

Ministry of Social Development's decision not to review student allowance application

Legislation	Ombudsmen Act 1975, Education Act 1989
Agency	Ministry of Social Development
Ombudsman	Chief Ombudsman Peter Boshier
Case number(s)	405193
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The Ministry of Social Development refused an application for a student allowance and on review, concluded that the application should not proceed—Chief Ombudsman concluded that the decision to review the application as an administrative review (rather than a statutory review pursuant to section 305 of the Education Act 1989), was unreasonable—Ministry agreed to reconsider the application under the Education Act 1989

The complainant complained about the decision made by the Ministry of Social Development (StudyLink) regarding her application for a Student Allowance. The Chief Ombudsman's investigation concerned the Ministry's decisions to: apply the rate of '*couple, both eligible*' to her Student Allowance; and address the applicant's application for review as an administrative review, rather than a statutory review pursuant to section 305 of the Education Act 1989.

With regard to the Ministry's first decision regarding the rate applied to her student allowance, the Chief Ombudsman concluded that this decision was one that was reasonably open to the Ministry to have made and this aspect of the investigation was discontinued.

With regard to the Ministry's review of the decision, the Chief Ombudsman noted that section 305(1) of the Education Act allows for the right to appeal a decision '*fixing the amount of any allowance*', provided that the decision was one that the decision-maker '*had power to make in some other way*'.

The Ministry states that, on the facts, there was no power to make a different decision because the complainant is not disputing the facts, but is '*asserting an interpretation of the regulations*

that is suggested would result in a different decision’. It appears to be suggesting that where facts are accepted, The Ministry’s conclusion on which rate applies must inevitably be correct.

However the Chief Ombudsman did not see that this is the effect of the limitation on appeal rights in section 305(1), as it would be inconsistent with the right to appeal a decision ‘*fixing the amount of any allowance*’ in section 305(1)(a). That right would be nugatory if it meant that the Ministry’s decisions could not be challenged solely because the facts on which it made its decision were not in dispute.

In the Chief Ombudsman’s view the limitation on appeal rights means that there is no right to appeal the amount of an allowance that is fixed by the regulations, but does not preclude appealing a decision on the basis that the incorrect rate is being applied. Which rate should be applied is a decision that the Ministry must make, but its decision on that issue may be right or wrong. The Chief Ombudsman could see no basis upon which the Act can be construed as conferring a right to appeal a decision fixing the amount of an allowance, while simultaneously giving the Ministry the power to extinguish that right by determining that its own view of the applicable rate is correct.

This ground of the complaint was upheld and the Chief Ombudsman proposed a recommendation for the Ministry to reconsider the complainant’s application for review pursuant to section 305; and amend its guidance for Review of Decision applications accordingly. The Ministry accepted the proposed recommendations and it was therefore unnecessary for the Chief Ombudsman to make a formal recommendation under the Ombudsmen Act 1975.

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