing the real names of panel members who had been part of Benefit Review Committee hearings.

[5.2] A description of the Ministry's "Remote Client Unit", which apparently provides services for persons whom the Ministry considers pose "a high risk to the safety of front line staff nationwide".

[5.3] A statement that the Ministry has "determined that the use of pseudonyms [is] a necessary and appropriate control to protect staff from being identified and potentially placed at greater risk of harassment, threats or even violence".

[5.4] A statement that pseudonyms are used by all panel members of Benefit Review Committee hearings where the person seeking a review is dealt with by the Remote Client Unit.

[5.5] A series of critical comments relating to the appellant and these appeals stating that she has a history of being "abusive", engaging "harassing behaviour", that she has made death threats against Ministry staff, that she has made "inappropriate allegations of sexual misconduct".

[5.6] The assertion that "the risk is too high to our staff members to disclose the real names of those [Benefits Review Committee members who] have dealt with [the appellant's]" Benefit Review hearings.

[6] This information in Mr Van Ooyen's memorandum disclosed to the Authority that the series of decisions of Benefits Review Committees that heard the appellant's appeals had false names and signatures. That fact was not apparent from the documents or other information provided by the Chief Executive, who was responsible for issuing the documents, and dealing with them before this Authority.

[7] The Authority was concerned that, apparently, the Chief Executive:

[7.1] had issued statutory decisions that used false names and signatures;

[7.2] had not previously notified the appellant or the Authority that the documents contained false information on the face of the documents; and

[7.3] Mr Van Ooyen had attempted to communicate with the Authority "in confidence" regarding the character of the appellant.

[8] There was a further issue of concern to the Authority. The first of the Benefits Review Committee decisions used the true names of the members making the decision. They said in their decision that staff in the Remote Client Unit had apparently deliberately omitted key information relating to the appellant's circumstances; and that could have led to a wrong and unfair conclusion. Accordingly, that Benefits Review Committee raised serious issues relating to the integrity of staff in the Remote Client Unit, in relation to the appellant's review.

[9] In these circumstances, the Authority issued a Minute to both the appellant and the Ministry. It notified the appellant of the attempt to communicate in secret with the Authority and gave notice of its grave concerns regarding the integrity of the information presented to the Authority by the Chief Executive.

[10] The appellant was self represented, except to the extent she had assistance from an agent who is not legally trained. In these circumstances, the Authority included information in its Minute which made it clear that in law, there were grounds to be very concerned regarding the Chief Executive's conduct of these appeals.

[11] After receiving the Authority's minute, the Chief Executive disclosed the true names of members of the Benefits Review Committees to the Authority, but applied to continue to withhold the information from the Appellant.

[12] The Authority heard evidence on the Chief Executive's application, and in relation to the integrity of the material before the Authority in relation to the appeals.

Discussion

Facts

[13] These appeals are not the first occasion where Benefits Review Committees have used false names. The Authority has previously determined that these statutory decision-makers must disclose their identity. The Chief Executive of the Ministry of Social Development gave a personal undertaking to the Authority that he would comply with the Authority's decision. We now set out the circumstances in which the Chief Executive gave his personal undertaking that members of Benefits Review Committees would disclose their true identity.

[14] On 18 December 2015, this Authority issued the decision *SSAA Appeal* [2015] NZSSAA 102. In that decision, the Authority pointed out that:

[14.1] Benefits Review Committees are statutory bodies established by the Minister under section 10A(2) of the Act;

[14.2] a Benefits Review Committee must issue its decisions in writing, and give reasons for its decision.

[14.3] in *Arbuthnot v Chief Executive of the Department of Work and Income* [2007] NZSC 55, the Supreme Court said a Benefits Review Committee is a decision-making body effectively acting in the Chief Executive's stead;

[14.4] despite Benefits Review Committees not being independent tribunals, rules of natural justice apply;

[14.5] the use of false names deprived appellants of their right to natural justice, as they could not ascertain whether the members were validly appointed, involved previously in the decision they were reviewing (required by section 10A(7)), or biased; and

[14.6] anonymous decision-makers deciding on entitlements are not a common feature of jurisdictions that subscribe to the rule of law.

[15] Following the ruling that not disclosing the names of Benefits Review Committee members was unlawful, the Chief Executive decided to convene a new Benefits Review Committee to reconsider that appellant's review. The matter returned to this Authority as *SSAA* 038/16. The new Benefits Review Committee did the same as the previous Benefits Review Committee, and withheld the identity of the members. This Authority issued a minute dated 9 June 2016 that stated:

> On the face of it the Chief Executive has deliberately disregarded the Authority's decision of 18 December 2015. The Authority is extremely concerned at this development.
>
> The Authority requests the Chief Executive provide a personal explanation for the manner in which the Benefits Review Committee was conducted and in particular the use of false names by departmental staff members of the Benefits Review Committee. The explanation is required by 10:00 am on Wednesday 15 June [2016].

[16] The Ministry of Justice's National Manager, Specialist Courts and Tribunals sent the minute to the Chief Executive of the Ministry of Social Development, stating it was for "your personal attention", and saying the minute "seeks an explanation as to why the finding in an earlier Authority decision appears to have been disregarded."

[17] The Chief Executive's personal response was provided in the form of an undated memorandum from his counsel, Mr Stainthorpe, delivered to the Authority on 14 June 2016. The Chief Executive stated:

[17.1] he accepted he was under a statutory compulsion to take all necessary steps to carry into effect the decisions of the Authority;

[17.2] that the use of false names after the Authority's ruling "was an error that staff followed an existing policy to hold an anonymous Benefits Review Committee without turning their mind to the Authority's finding in [the Appellant's] case. This was an error that the Ministry unreservedly apologises for"; and

[17.3] he took the Authority's concerns seriously, and was seeking further advice as to "in what circumstances anonymous Benefits Review Committees may be appropriate".

What happened after the Chief Executive's undertaking in* SSAA Appeal *[2015] NZSSAA 102

[18] It is necessary to relate the events in the present appeal to the timing of the events in *SSAA Appeal* [2015] NZSSAA 102. When doing so, a primary consideration is that in this present appeal the Benefits Review Committee decisions have not had the names of members redacted. The names and signatures[1] are simply false, and nothing on the face of the decisions discloses that they are false.

[19] The first time the Chief Executive disclosed to the Authority that the names and signatures were false was on 1 March 2017 when Mr Van Ooyen filed his memorandum. Two of these Benefits Review Committee reports for the present appeals were prepared with false names and

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[1] Where they are legible they appear to be a signature form of the false name.

signatures after the Chief Executive's personal statement that he would comply with the Authority's ruling in *SSAA Appeal* [2015] NZSSAA 102, and that his failure to do so previously was an error not an intentional act.

[20] Of the present appeals, the two Benefits Review Committee decisions that were issued after the Chief Executive's undertaking continued the practice of using false names and signatures:

[20.1] Appeal 088/16, which has a Benefits Review Committee decision dated 17 June 2016 (some three days after the Chief Executive's undertaking he would provide Benefits Review Committee decisions with the true identity of the decision-makers),

[20.2] Appeal 134/16, which issued on 26 September 2016.

[21] However, the issue of the decisions was not the only occasion when the Chief Executive's conduct of the appeal required him to deal with the decisions, and whether they were true records of the Benefits Review Committees' decisions. The Chief Executive is required to file statutory reports regarding the appeals under section 12K of the Act. He did so, and treated the decisions containing false names and signatures as genuine documents. In particular:

[21.1] in appeals 039/16, 048/16, 054/16, 059/16 and 066/16, the Chief Executive filed his statutory report under section 12K of the Act with the Authority on 8 September 2016;

[21.2] in appeal 088/16, he filed his section 12K report with the Authority on 25 November 2016; and

[21.3] in appeal 134/16, he filed his section 12K report with the Authority on 3 February 2017.

The use of false names and signatures commenced after a critical Benefits Review Committee decision

[22] The use of false names and signatures in statutory decisions is very concerning in itself, and is aggravated because it occurred in breach of the Chief Executive's personal undertaking to this Authority. However, there is a further and an equally concerning element.

[23] In Appeal 039/16, the Benefits Review Committee heard the appeal on 25 November 2015, and issued its decision on 26 November 2015. That is the earliest decision of any of the Benefits Review Committees in the seven appeals in issue. That Benefits Review Committee used the real names of its members. The evidence before us is that the staff of the

Remote Client Unit (which deals with the appellant's affairs) use false names. Mr Van Ooyen said:

> There are currently a number of security processes in place to ensure the safety of staff working within the RCU. These include protecting their identity with the use of pseudonyms, …

[24] The Benefits Review Committee commented on how staff in the RCU dealt with the appellant's case when dealing with the disputed that led to Appeal 039/16. Their decision issued on 26 November 2015 said:

> Based on the new evidence presented by all parties on 26 November 2015, the Committee wishes to express great concern on what appears to be **the deliberate omission of key information relating to this case by the [RCU of the Ministry of Social Development (RCU)].** ... **The Committee found this information misleading and could have led to a wrong and unfair conclusion**.
>
> The Committee recommends a review of all of the applicant's information lodged with the RCU ...
>
> (emphasis added)

[25] From that point forward, the members of the Benefits Review Committees used false names and signed decisions with false signatures. The Ministry employees who sat on that Benefits Review Committee did not sit on later Benefits Review Committees.

The Chief Executive's position

[26] The Chief Executive's position is that this Authority should allow him to withhold the names of the members of the Benefits Review Committees from the appellant.

[27] He explained why Mr Van Ooyen's memorandum supplied to the Authority on 1 March 2017 (but dated 31 October 2016) was drafted. He said that occurred after the advocate for the appellant indicated he was concerned that Benefits Review Committee members had used false names. He said that there had been errors in how that document was handled:

[27.1] It should have been addressed to the Chief Executive of the Ministry of Justice, indicating that Benefits Review Committee members used false names, and why.

[27.2] The memorandum should have been a late addition to the section 12K reports.

[27.3] It should have been served on the appellant.

[28] The Chief Executive has now disclosed the names of the members of the Benefits Review Committees to the Authority, but does not wish to disclose them to the appellant.

[29] The justification for withholding the names is that:

[29.1] two staff members of the Ministry of Social Development were murdered during their work at Ashburton on 1 September 2014;

[29.2] the Ministry was convicted of offences relating to its failure to provide a safe work environment; and

[29.3] the appellant is a person who exposes Ministry staff to danger, which is mitigated by hiding their identity.

The appellant's position

[30] The appellant wishes to have full disclosure of the membership of the Benefits Review Committees. She claims that the Ministry has not produced an accurate record in its reports filed under section 12K of the Act.

Other issues to address

[31] The Authority raised the question of its need to be satisfied of the record before it is genuine and complete, given the findings of the first Benefits Review Committee in Appeal 039/16. The Authority indicated that it anticipated conducting the appeals as a full rehearing pursuant to section 12M of the Act; and the Chief Executive should expect to authenticate the whole of the record he has provided.

[32] There was also some discussion as to how to proceed given what had occurred with the Benefits Review Committees.

The factual determinations

[33] We must make findings regarding two factual issues:

[33.1] What the Chief Executive did in relation to issuing statutory decisions with false names and false signatures.

[33.2] Whether the appellant is a dangerous person, and if so, to what extent.

Our conclusion – what the Chief Executive did relating to Benefits Review Committee decisions

[34] What happened in relation to issuing decisions with false names and signatures is documented, and there can be little dispute as to what happened:

[34.1] On 1 September 2014, two staff members in the Ministry of Social Development were murdered while working in the Ministry's office at Ashburton.

[34.2] On 13 October 2014, the Ministry's file notes say "[The appellant] has been convicted of several charges of Misuse of Telecommunications device … [She] is on active charges of threatening to kill Ministry staff …".

[34.3] On 26 November 2015, the first Benefits Review Committee issued a decision in the first of these present appeals —Appeal 039/16. The Benefits Review Committee decision said the members had great concern that staff in the RCU deliberately omitted key information from their report to the Benefits Review Committee. They said the omission was misleading, and could have led to a wrong conclusion on the part of the Benefits Review Committee.

[34.4] On 18 December 2015, this Authority issued its decision in *SSAA Appeal* [2015] NZSSAA 102. It stated that the names of Benefits Review Committee members must be disclosed, and gave reasons for that requirement.

[34.5] On 4 March 2016, members of two Benefits Review Committees issued and signed decisions in the present appeals using false names and signatures,

[34.6] On 1 and 29 April 2016, members of respective Benefits Review Committees issued and signed decisions using false names and signatures, also relating to the present appeals.

[34.7] On 9 June 2016, the Authority required a personal explanation from the Chief Executive of the Ministry of Social Development for his apparent failure to comply with its direction in *SSAA Appeal* [2015] NZSSAA 102. On 14 June 2016, the Chief Executive provided his explanation, saying that the failure to disclose the names of another Benefits Review Committee was an error.

[34.8] On 17 June 2016, members of a Benefits Review Committee issued and signed a decision using false names and signatures.

[34.9] On 8 September 2016, the Chief Executive filed his statutory report for appeals 039/16, 048/16, 054/16, 059/16 and 066/16, and did not disclose that four of the Benefits Review Committee decisions used false names and signatures.

[34.10] On 26 September 2016, members of a Benefits Review Committee issued and signed a decision using false names and signatures.

[35] On 25 November 2016, in appeal 088/16 the Ministry filed a statutory report under section 12K of the Act; it did not disclose the Benefits Review Committee decision had used false names and signatures. The same occurred on 3 February 2017 in respect of appeal 134/16.

[36] On 1 March 2017, Mr Van Ooyen sent his memorandum to the Authority disclosing to it, for the first time, that Benefits Review Committee decisions in these appeals contain false names and signatures. The Chief Executive, through his counsel, appears to accept Mr Van Ooyen's memorandum was not issued simply because the Chief Executive realised he provided statutory decisions with false information. He expressly said the motivation was that the appellant had discovered what had happened:

> … the advocate for the appellant had intimated to the Ministry that the issue of [the] use of pseudonyms by Benefits Review Committee panel members was an issue relating to the decisions he would raise on appeal. It was in that context that [that] memorandum was created.

[37] In relation to the murder of Ministry Staff and the appellant's threats to kill, it appears her convictions were events that occurred in 2014. Despite those events, the first Benefits Review Committee convened and used the real names of its members. They raised a concern that staff in the Remote Client Unit had deliberately attempted to mislead the Benefits Review Committee. That concern could not be more serious. Providing misleading information to a statutory decision-maker to deprive a person of their legal rights undermines the integrity of the Ministry of Social Development, and there are severe sanctions for such conduct.

[38] Only after the first Benefits Review Committee raised concerns regarding the integrity of staff in the RCU did the Benefits Review Committees start using false names and signing decisions with false signatures.

[39] The practice of using false names and signatures continued unabated, notwithstanding this Authority's decision that the practice was unlawful. It then continued after the Chief Executive of the Ministry of Social Development gave his personal assurance to this Authority that:

[39.1] he "is required by section 12P of the Social Security Act 1964 to forthwith take all necessary steps to carry into effect the decision of the Authority"; and

[39.2] the instance of following an existing policy rather than the Authority's requirement to disclose the true identities of BRC members was "an error that the Ministry unreservedly apologises for."

[40] The Chief Executive then filed statutory reports under section 12K which failed to disclose that the Benefits Review Committee reports, to which the 12K reports related, had false names and signatures. Apparently, the true position was only disclosed because the appellant's advocate had become aware of the issue. The position taken by the Chief Executive's counsel seems to be that he accepts that if not detected; the appellant and the Authority would have been allowed to continue under the misapprehension that the Benefits Review Committee reports were true documents.

[41] It is a fact that the use of false names and signatures began after the first Benefits Review Committee disclosed its concerns that staff in the Remote Client Unit had deliberately attempted to mislead them.

Our conclusion – the danger the appellant poses to Ministry staff

[42] The Chief Executive's claim is that the appellant poses "a high risk to the safety of front line staff", and for that reason he was justified in filing decisions with false names and signatures.

[43] The Ministry filed an affidavit from Mr Van Ooyen, and he was cross-examined on his affidavit at an oral hearing. The text in Mr Van Ooyen's affidavit did not directly address the question of whether the appellant did pose a high risk to front line staff. He did, however, produce written material which included communications from the appellant. It is only necessary to look at the notices of appeal themselves to identify that the appellant communicates in an aggressive tone; she uses crude language, and blames the Ministry for unfortunate circumstances in her life. The various communications that Mr Van Ooyen produced confirm that.

[44] There are various references to the Ministry having prosecuted the appellant and references to assertions from the appellant that WINZ employees had drugged her, raped her, beaten her up and killed some of her animals. There are also references to a warning letter about misuse of telephonic equipment, and notes referring to oral confrontations in Ministry offices, trespass notices issued against the appellant and a range of other matters demonstrating a highly fractious relationship between the appellant and Ministry staff.

[45] The most serious element of the material Mr Van Ooyen produced referenced charges of threatening to kill Ministry staff. Mr van Ooyen had no personal knowledge of the matters. In these circumstances, it appeared that some dimension and perspective was given to the information by the following note made by Ministry staff:

> We have contacted the Police about this, here is their response:
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> Keep recording all this information and get it forwarded to me in [the relevant Police Station]. Advise your staff that she is harmless if they have any concerns about her and she won't act on any of her threats.

[46] Accordingly, it seemed that there has been some Police involvement, possibly some charges, but the evaluation was that the appellant was harmless.

[47] That is where the matter lay at the end of the evidence to support the Ministry's application. At that point, the appellant's agent openly advised her that she should not add to the evidence as it was not in her interests to do so. The appellant chose to give evidence. Unlike Mr Van Ooyen, she did have a full knowledge of the events. It very quickly emerged from her testimony that the appellant has been convicted of benefit fraud, misuse of telephonic equipment and threatening to kill Ministry staff. There was some vagueness as to the number of charges and the consequences. In terms of the present issue, the conviction for threatening to kill is the only one on which we place significant weight.

[48] A conviction for threatening to kill can only be entered when the threat is not harmless; under s 306 of the Crimes Act 1961 it is an offence where an offender is liable to imprisonment for a term not exceeding seven years. *R v Adams*[2] sets out what is required to establish the offence. The key requirement in addition to the threat is an intention that the threat be taken seriously (also see *Bonfert v R* [2012] NZCA 313). The reaction of the person threatened is not a critical ingredient; the essential ingredients are the threat, and that it is intended to be taken seriously. Accordingly, a conviction for threatening to kill is an inherently serious matter. However, it does not necessarily imply the offender was about to carry out the threat.

[49] We have formed a clear view that the appellant consistently acts in ways that are against her interest. The inappropriate aggression, profanity and tone of her communications with this Authority and other parties inescapably point to the appellant acting in concerning ways that do not advance her interests. We also have regard to the fact that, at least on

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2 [1999] 3 NZLR 144 (CA)

one occasion, the appellant has made a threat sufficient to result in her being convicted of threatening to kill. The evidence was not precise; however, we understand that no penalty or a minimum penalty was imposed.

[50] The evidence given by the appellant was that she was very fearful, on occasions when she had dealt with the Court, of having anything in the nature of a condition of good behaviour imposed upon her, as she was concerned that she would be unable to comply with it. That reinforces our view that the appellant is unable to make consistently good decisions, and struggles to control inappropriate impulses.

[51] Mr Van Ooyen appeared to be unaware of the appellant's conviction for threatening to kill; he did not mention it in his affidavit or disclose it when questioned by counsel for the Chief Executive. He instead attached various notes made by staff, including the report that the police regarded the appellant as "harmless". That inevitably gives some perspective as to the level of concern the Ministry has regarding danger posed by the appellant.

[52] In our view on the evidence provided, it is reasonable to have concerns regarding the appellant's behaviour. However, it is mainly related to her making threats, allegations, and using profane language. It is not a history of actual violence against persons dealing with her. Mr Van Ooyen did not seek to keep his identity hidden; counsel for the Chief Executive did not seek to do so either. For reasons discussed below, it is not likely that endeavours to do so would have succeeded; regardless, that too demonstrates the level of the Ministry's concerns and the remoteness of the two murders of staff that counsel for the Chief Executive raised as a justification for using false names and signatures.

[53] In our view, the appellant does not pose an imminent and real risk of performing a physically violent act. We accept that anyone dealing with her in connection with the Ministry of Social Development is likely to be subjected to obscene and insulting correspondence, potentially confronting telephone calls, threats, and, some of the material could be posted in social media. We note that the Ministry of Justice has had to warn the appellant regarding her conduct in relation to staff providing support to this Authority.

The Law – statutory decision-makers may not remain anonymous

[54] It is an elementary feature of New Zealand's legal system that powers to exercise statutory authority are not conferred on decision-makers whose identity is concealed from the persons affected by their decisions. On the

contrary, New Zealand has an open justice system where statutory decision-makers usually have to give reasons for their decisions, and are invariably subject to the jurisdiction of the High Court to account for the discharge of their duties when exercising statutory powers of decision. Those duties include elements such as the lack of bias on the part of the decision-maker and the duty to only make decisions when properly constituted under the relevant statute. Decision-makers whose identity is hidden cannot effectively be called to account in relation to many of those duties.

[55] In these proceedings, the members of this Authority and any High Court judge hearing an appeal from the Authority's decisions will not have their identity hidden. In New Zealand's open justice system, the most serious crime is prosecuted by prosecutors whose identity is not hidden, members of juries who do not have their identity concealed hear cases, and judges do not have their identify concealed either. Benefit Review Committees do not have any statutory right to conceal the identity of their members; given that other decision-makers are not concealed, that is not at all surprising.

[56] The concept of "faceless" decision-makers in a statutory process of independent review is repugnant to the most fundamental concepts of justice. The Human Rights Committee, established under article 28 of the International Convention on Civil and Political Rights met on 6 November 1997 to consider the case of *Rosa Espinoza De Polay v Peru* (www.worldcourts.com).[3] The case concerned a trial of terrorism charges. The Committee observed, at [8.8]:

> As to Mr. Polay Campos' trial and conviction on 3 April 1993 by a special tribunal of "faceless judges", … Moreover, this system fails to guarantee a cardinal aspect of a fair trial within the meaning of article 14 of the Covenant: that **the tribunal must be, and be seen to be, independent and impartial**. (emphasis added)

[57] Section 27 of the New Zealand Bill of Rights Act 1990 provides that every person has the right to the observance of principles of natural justice by any tribunal or other authority that has the power to make a determination in respect of that person's rights or interests. That includes being satisfied that the decision-makers are not biased, and other fundamental concepts of justice.

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3 *Espinoza de Polay v Peru* Comm. 577/1994, U.N. Doc. A/53/40, Vol. II, at 36 (HRC 1997).

[58] In *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 the court observed, at [79]:

> The principle of open justice serves a wider purpose than the interests represented in the particular case. It is critical to the maintenance of confidence in the system of justice.

[59] We have already referred to the Authority's decision reported as [2015] NZSSAA 102 (a similar finding of the Authority is [2015] NZSSAA 105), and adopt the reasoning regarding the obligation to disclose the true names of the members of the committees expressed in that case.

[60] It is difficult to imagine a more effective way of undermining public confidence in the independence of this Authority, than for it to acquiesce to the Chief Executive's conduct of these appeals. Mr Van Ooyen as his delegate has attempted to secretly communicate with the Authority, so as to disparage the appellant. Without notice the Chief Executive's delegates issued statutory decisions with false names and signatures. Other delegates of the Chief Executive then presented them as genuine documents to the Authority. This activity occurred in breach of the Chief Executive's personal undertaking to this Authority that such behaviour would not occur.

[61] The present application amounts to a request that the Authority acquiesces in the conduct described, and hear the appeals using the decisions of "faceless" decision-makers, to determine the appellant's entitlements.

[62] The closest to a secret process for tribunals provided for in New Zealand litigation is contained in sections 263 to 271 of the Immigration Act 2009. It is triggered by information affecting the security of defence of New Zealand and some other matters. The statutory regime provides for the appointment of special counsel, and provides for communications with affected persons. Significantly the classified information is disclosed to both the special counsel, and the tribunal; and does not provide for secret decision-makers. Comparison with that regime gives dimension and perspective to the Chief Executive's unauthorised failure to provide the information required under the Act to the Tribunal and the appellant.

[63] We are very conscious that the Supreme Court in *Arbuthnot v Chief Executive of the Department of Work and Income*[4] characterised Benefits Review Committees as a purely "administrative body", but nonetheless a decision-making body. It is a critical decision in all of the present appeals, as pursuant to section 12J(16) of the Act, this Authority has no jurisdiction

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4 [2007] NZSC 55, [2008] 1 NZLR 13.

to hear these appeals in the absence of the Benefits Review Committee decisions.

[64] We appreciate that standards for bias may be different for a Benefits Review Committee when compared with a judicial body such as the Authority. However, such a difference cannot diminish the important of openness and integrity. The Supreme Court in *Arbuthnot* regarded the decisions of the Benefits Review Committees as part of the Chief Executive's decision-making process. As the High Court noted in *Ministry of Social Development v Genet*[5], this Authority largely depends on that process to provide information to decide appeals. If that process does not have complete integrity, this Authority cannot function independently or make fair decisions.

[65] The present case provides ample evidence of the important role Benefits Review Committees have in maintaining the integrity of the information provided to the Authority. Without the Benefits Review Committee having detected that the staff in the Remote Client Unit apparently deliberately attempted to withhold information to mislead the Benefits Review Committee, it is unlikely that this Authority would have been aware of that concern. If this Authority were to allow Benefits Review Committees to issue documents that contain elements of falsity, the effect on the integrity and effectiveness of the Authority is obvious.

If there is a discretion we would not allow anonymity

[66] For the reasons expressed, in our view, there is an absolute prohibition on statutory decisions-makers, in the absence of express statutory authority, remaining anonymous. If we are wrong in that conclusion, and we do have discretion to allow anonymity of the members of the Benefits Review Committees, we do not consider there is any merit in permitting anonymity in this case.

[67] The Chief Executive's justification for claiming anonymity lacks substance. The appellant could create embarrassment, she is highly likely to engage in offensive communications, but that is slight when weighed against the right to open justice. It is a matter of daily routine for decision-makers who do have to deal with persons with a long and concerning history of violence to do so without hiding their identity. Appropriate measures may be taken; anonymity is not one of them. There

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5 *Chief Executive of the Ministry of Social Development v Genet* [2016] NZHC 2541 at [15]; refer below paragraph [71].

is simply not enough weight in concerns expressed relating to the appellant.

In this case the Chief Executive has compromised any claim to anonymity

[68] While we do not consider that any Benefits Review Committee could claim anonymity for its members; regardless, we consider this case lacks merit if we have such discretion. However, there is a further factor; anonymity in this particular case would seriously compromise this Authority.

[69] Pursuant to section 12I of the Act, this Authority shall:

> .. sit as a judicial authority for the determination of appeals in accordance with section 12J of this Act.

[70] That section makes it clear that this Authority must act with impartiality and independence. It is invariably addressing the rights of individuals under statutory provisions; the State is the other party to the dispute. Most commonly, they are statutory rights under the Social Security Act 1964. That Act protects some of the most vulnerable persons in society who "for one reason or another, are unable to provide for themselves."[6]

[71] In proceedings before this Authority, the Chief Executive of the Ministry of Social Development is the formal respondent in all appeals. Given that the other party is often a person who is vulnerable and likely to lack resources, the Chief Executive is given exceptional responsibilities to provide the information this Authority needs to make fair and correct decisions.[7] In *Chief Executive of the Ministry of Social Development v Genet* Williams J said, at [15]:

> Another of the Act's design elements is that the Ministry must facilitate the prosecution of the appeal. For example, s 12K requires the appellant to lodge a written notice of appeal with the Authority and to send or leave with the Chief Executive a copy of that notice of appeal. At that point it is the job of the Chief Executive to provide any necessary background information to the Authority to assist its assessment of the appeal including "a report setting out the considerations to which regard was had in making the decision or determination"

[72] The Chief Executive is given the responsibility to provide accurate and true information to the Authority. It need not be emphasised that the Chief Executive is a statutory officer; accordingly, when dealing with a judicial authority, there is no scope for anything other than exemplary standards.

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6 *Chief Executive of the Ministry of Social Development v Genet* [2016] NZHC 2541 at [13].

7 Section 12L of the Social Security Act 1964; refer: *Chief Executive of the Ministry of Social Development v Genet* [2016] NZHC 2541 at [14].

[73] In *Wilson v R* [2015] NZSC 189, the Supreme Court considered a prosecution where a police undercover operation used a bogus search warrant and bogus prosecution of an undercover officer. While the facts are quite different, some observations regarding the integrity of the justice system are relevant. The review of decisions under the Social Security Act 1964 commence with a Benefits Review Committee, proceed to this Authority, and from there to the High Court and superior appellate courts on points of law. This system ensures that individuals' rights under the Act are determined and protected by the justice system. The whole process is dependent on the steps that commence with the Benefits Review Committee. The Supreme Court in *Wilson* noted:

> The independence of judges from the executive, both in appearance and in reality, is critical both to the proper operation of the rule of law and New Zealand's constitutional arrangements, and to the maintenance of public confidence in their operation. If authority is needed for this fundamental proposition, reference can be made to the Latimer House Principles, the Bangalore Principles of Judicial Conduct and s 25(a) of the New Zealand Bill of Rights Act 1990. The Latimer House Principles provide:
>
> > An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice. The function of the judiciary is to interpret and apply national constitutions and legislation, consistent with international human rights conventions and international law, to the extent permitted by the domestic law of each Commonwealth country.
>
> The Bangalore Principles state:38
>
> > Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

[74] That protection is completely undermined, if the courts are making decisions based on information from the executive, which is not open to scrutiny and may not be complete or true.

[75] Accordingly, the justice system demands that the Executive act with absolute honesty and that that it never attempts to mislead when dealing with a judicial decision-maker. To maintain the integrity of the justice system, the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 deal with the obligations lawyers have to the courts. The standard is absolute:[8]

> A lawyer has an absolute duty of honesty to the court and must not mislead or deceive the court.

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8 Rule 13.1.

[76] This Authority cannot accept the Chief Executive filing documents that contain false information. He has done so in this case, and he must now disclose the full extent of what is false. He must also verify the integrity of the whole record he has provided in his conduct of this appeal.

Decision

[77] We dismiss the Chief Executive's application to withhold the identity of members of the Benefits Review Committees. For the reasons set out, we do not consider we can, or should, make such an order.

[78] The remaining issue is the integrity of the record provided for us to make a decision. We are not in a position to determine whether the Benefits Review Committee's concerns regarding the conduct of staff in the Remote Client Unit were well founded. However, the appellant is entitled to have the Chief Executive provide the information necessary for her to pursue that issue effectively. We make the following directions to protect the appellant's rights to a fair hearing.

Directions

[79] Our first concern is that the appellant requires legal assistance. However, that is her choice; the Authority cannot require the appellant to instruct a lawyer.

[80] We appreciate that the appellant is not likely to be in a position to be able to pay for a lawyer to assist her. It is likely that she could successfully apply for legal aid, and we expect the cost would not be recoverable from her. However, we may not know all of the appellant's relevant financial circumstances. Accordingly, she would need to take legal advice to ascertain whether she can obtain assistance on appropriate terms. We are aware that the appellant has previously engaged counsel, so we anticipate she can obtain advice regarding that matter.

[81] The proceedings will be adjourned for 10 working days or until the appellant indicates whether she has taken steps to gain legal assistance, if that is sooner.

[82] Within that time, the Chief Executive is to provide the appellant and the Authority with the names (and any former names) of all members of the Benefits Review Committees that have convened and dealt with reviews which the appellant has applied for where they have used false names when issuing reports.

[83] The Authority will convene a telephone conference, and will wish to discuss:

[83.1] The extent of the information the appellant requires the Chief Executive to provide.

[83.2] The parties should expect that the Authority will itself require a person having direct knowledge to provide sworn evidence that the material before the Authority has not been subject to falsification of any kind, and meets the standards for disclosure in a civil proceeding under the District Court Rules.

[83.3] Scheduling a hearing of the appeals, including the time required, dates, and place.

[83.4] Any other orders that may be required.

[84] We direct that this decision be sent to the Solicitor-General in her capacity as a Law Officer, given our findings regarding the conduct of Crown litigation.

DATED at Wellington 15 September 2017

Grant Pearson
Chairperson

Charles Joe JP
Member