IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA287/2020
[2021] NZCA 329

BETWEEN	LILLIAN ALICE TAYLOR Appellant
AND	THE ATTORNEY-GENERAL ON BEHALF OF THE MINISTRY OF SOCIAL DEVELOPMENT Respondent

Hearing:	17 June 2021
Court:	Courtney, Mander and Hinton JJ
Counsel:	Appellant in Person M J Bryant and S Deng for Respondent
Judgment:	23 July 2021 at 10 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B We make no order as to costs.

REASONS OF THE COURT

(Given by Courtney J)

Introduction

[1] Lillian Taylor has a longstanding concern about the way the Ministry of Social Development (MSD) calculates benefit entitlements for people with disabilities. Her concern relates particularly to the calculation of entitlements for additional power usage required as a result of disability, such as the need for extra heating. Although

Ms Taylor is entitled to such benefits, her concern extends beyond her own entitlement — she is concerned about the effect of the MSD's conduct on people with disabilities generally.

[2] Ms Taylor brought judicial review proceedings against the MSD in an effort to ventilate this issue. Brewer J dismissed the proceedings.[1] Ms Taylor appeals Brewer J's decision. She also seeks to appeal decisions made by both judicial officers and Registry staff leading up to the determination of the judicial review proceedings. In this decision we deal only with the appeal against Brewer J's decision.[2]

[3] The scope of the appeal and the grounds advanced by Ms Taylor were contentious. We address them after recording the background to the case.

Interlocutory application for discovery

[4] Shortly before the hearing scheduled for the appeal Ms Taylor filed a document entitled "interlocutory application for orders" in which she gave notice of a variety of applications, only one of which was amenable to being dealt with in the context of the appeal. That was the order sought for discovery of a MSD file note dated 29 September 2016. In fact this document was already in Ms Taylor's possession; it was included in a bundle of documents that she sought to hand up on the morning of the hearing. It is clear that what Ms Taylor really meant by her interlocutory application was that she was seeking to adduce further evidence, particularly the MSD file note. At the outset of the hearing we could not immediately see the relevance of that document but accepted the bundle on the basis we would consider that issue as part of the overall determination of the appeal.

[5] Subsequent to the hearing of the appeal Ms Taylor filed a memorandum advising that the interlocutory application was withdrawn. The MSD has indicated

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1 *Taylor v Attorney-General on behalf of the Ministry of Social Development* [2020] NZHC 852 [Decision under appeal].

2 The other decisions, recorded in minutes of Judges or decisions of Deputy Registrars, are not matters on which a right of appeal exists. Leave is required to appeal a decision of the High Court on an interlocutory matter: Senior Courts Act 2016, s 56(3). Where administrative decisions have been made in court correspondence there is no right of appeal: s 56(1).

that it does not seek costs on the application. We do not need to consider the matter further.

Background to the judicial review proceedings

Calculating the Disability Allowance and Temporary Additional Support

[6] Under the Social Security Act 1964 (SSA) a disability allowance can be paid to a person who has additional expenses of an ongoing kind arising from their disability.[3] The SSA also provides for temporary additional support (TAS) as a last resort to help people meet "essential costs" that cannot be met from their income or other resources (including a disability allowance).[4] "Essential costs" include "regular essential expenses".[5] An essential expense is an expense that is essential for a person to meet their daily living needs.[6] This can include "disability costs", which include "disability-related expenses, being expenses of a kind for which a disability allowance … would be payable".[7]

[7] The MSD has a Manuals and Procedures (MAP) document for staff to use in assessing a person's power cost component of their disability allowance (i.e. that person's additional power costs arising from their disability). It includes a seven-step formula which compares a person's actual power usage to an estimate obtained using the "Powerswitch" calculator of normal power usage of a similar sized household.[8] If a person's power usage exceeds the estimate of the normal power usage of a similar sized household then this amount is the additional power usage included in the calculation of the person's disability allowance.

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3 Social Security Act 1964 [SSA 1964], s 69C. See also Social Security Act 2018 [SSA 2018], s 85. At the time Ms Taylor filed her claim the SSA 1964 was in force. That Act was repealed on 26 November 2018 by s 455(1) of the SSA 2018.

4 SSA 1964, s 61G; and Social Security (Temporary Additional Support) Regulations 2005 [TAS Regulations 2005], sch 1, cl 3(a). See also SSA 2018, ss 95 and 96.

5 SSA 1964, s 61G(7); and TAS Regulations 2005, sch 2, cl 1.

6 TAS Regulations 2005, sch 2, cl 2.

7 Regulation 4 and sch 2, cl 3(e).

8 The Powerswitch website is owned and operated by Consumer New Zealand to provide a free means by which people can compare electricity and gas prices.

Whata J's decision

[8] Ms Taylor is eligible for a disability allowance and for TAS because her regular ongoing disability costs exceed her maximum entitlement to a disability allowance. Ms Taylor's need for extra additional power as a consequence of having a disability is met through the disability allowance and TAS.

[9] In 2013 the MSD reduced the amount of additional power included in the assessment of Ms Taylor's disability costs. This had the result of reducing the TAS payable to her. Ms Taylor considered that the MSD had used the wrong comparison figure on the Powerswitch calculator to calculate her actual power use compared with an average similar sized household. The decision was reviewed by a Benefits Review Committee (BRC) which allowed a further $0.96 per week.

[10] Ms Taylor appealed to the Social Security Appeal Authority (the Authority). The Authority accepted that Ms Taylor needed additional power as a result of her disability. It considered the various mechanisms for assessing her usage and directed that her additional power costs for the year commencing 8 November 2013 should be assessed not by reference to the Powerswitch calculator but instead on the basis that her additional power costs be treated as 15 per cent of her total usage.[9]

[11] Ms Taylor appealed that decision by way of case stated to the High Court. Relevantly, she maintained that the MAP process had not been correctly implemented in terms of the Powerswitch calculator and there was no evidence to support the 15 per cent methodology. Whata J held that the MSD was not required to follow the MAP process, which existed to provide internal guidance and did not bind the MSD or give rise to any legitimate expectation that it would be followed, including in relation to the Powerswitch calculator.[10] He held that the Authority had a broad discretion to arrive at a disability allowance that was fair and practicable and that it had done so on the basis of the available evidence.[11] The Judge therefore dismissed the appeal.

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9 *An appeal against a decision of a Benefits Review Committee* [2015] NZSSAA 24.
10 *Taylor v Chief Executive of the Ministry of Social Development* [2016] NZHC 1160 at [34].
11 At [37].

[12] Ms Taylor applied unsuccessfully to this Court for leave to appeal the decision of Whata J.[12] Brown J, for the Court, considered that the proposed appeal did not raise any matter of general or public importance.

Subsequent developments

[13] In September 2016 the MSD reassessed Ms Taylor's disability allowance entitlement. But it failed to follow the Authority's decision (which had been upheld by Whata J) that Ms Taylor's additional power costs should be assessed on the basis of 15 per cent of her total usage. It wrongly removed the power costs from the disability allowance costs (the September 2016 decision). Ms Taylor sought a review of the September 2016 decision.

[14] On 31 October 2016 the MSD reassessed the position and advised Ms Taylor that her disability allowance and TAS would increase (the October 2016 decision). Ms Taylor was advised that if she did not agree with the decision she could ask for a review of it and that she should advise of any changes in her circumstances that could affect her payments.[13]

[15] In a subsequent letter dated 22 November 2016, the MSD advised the outcome of its (internal) review of the September 2016 decision. The outcome reflected the letter of 31 October 2016, though, confusingly, did not refer to that letter.

[16] The matter proceeded to the BRC for review of the September 2016 decision. The report of the BRC dated 11 July 2017 recorded its decision "to overturn the decision dated 29 September 2016 and to allow the Applicants [sic] expense for extra electricity costs as 15% of her total electricity cost".

[17] Ms Taylor appealed the BRC decision to the Authority. The Authority made pre-hearing directions on 30 January 2018 including that "the High Court decision is binding on the Authority whether or not [Ms Taylor] accepts it" and that "[t]herefore,

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12 *Taylor v Chief Executive of the Ministry of Social Development* [2016] NZCA 489.

13 The MSD evidence was that Ms Taylor had sought a review of the October 2016 decision, though there was no document showing that.

raising the same arguments before this Authority will have a predictable outcome". Ms Taylor withdrew her appeal before the hearing date.

[18] That was the state of affairs when Ms Taylor commenced the present judicial review proceedings.

The case in the High Court

Application to strike out the judicial review proceedings

[19] Ms Taylor's judicial review proceedings were brought against a number of other defendants in addition to the MSD. Edwards J determined an application by the defendants to strike out the proceedings.[14] The Judge recorded that Ms Taylor's complaints were "wide-ranging, but at the heart of them is a concern about the methodology used to calculate her Disability Allowance and Temporary Additional Support payments, and in particular, her additional power costs".[15] Edwards J accepted that the MSD's use of the Powerswitch calculator was amenable to judicial review[16] but cautioned that:[17]

> There is no outstanding decision identified by Ms Taylor where either she, or someone else, is directly affected by a decision to calculate additional power use through the Powerswitch calculator. Identifying the exercise of a power or a decision is a necessary pre-requisite to Ms Taylor's claim for review going forward on this basis.

[20] The Judge struck out, as an abuse of process, any claims that related to previous determinations already considered by the Authority and the courts. The remainder were to be repleaded to bring them within the parameters of the Judicial Review Procedure Act 2016.[18]

The surviving issues

[21] Ms Taylor filed a number of amended pleadings. The MSD contended that the pleadings still did not comply with the High Court Rules 2016, including because no

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14 *Taylor v Social Security Appeal Authority* [2019] NZHC 1718 [Strike out decision].
15 At [1].
16 At [42].
17 At [43].
18 At [50].

reviewable error was identified. Specifically, it maintained that the September 2016 decision, which Mrs Taylor had confirmed was under challenge, could not be reviewed because it had been superseded by the October 2016 decision and therefore had no current effect, making any challenge to it moot.

[22] Eventually, Palmer J settled the following issues for hearing:[19]

> (a) Did the Authority pre-determine Ms Taylor's appeal in its pre-hearing direction on 30 January 2018? Edwards J held this was reasonably arguable. The claim remains in the amended statement of claim. Ms Taylor does not explicitly seek relief for this claim. But, as she said at the call before last in the List, and my interpretation of paragraph [8.7] of her memorandum of 22 October 2019, she can be taken to be seeking to have the decision quashed and her appeal considered by the Authority.
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> (b) Did the Ministry's decision, communicated on 31 October and 22 November 2016, applying the 15 per cent methodology, overlook relevant considerations, take into account irrelevant considerations or fetter its discretion? In particular, did the Ministry fail to follow its own internal procedures, because the 15 per cent methodology had not become part of its MAP process and did it fail to make allowance for the daily line charges and assume prompt payment of power bills? It is sufficiently clear Ms Taylor is challenging this decision, not only the 29 September 2016 decision. Edwards J identified fettering discretion as a potential ground of review. Ms Taylor put it somewhat differently in the amended statement of claim. But her memorandum of 22 October 2019 effectively makes that claim in submitting the Ministry was wrong to reapply the 15 per cent methodology which had been set down for an earlier period and specific amount of usage.

[23] Palmer J expressly identified three issues that could not be pursued in the proceedings:[20]

> (a) Ms Taylor cannot now claim that the Ministry made an error of law in its 29 September 2016 decision in its use of the Powerswitch website. That is because Edwards J found there is no such extant decision to challenge, because it has been overturned.
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> (b) Neither does Ms Taylor's amended statement of claim appear to challenge decisions in relation to transport costs or accommodation loadings. Those are discussed as issues, and in relation to accommodation, Ms Taylor appears to be seeking information about how the Ministry makes decisions on those issues. Such a request for information is not properly pursued through litigation. Rather, the

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19 *Taylor v Social Security Appeal Authority* CIV-2018-404-2129, 24 October 2019 (Minute No. 2 of Palmer J) at [8] (footnotes omitted).

20 At [9] (footnotes omitted).

Ministry should treat the request as a request for official information and answer it directly.

(c) The reference in the amended statement of claim to an unspoken threat also does not identify any reviewable decision so is not a claim the Ministry has to answer in the proceeding.

[24] Section 14(2)(a) of the Judicial Review Procedure Act permitted Palmer J to settle the issues that could proceed to a substantive hearing of the judicial review proceedings.[21]

The hearing

[25] A half-day hearing date was allocated for 24 April 2020. New Zealand was under COVID-19 Alert Level 4 at that time. Lang J directed that the matter proceed by telephone. Ms Taylor felt unprepared and sought an adjournment, which Lang J declined. On 21 April 2020 Ms Taylor applied again for an adjournment, saying that she would be unable to present her case adequately by telephone (including because she would need to use Powerpoint or a whiteboard presentation). Ms Taylor also indicated that she wished to have a jury trial and call witnesses. The next day Ms Taylor advised the Registrar by memorandum that she would be unavailable for the hearing.

[26] It is unclear how the 21 April application for adjournment was dealt with but Brewer J later recorded in his decision that he had determined that the hearing should proceed and if problems arose of the kind envisaged by Ms Taylor, then steps could be taken to address them, including adjourning the matter part-heard.[22]

[27] Ms Taylor had filed written submissions but did not appear by telephone on the allocated date. Efforts by the Registry to contact her were unsuccessful. With the consent of the MSD, Brewer J adjourned the Court and determined the matter on the papers.

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21 Ms Taylor could have applied, but did not, for leave to appeal that order: Judicial Review Procedure Act 2016, s 20; and Senior Courts Act 2016, s 56.

22 Decision under appeal, above n 1, at [28].

Brewer J's decision

[28] Brewer J was very concerned with the difficulty of identifying a justiciable issue in Ms Taylor's pleadings. However, he ultimately proceeded on the basis that the October 2016 decision was amenable to judicial review:

> [34] I discern that much of Ms Taylor's documentation relates to her dissatisfaction with the decision of the Ministry of 29 September 2016 to remove her additional power costs from the calculation of her Disability Allowance payment on the basis that Ms Taylor was not using more electricity than the single 'normal' group she was being compared with in the Powerswitch calculator. However, the Ministry quickly acknowledged it had made an error and reassessed Ms Taylor's entitlements in accordance with the methodology upheld by Whata J. Therefore, the decision of 29 September 2016 is spent. It has no effect on Ms Taylor. It does not matter that the decision might have failed to address all of Ms Taylor's arguments on the use of the Powerswitch calculator. If the process by which the Ministry consulted with Ms Taylor prior to making its decision of 29 September 2016 was flawed, that does not provide a ground for judicial review either. The decision of 29 September 2016 was acknowledged to be wrong and was superseded by the Ministry's October 2016 decision.
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> [35] In my view, it is the October 2016 decision which can be examined on judicial review. I adopt Palmer J's formulation of the issues [relating to the October 2016 decision] …

[29] The Judge then proceeded to consider the October 2016 decision. He rejected Ms Taylor's general complaint that the decision was wrong: although an outcome can be relevant in judicial review if based on an error of fact or so perverse that it cannot be allowed to stand, the Judge considered that the evidence did not establish either ground.[23]

[30] The Judge turned to consider whether the MSD had failed to take into account relevant considerations or taken into account irrelevant considerations. As to the former, the Judge had before him evidence from the MSD about the methodology used to determine the extent to which Ms Taylor had "additional [power costs] of an ongoing kind arising from [her] disability".[24] That methodology involved use of the Powerswitch website and the 15 per cent methodology that Whata J had sanctioned.

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23 At [36].
24 SSA 1964, s 69C(2A)(a).

[31] Brewer J recorded Ms Taylor's argument that the MSD was required to use the MAP formula so that the 15 per cent methodology approved by Whata J and used by the MSD in its October 2016 decision was not available.[25] He rejected that argument, agreeing with Whata J that the MAP was merely an internal guideline or guidance document and not binding on the MSD.[26] He concluded that the MSD had considered the factors that were relevant to the exercise of its power to determine Ms Taylor's benefit entitlements.[27]

[32] As to whether irrelevant considerations had been taken into account, the Judge noted Ms Taylor's argument that the 15 per cent methodology was not available but rejected the argument on the basis that the Ministry had to take into account Whata J's decision.[28]

[33] Finally, the Judge considered whether the MSD had fettered its discretion by adopting a rigid approach and not properly considering Ms Taylor's arguments. However, he considered that the arguments advanced by Ms Taylor related to the September 2016 decision which was not in issue before him. He was satisfied on the evidence before him that the MSD had not closed its mind to Ms Taylor's circumstances in making the October 2016 decision.[29]

Appeal

Scope of appeal

[34] It was evident from Ms Taylor's written synopsis and oral argument that her real complaint is that the Judge did not address the issues she had identified in her pleadings and submissions. Ms Taylor is concerned with the MSD's use of the Powerswitch calculator generally, not merely the decisions the MSD had made about her own entitlements. To the extent that she is concerned about her own position, her arguments were directed towards steps taken by the MSD prior to the October 2016 decision.

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25 Decision under appeal, above n 1, at [44].
26 At [45].
27 At [47].
28 At [48]–[49].
29 At [50]–[53].

[35] In her written synopsis filed for the purposes of the appeal, Ms Taylor said:

> Whata J did not find against me – his decision was for the use of Powerswitch as a quantitative methodology if the Ministry decided to opt for it instead of the 15% of usage methodology …
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> …
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> My claim is that the error was that it was the use of the wrong Powerswitch method, *not the failure to use the 15% of usage methodology* …
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> …
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> The only reasons that my Statements of Claim and other documents are 'unclear' to the respondent and the courts is that they have not grasped that the substantive matter is whether the Ministry is properly and accurately calculating disability entitlements using practices of integrity, not just for myself *but for all other applicants*.
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> …
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> In a nutshell, my case is this: The Ministry is depriving all disabled applicants [of] extra power for heating by comparing their actual usage with a figure which does not represent the usage of 'a person in similar circumstances but without the disability', which is what the legislation requires. They achieve this by using a Powerswitch estimate of what their clients' usage would cost on other plans rather than what the usage of such a person would be. In my case, during an internal review and instead of replacing this method with one approved and verified by my Accountant, they attempted to replace this method with a 15% of usage methodology which was irrelevant as it was spent, they had not taken up the method when it was offered, it was not part of their Map for assessment of additional power and not available to any other applicant. In short, it is not an issue. Therefore, I would like the Ministry to respond to the original charge – that 'their' Powerswitch method will not result in the subtrahend required by legislation. …
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> …
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> The main issue is whether the Ministry, in assessing whether clients are using additional power, is using the Powerswitch website calculator in a way which will result in the required subtrahend.
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> The second issue is whether the Ministry properly reviewed the decisions I requested.
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> The third issue is whether the actions taken by the Ministry upon overturning the original decision were appropriate as required by the Review of Decision flowcharts.
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> (Emphasis in original.)

[36] Brewer J made no error in determining the proceedings by reference to the issues settled by Palmer J. There was, therefore, no error in his refusing to engage

with Ms Taylor's arguments regarding the use of the Powerswitch calculator or the September 2016 decision.

[37] Having said that, however, we can make some observations that may assist Ms Taylor's understanding of the approach taken by the Judge. We start with Ms Taylor's generalised concern about the way the MSD uses the Powerswitch calculator generally, i.e. in relation to all its clients. A person is not necessarily precluded from challenging the decisions or actions of a government department that do not directly affect them if there is a legitimate public interest in doing so.[30] But, fatally, Ms Taylor has not identified a specific decision or action that could be judicially reviewed.

[38] Ms Taylor relied on Edwards J's statement that the use of the Powerswitch calculator was amenable to judicial review as supporting her position that the issue should have been considered. But Edwards J went on to make clear that, whilst the use of the Powerswitch calculator could be amenable to judicial review, that could only happen in the context of an identifiable decision that could be reviewed.[31]

[39] As to the September 2016 decision (and the various decisions and actions that led to that decision), Whata J's decision (and this Court's refusal to grant leave to appeal it) means that it can no longer be challenged. An important principle in all litigation is finality — a final judicial determination is not to be subverted by collateral challenge in further proceedings on the same subject matter.[32] Ms Taylor cannot reopen the issues determined by Whata J.

Brewer J's decision

[40] We turn to the Judge's determination of the issues identified by Palmer J. Ms Taylor's submissions before us focused on what she perceived the issues to be, namely the way the MSD is using the Powerswitch calculator to calculate disability allowances. For the reasons already discussed, these arguments did not engage with

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30 *Jeffries v Attorney-General* [2010] NZCA 38 at [70].
31 Strike out decision, above n 14, at [43].
32 *Faloon v Planning Tribunal at Wellington* [2020] NZCA 170 at [2].

the issues that Brewer J was determining. Ms Taylor did not identify specific errors in the way the Judge dealt with the issues that the Judge was required to consider.

[41] Mr Bryant, for the Crown, made submissions in support of the Judge's decision, canvassing the Judge's treatment of issues on orthodox judicial review principles.

[42] Having reviewed the issues and the Judge's decision, we are satisfied that there is no apparent error in the decision itself.

Was the hearing fair?

[43] Ms Taylor complains that the way the hearing was conducted was unfair because it was conducted by telephone. She says that she was entitled to an in-person hearing and that her inability to appear in person disadvantaged her in some specific ways. More generally, Ms Taylor made submissions to the effect that natural justice required an in-person hearing open to the public.

[44] Court hearings are, save for specified circumstances, required to be held in a courtroom which is open to the public. In this case, r 3.4A(1) of the High Court (COVID-19 Preparedness) Amendment Rules 2020 permitted the Court to direct that the hearing be conducted by telephone. But the rules did not require a hearing in that form and, in our view, it was inappropriate in this case.

[45] Ms Taylor's specific complaints regarding the lack of an in-person hearing are unsustainable. The fact that she could not view the Court's file made no difference; she did not identify any document on the Court file that could have altered her position at a hearing. Not being able to use a Powerpoint or whiteboard presentation to show the Court how the Powerswitch calculator worked would have made no difference because the issues as they had been settled by Palmer J would not have required such presentation. Nor were the facts that witnesses could not be called or a jury empanelled relevant. Judicial review proceedings generally proceed on the basis of affidavit evidence and they cannot be heard before a jury.[33]

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[33] Senior Courts Act, s 16(6).

[46] We do, however, accept Ms Taylor's complaint that it was unfair to require her to proceed by telephone. A short hearing can be conducted fairly by telephone if the circumstances require it. But generally a telephone hearing is an unsatisfactory way of conducting a hearing of some length, especially when one party is unrepresented. A half day telephone hearing for an unrepresented litigant would be onerous. Moreover, there was no urgency that required a hearing by telephone. Ms Taylor is justified in feeling aggrieved at being required to proceed in these circumstances.

[47] Nevertheless, this is not a matter that warrants setting aside the decision and directing a fresh hearing. Ms Taylor's concerns cannot be resolved in the context of judicial review proceedings. Because of the inevitability of the outcome of any further hearing, we are satisfied that no miscarriage of justice arises as a result of the way the hearing proceeded.

Result

[48] The appeal is dismissed.

[49] We make no order as to costs.

Solicitors:
Crown Law Office, Wellington for Respondent