



Investigation into Ministry of Health *ex gratia* payment

Legislation	Ombudsmen Act 1975, ss 13, 22 (see Appendix for full text)
Agency	Ministry of Health
Complaint:	The decision by the Ministry of Health on 5 December 2016 to offer the complainant an \$8000 <i>ex gratia</i> payment for unreasonable reduction of Funded Family Care payments was itself unreasonable.
Ombudsman	Leo Donnelly
Case number(s)	419489
Date	18 January 2018

Contents

Summary	2
Ombudsman’s role	2
Background	3
Complaint	4
Investigation	4
Analysis and findings	5
Ombudsman’s opinion	7
Conclusion	7
Appendix 1. Relevant statutory provisions	8
Ombudsmen Act 1975	8

Summary

On 27 October 2016, I concluded an Ombudsmen Act investigation into a complaint by Cliff Robinson about the decision of the Ministry of Health's Individual Review Panel to reduce Mr Robinson's Funded Family Care from 40 hours a week to 29.5.

On 5 December 2016, the Director, Service Commissioning, Ministry of Health, wrote to Mr Robinson acknowledging the maladministration by the Ministry in reducing Mr Robinson's funding, but declining to offer him backpay in redress. Specifically, the Director advised Mr Robinson:

'The Ombudsman investigated the decision to reduce the hours allocated to your son John and for which you are the paid family carer. The Ombudsman concluded that the Ministry's decision was unreasonable and in response the Ministry has reinstated the payment of 40 hours of care.'

I have given careful consideration to your complaint about back-pay and believe that the Ministry has a moral obligation to correct the mistake in reducing those hours by way of an apology and an ex gratia payment.

I apologise for the mistakes made by the Ministry, initially through Disability Support Link and subsequently by the National Review Panel. Neither mistake should have occurred. The Ministry has taken steps to strengthen the review process to ensure that similar mistakes do not occur in the future.

Additionally, for the distress caused to you and John, and the lengths you have had to go to seek redress for the mistakes, I am prepared to offer \$8000 as an ex gratia payment.'

Mr Robinson then complained to me, as Ombudsman, concerning his dissatisfaction with the decision.

Based on the information provided to me, I formed the opinion that the Ministry's offer of \$8000 as an *ex gratia* payment failed to give sufficient recognition for the amount of care Mr Robinson provided for his disabled son John during time his funding was reduced. For this reason the offer was inadequate.

I asked the Ministry of Health to consider increasing its offer of an *ex gratia* payment to Mr Robinson from \$8000 to \$14 000.

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, in an investigation, 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. Mr Cliff Robinson was a plaintiff in the *Atkinson v Ministry of Health* case 2012,¹ 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.
6. In October 2014, Mr Robinson was advised by NASC (Needs Assessment and Service Coordination) that he would receive 40 hours Funded Family Care per week for the care of his son John, who has an intellectual disability, schizophrenia, bipolar disorder and microcephalus. He was also advised that he could receive 19 hours for a support person. He declined the offer of a support person as it would be impractical and stressful to John.
7. Mr Robinson appealed to the Individual Review Panel, which met on 21 May 2014, to be provided the additional 19 hours to fund his own caregiving.
8. After this meeting, Mr Robinson was informed that the Panel had declined his request for additional hours of employment under Funded Family Care. Mr Robinson was further advised that Disability Support Link had made an error in his current allocation of 40 hours of Funded Family Care per week, and that this would be reduced to 29.5 hours per week from 15 July 2014.
9. Mr Robinson believed the Ministry's decision was unreasonable and asked me to investigate it under the Ombudsmen Act. In the course of my investigation, the Ministry agreed to reinstate Mr Robinson's allocated hours of care to 40 hours from 1 November 2016. I released my final opinion on 27 October 2016, in which I stated:

'...I have now formed the final opinion that the Ministry of Health has acted unreasonably. However, in light of the remedial action that the Ministry has undertaken to implement to date, it is unnecessary for me to make any recommendations.'
10. Following the release of my opinion, Mr Robinson complained to the Minister of Health and the Ministry of Health that he had not received backpay to cover the time his Funded Family Care was reduced (15 July 2014 to 1 November 2016).

¹ Accessed 31 October 2017: [http://www.nzlii.org/cgi-bin/sinodisp/nz/cases/NZCA/2012/184.html?query=title\(Ministry%20of%20Health%20near%20Atkinson\)](http://www.nzlii.org/cgi-bin/sinodisp/nz/cases/NZCA/2012/184.html?query=title(Ministry%20of%20Health%20near%20Atkinson))

11. The Director, Service Commissioning, wrote to Mr Robinson on 5 December 2016 offering him an *ex gratia* payment of \$8000. In my letter of 2 March 2017 notifying my investigation to the Chief Executive of the Ministry of Health, I noted:

'I consider [the Ministry's] letter of 5 December 2016 to constitute a separate decision to that of the Ministry's Individual Review Panel which was the subject of my earlier investigation under the OA. I have decided to investigate whether [the Ministry's] decision of 5 December 2016 was reasonable.'

Complaint

12. Mr Robinson's complaint was that the decision of 5 December 2016 to offer him \$8000 as an *ex gratia* payment was unreasonable. Mr Robinson believed that, in all the circumstances, the reinstatement of payment to 40 hours of care should be backdated to 15 July 2014.
13. Mr Robinson was concerned that the *ex gratia* payment offered would not restore him to the position that he would have been in had the maladministration, recognised by the Ministry of Health, not occurred. To this end Mr Robinson sought an *ex gratia* payment equal to the amount of Funded Family Care payments he would have received between 15 July 2014 and 31 October 2016. In its letter of 31 March 2017, the Ministry confirmed that it had calculated this amount to be \$22 000 at the time of his complaint.

Investigation

14. I had a discussion with the Chief Legal Advisor to the Ministry of Health on 12 January 2017. I informed him that I considered the 5 December 2016 letter of the Director, Service Commissioning to constitute a separate decision to that of the Ministry's Individual Review Panel, the subject of my earlier investigation under the OA. I also advised him that I had decided to investigate under the Ombudsmen Act 1975 whether the Director's decision of 5 December 2016 was reasonable.
15. Given the background, I advised the Chief Legal Advisor that it seemed appropriate to proceed first to have a meeting with him and relevant Ministry officials to discuss and clarify:
- a. the reasons for the Ministry's decision not to back-pay Mr Robinson for the 40 hours of care per week from 15 July 2014; and
 - b. the general approach of Ombudsmen in considering what reasonable redress for maladministration, by way of *ex gratia* payment, should take into account.
16. The complaint was formally notified on 2 March 2017, and the meeting took place on 24 March 2017. At the meeting I invited the Ministry to put in writing how the figure of \$8000, as an *ex gratia* payment, was arrived at.

17. On 31 March 2017, the Ministry provided an explanation of how it arrived at the figure of \$8000. The Ministry advised that it had taken three factors into account:
 - some comparison with other *ex gratia* payments;
 - the level of the claim for backpay; and
 - the fact that Mr Robinson was receiving a discretionary enhanced entitlement for the continuing care of his son.
18. In respect of the comparison with other *ex gratia* payments offered by the Ministry, it said this was of limited assistance given the particular circumstances of this case. Apart from historic abuse claims, previous *ex gratia* payments by the Ministry have usually been between \$1000 and \$5000 based on the circumstances of any maladministration, costs incurred by the affected individual and recognising the inconvenience or injustice to the individual. The Ministry commented that the assessment of an appropriate amount '*does tend to be more of an art than science*'. The Ministry advised that reflecting on '*the inconvenience to Mr Robinson, his expectation of his entitlement and the desire to seek to resolve Mr Robinson's complaint, the Ministry assessed a payment of an amount between a quarter and a third of the amount sought by him as being appropriate in the circumstances*'.
19. In respect of the level of the claim for backpay, the Ministry advised that it considered the wrongful description of any *ex gratia* payment as backpay could be misleading throughout the group of eight claimants before the Human Rights Commission (and Office of Human Rights Proceedings).

Analysis and findings

20. The meeting on 24 March 2017 clarified that this was not an issue of backpay, but rather, as had been agreed by the Ministry in the letter from the Director, Protection, Regulation and Assurance of 6 October 2016, a matter of Mr Robinson's '*reasonable expectation of payment of 40 hours of care*' after the original decision. The Director, Protection, Regulation and Assurance, confirmed that the Ministry '*also accepts that reliance by Mr Robinson would have been placed on that decision*' to increase the hours of care to 40.
21. I considered Mr Robinson reasonably placed reliance on the '*expectation*' of 40 hours payment of Funded Family Care from 10 October 2013, when he was provided the outcome of the Needs Assessment by the NASC, which awarded him payment for 40 hours under Funded Family Care.
22. As I noted in my 2 March 2017 letter to the Chief Executive of the Ministry of Health, there is no doubt there was maladministration by the Ministry in Mr Robinson's case and the Ministry accepts this. I also noted that the general starting principle for Ombudsmen in investigating such cases where there has been maladministration is that, wherever

practicable, persons affected by maladministration should be put back in the position that they would have been in had the maladministration not occurred.

23. However, I accept that in the circumstances of this case, while Mr Robinson had a reasonable expectation that he would be funded for 40 hours per week of care for his son, John, there was no legal entitlement to compensation.
24. As the Ministry has confirmed, it has calculated the amount that Mr Robinson would have received had the 40 hours of care not been reduced between 15 July 2014 and 1 November 2016, to be \$22 000. The Ministry explained that taking into account the three factors it identified in its letter of 31 March 2017, it considered a payment of an amount between a quarter and a third of the amount sought by Mr Robinson was appropriate in the circumstances. It determined that it was prepared to offer \$8000 for the distress caused to Mr Robinson and John and the lengths he had to go to seek to redress the mistakes.
25. While I consider it was reasonable for the Ministry to consider the three factors it has identified in arriving at the figure of \$8000, I consider there are additional considerations that should also have been taken into account. In agreeing to reinstate the 40 hours of care as a discretionary exception to policy (the 2:1 care), the Ministry has implicitly accepted that funding Mr Robinson for providing 40 hours of care for his disabled son was justified. However, in his letter of 6 October 2016, the Director, Protection, Regulation and Assurance, says it would not be reasonable to backdate the payments because the reason for the reduction was the 2:1 care policy.²
26. In the circumstances of this case, the fact remains that throughout the period from 15 July 2014 to 1 November 2016, Mr Robinson continued to provide the same level of care for his disabled son. In my view, it is unreasonable not to give greater recognition to the amount of care Mr Robinson actually provided. I consider an *ex gratia* payment of \$8000, on the basis of between a quarter and one third of the \$22 000 that would have been paid if the 40 hours had not been reduced, is unjust in the circumstances of this case.
27. While I accept that he had been receiving an enhanced entitlement following mistakes by the NASC and Review Panel, the Ministry has accepted that he placed reliance on that decision. That reliance commenced on 10 October 2013 when he was advised of the outcome of the needs assessment by NASC. This was nine months before the decision to reduce the 40 hours care to 29.5 hours care. After nine months, Mr Robinson had a reasonable expectation that payment for 40 hours of care was the correct level.
28. Given the Ministry's acceptance that a discretionary exception to policy is justified in Mr Robinson's case, I consider that the Ministry should have given greater recognition to the fact that the same level of care had continued to be provided by Mr Robinson throughout the period that the 40 hours care had been reduced. I consider that an *ex gratia* payment greater than a half but no more than two thirds is more appropriate to

² The 2:1 care policy is discussed in my first opinion of 27 October 2016.

address the distress caused to Mr Robinson and John and the lengths he had to go to seek redress for the Ministry's and the NASC's mistakes.

29. In these circumstances, I asked the Ministry to consider amending its offer from \$8000 to \$14 000, as I considered anything less than \$14 000 is neither reasonable nor just in terms of section 22(1)(a) of the Ombudsmen Act.

Ombudsman's opinion

30. For the reasons set out above, I have formed the opinion that the Ministry of Health had acted unreasonably in deciding to limit the *ex gratia* payment to Mr Robinson to \$8000.

Conclusion

31. Following its consideration of my provisional opinion, the Ministry of Health accepted my view that the quantum of the *ex gratia* payment originally offered was inadequate because it did not give sufficient recognition for the amount of care Mr Robinson provided to John during the period of the reduced Funded Family Care hours.
32. The Ministry confirmed that it was prepared to increase the *ex gratia* payment from \$8000 to \$14 000 and to advise Mr Robinson accordingly. Mr Robinson accepted the increased offer.
33. In light of the Ministry's proposed remedial actions, it has not been necessary for me to make any recommendations in this case.

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.