

Unreasonable reduction of funding for care of adult disabled children

Legislation	Ombudsmen Act 1975, ss 13, 22 (see appendix for full text)
Agency	Ministry of Health
Complaint	That the process for allocating funded family care to Mr Cliff Robinson has been unreasonable.
Ombudsman	Leo Donnelly
Case number	419489
Date	27 October 2016

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Summary

Mr Cliff Robinson was a plaintiff in the *Atkinson v Ministry of Health* case which won the right for parents of intellectually disabled adult children to be paid for the care of their children. He provides care to two disabled adult children.

In 2014, Mr Robinson was advised by the Needs Assessment and Service Coordination Service (NASC) Disability Support Link (DSL) that he had been awarded 59 hours funded family care per week for the care of his son John, who has an intellectual disability, schizophrenia, bipolar disorder and microcephalus. 40 hours of these were to fund his own care of John, and the remainder was available to fund an external carer. He declined the offer of a support person as it would be impractical and stressful to John.

In the course of a visit by an assessor to determine the quality of care, Mr Robinson was subsequently advised that he could appeal to the Individual Review Panel to be provided the additional 19 hours to fund his own caregiving.

Mr Robinson subsequently appealed to the Individual Review Panel, which met on 21 May 2014.

In an email to Mr Cliff Robinson on 28 May 2014, DSL advised Mr Robinson that the Panel had declined his request for additional hours of employment under Family Funded Care. The NASC further advised that there had been an error in Mr Cliff Robinson's current allocation of 40 hours of Family Funded Care per week and that this would be reduced to 29.5 hours per week.

Based on the information before me, I formed the provisional opinion that the decision to award Mr Robinson 40 hours of funded family care and subsequently reduce it to 29.5 hours was unreasonable.

The Ministry responded to my provisional opinion acknowledging that Mr Robinson would indeed have had a reasonable expectation of payment of 40 hours of care and placed reliance on that decision and agreeing that the natural justice requirements of the Individual Review Panel should be strengthened. I have accordingly confirmed my opinion that the Ministry's decision to award Mr Robinson 40 hours of funded family care and subsequently reduce it to 29.5 hours was unreasonable. It has not been necessary for me to make any recommendations given the Ministry's undertaking to take actions that would resolve the complaint.

Ombudsman's role

1. Under section 13(1) of the Ombudsmen Act 1975 (OA), I have the authority to investigate the administrative acts, decisions, omissions and recommendations of the Ministry of Health.
2. My role is to consider the administrative conduct of the Ministry of Health, and to form an independent opinion on whether that conduct was fair and reasonable (sections 22(1) and 22(2) of the OA refer).

3. The relevant text of these statutory provisions is set out in the Appendix.
4. My investigation is not an appeal process. I would not generally substitute my judgment for that of the decision-maker. Rather, I consider the substance of the act or decision and the procedure followed by the Ministry of Health and then form an opinion as to whether the act or decision was properly arrived at and was one that the Ministry of Health could reasonably make.

Background

5. The background to this matter is as follows. Mr Cliff Robinson was a plaintiff in the *Atkinson v Ministry of Health* case which won the right for parents of intellectually disabled adult children to be paid for the care of their children. He has provided care to two disabled adult children for 40 years. He is currently 80 years old.
6. In 2014, Mr Robinson was advised by DSL that he would receive 40 hours per week for the care of his son John, and that he could receive 29.5 hours for a support person. He declined the offer of a support person as it would be impractical. In the course of a visit by an assessor to determine the quality of care, Mr Robinson was subsequently advised by DSL that he could appeal to the Individual Review Panel to be provided the additional 19 hours to fund his own care-giving.
7. Mr Robinson subsequently appealed to the Individual Review Panel, which met on 21 May 2014. Mr Robinson was advised of the Panel's decision in an email dated 28 May 2014 from DSL, as follows:

The panel has responded and have declined your request for the additional hours of employment under FFC. Furthermore I have been advised through the MOH that we have made an error at DSL in regard to your current allocated 40 hours to support John's personal care. We would have allocated a 2:1 service if using a contracted provider which would have equated to 59 hours per week, due to assessed risk to John and others. Subsequently we allocated in error 40 of these hours under FFC. I apologise for this mistake.

We are to alter this allocation immediately. As of Monday 2/6/14 these hours will be reduced to 29.5 hours per week. Which is the hours of support that would have been allocated for one person to provide support. Should you wish to make a complaint, please refer directly to the MOH website which will advise you of this process.

8. Following receipt of this decision, Mr Robinson wrote to the Minister of Health. The Director-General of Health responded on the Minister's behalf on 21 July 2014, advising that the NASC's original allocation of 40 hours of funded family care 'did not take into account the two to one nature of support John was assessed as needing. The Director-General advised that 'the correct allocation of funded family care for John is 29.5 hours

per week', and that 'the remaining 29.5 hours can be provided by a contracted Home and Community Support provider or through an Individualised Funding Arrangement'.

Complaint and investigation

9. Mr Robinson has made a complaint that the process for allocating funded family care to him has been unreasonable. In particular:
 - a. the decision to award him 40 hours of funded family care and subsequently reduce it to 29.5 hours was unreasonable;
 - b. the panel failed to give Mr Robinson or his son the opportunity to appear before it in breach of Article 4.3 of the United Nations Convention on the Rights of Persons with Disabilities; and
 - c. the panel failed to have proper regard to Mr Robinson's exceptional circumstances, which entitled him to funding in excess of 40 hours.
10. In commenting on this matter, Mr Robinson advises that he has looked after John (and his disabled sister) singlehandedly for 40 years, and that it is not viable to employ an outside caregiver. He further states *'our long drawn out legal battle was for parents to be paid for home based support hours.'*

Complaint

11. The complaint is that the decision of 21/05/2014 to decline Mr Robinson's request for additional hours of Family funded Care and to reduce his current allocation from 40 hours per week to 29.5 per week was unreasonable.

Investigation

12. On 31 March 2016, the Ministry of Health was notified of my investigation. A copy of the relevant papers and a report addressing the concerns that had been raised were requested. The Ministry of Health provided the requested material on 22 April 2016.
13. After considering this material, Senior Disability Advisor Paul Brown emailed the Ministry of Health on 17 June 2016 seeking:
 - a. a copy of Family Funded Care (FFC) contract with Cliff Robinson for 40 hours;
 - b. a copy of the minutes of the meeting of the Individual Review Panel as it related to Cliff Robinson's application for FFC (clause 11 of the Individual Review Panel Terms of Reference refer); and

- c. a copy of the independent review by National NASC Reviewer (NNR) undertaken on 6/3/14 referred to in document entitled '*National NASC Reviewer John Robinson (NNR Review of allocated supports)*'.
14. The Ministry of Health responded to our request on 17 June 2016. The 6/3/14 review was not included in the response.
15. I have now considered the information provided by both the Ministry of Health and the complainant, and formed an opinion.

Analysis and findings

16. Having carefully considered all the documentation provided, I have formed the view that it was unreasonable for the Ministry of Health to advise Mr Robinson that he would be paid 40 hours per week and then reduce that funding to 29.5 hours. My reasons are as follows:
 - a. In contracting with Mr Robinson to pay him 40 hours funded family care, the Ministry of Health created an expectation on Mr Robinson's part that the payments would be made. The undertaking to pay Mr Robinson 40 hours per week bore some hallmarks of a '*legitimate expectation*' at law.

*The foundation stone of an argument for legitimate expectation in public law is the existence of a promise, representation or assurance by an authority, loosely termed a representation, to act in a certain way.*¹
 - b. Mr Robinson made financial plans based on the expectation that he would be paid in accordance with the contract.
 - c. Mr Robinson was encouraged by DSL to appeal due to advice that he may be eligible for *additional* funding. The fact that the outcome of the appeal was a *reduction of the funding* would have created a particular sense of grievance on Mr Robinson's part.
 - d. No evidence has been provided of a key document underpinning the decision to reduce the funding, being the 6/3/14 NNR independent review, in spite of our specific request for this document. As this document appears from the timeline provided to be the first time in which the 2:1 support was referenced (which in turn explained why the 59 hours translated into 29.5 hours for Mr Robinson), the absence of this document from the record leaves a question mark over the rationale for the reduction in funding.
 - e. The nature of the 2:1 assessment underpinning the reduction in funding for Mr Robinson is otherwise unclear. In some of the documentation it appears that

¹ Westpac Banking Corp v Commissioner of Inland Revenue (2008) 23 NZTC 21, 264 (HC) at 144

the 2:1 assessment refers to 2 external staff operating simultaneously (eg. in the timeline entitled 'National NSC Reviewer' it states, under 12/3/14 '*In discussion, it was understood that when the care was undertaken by John's father, 2:1 care was not necessary as Mr Robinson stated he was very experienced in managing John's behaviours*'). In other documentation the 2:1 care appears to reference Mr Robinson operating simultaneously with an external carer. I also note that the letter drafted for the Minister's signature stated '*The NASC's original allocation of 40 hours of funded family care did not take into account the two to one nature of support John was assessed as needing*'. The words '*two to one nature*' are circled on the draft with the handwritten words '*what does this mean?*'. (The letter was subsequently sent out by the Director-General unamended).

- f. There is no record of the panel having properly considered relevant information. Mr Robinson advised us that he considered that employing an external carer would have an adverse impact on John, manifesting in exacerbated behavioural problems, a matter which is referenced in the quoted comments of John's advocate Laila Harre in the National Review Panel Exceptions Application, in the 'proposed support plan' section. However, in spite of the centrality of the needs of the disabled person in the Policy (see eg. Section 5.1 of the Funded Family Care Operational Policy), there is no record of the impact of external carers on John having been discussed by the panel. The NNR summary for FFC Escalation Panel simply states '*Mr Robinson has **refused** to uptake any HCSS [Home and Community Support Services] or IF [Individual Funding] support stating **it would disrupt the family...***', (emphasis added) and the Panel's response makes no reference to John's wellbeing.
- g. The process employed in the appeal process otherwise fell short of standards of administrative fairness. The Ministry maintained that Mr Robinson was given an opportunity to input into the appeals process, stating:

Mr Robinson was given the opportunity to apply and provide information to the Panel to support an exception to the maximum 40 hours; Mr Robinson did so. Accordingly, Mr Robinson (and by inference John) has not been denied his right to justice by not being able to appear before the Panel.

However, I have not been provided with any documentation inviting Mr Robinson to provide submissions, or indeed any submissions from him on the review. To the contrary, the only documents that appear to have been provided to the appeal were from DSL. The fact that '*the Panel members are aware of Mr Robinson's general situation*' is insufficient.

17. Bearing in mind all of the above procedural shortcomings, I have formed the opinion that the decision to reduce the funding that the Ministry of Health had undertaken to pay Mr Robinson was unreasonable. While I do not consider the expectation referenced at paragraph 16(a) above necessarily translates into a legal obligation to continue the

payments, I consider that in all the circumstances of the case it would be reasonable for the Ministry to reinstate the payments.

Ombudsman's opinion

18. For the reasons set out above, I have formed the opinion that the Ministry of Health has acted unreasonably.

Conclusion

19. Following its consideration of my provisional opinion, the Ministry of Health acknowledged that Mr Robinson would indeed have had a reasonable expectation of payment of 40 hours of care after the hours had been increased, and that reliance by Mr Robinson would have been placed on that decision. The Ministry also agreed that the natural justice requirements of the Individual Review Panel should be strengthened.
20. The Ministry has undertaken to:
 - a. Reinstate, from 1 November 2016, the 40 hours of paid care for Mr Robinson to care for his son John, as a discretionary exception to the policy;
 - b. Clarify, in the Terms of Reference for the Individual Review Panel, the ability of complainants to submit information to support their complaints; and
 - c. Include, in those Terms of Reference, the requirement that the Panel must first reach a provisional view, and if that view does not uphold the complaint, give the complainant the opportunity to comment before making a final decision.
21. In light of the Ministry's proposed remedial actions, it is not necessary for me to make any recommendations in this case.

Leo Donnelly
Ombudsman

Appendix 1. Relevant statutory provisions

Ombudsmen Act 1975

13 Functions of Ombudsmen

- (1) Subject to section 14, it shall be a function of the Ombudsmen to investigate any decision or recommendation made, or any act done or omitted, whether before or after the passing of this Act, relating to a matter of administration and affecting any person or body of persons in his or its personal capacity, in or by any of the departments or organisations named or specified in Parts 1 and 2 of Schedule 1, or by any committee (other than a committee of the whole) or subcommittee of any organisation named or specified in Part 3 of Schedule 1, or by any officer, employee, or member of any such department or organisation in his capacity as such officer, employee, or member.
- (2) Subject to section 14, and without limiting the generality of subsection (1), it is hereby declared that the power conferred by that subsection includes the power to investigate a recommendation made, whether before or after the passing of this Act, by any such department, organisation, committee, subcommittee, officer, employee, or member to a Minister of the Crown or to any organisation named or specified in Part 3 of Schedule 1, as the case may be.
- (3) Each Ombudsman may make any such investigation either on a complaint made to an Ombudsman by any person or of his own motion; and where a complaint is made he may investigate any decision, recommendation, act, or omission to which the foregoing provisions of this section relate, notwithstanding that the complaint may not appear to relate to that decision, recommendation, act, or omission...

22 Procedure after investigation

- (1) The provisions of this section shall apply in every case where, after making any investigation under this Act, an Ombudsman is of opinion that the decision, recommendation, act, or omission which was the subject matter of the investigation—
 - (a) appears to have been contrary to law; or
 - (b) was unreasonable, unjust, oppressive, or improperly discriminatory, or was in accordance with a rule of law or a provision of any Act, regulation, or bylaw or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory; or
 - (c) was based wholly or partly on a mistake of law or fact; or
 - (d) was wrong.
- (2) The provisions of this section shall also apply in any case where an Ombudsman is of opinion that in the making of the decision or recommendation, or in the doing or omission of the act, a discretionary power has been exercised for an improper

purpose or on irrelevant grounds or on the taking into account of irrelevant considerations, or that, in the case of a decision made in the exercise of any discretionary power, reasons should have been given for the decision.

- (3) If in any case to which this section applies an Ombudsman is of opinion—
- (a) that the matter should be referred to the appropriate authority for further consideration; or
 - (b) that the omission should be rectified; or
 - (c) that the decision should be cancelled or varied; or
 - (d) that any practice on which the decision, recommendation, act, or omission was based should be altered; or
 - (e) that any law on which the decision, recommendation, act, or omission was based should be reconsidered; or
 - (f) that reasons should have been given for the decision; or
 - (g) that any other steps should be taken—

The Ombudsman shall report his opinion, and his reasons therefore, to the appropriate department or organisation, and may make such recommendations as he thinks fit. In any such case he may request the department or organisation to notify him, within a specified time, of the steps (if any) that it proposes to take to give effect to his recommendations. The Ombudsman shall also, in the case of an investigation relating to a department or organisation named or specified in Parts 1 and 2 of Schedule 1, send a copy of his report or recommendations to the Minister concerned, and, in the case of an investigation relating to an organisation named or specified in Part 3 of Schedule 1, send a copy of his report or recommendations to the mayor or chairperson of the organisation concerned...