NOTE: ORDER PROHIBITING PUBLICATION OF NAME OF RESPONDENT.

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2018-485-000269
[2018] NZHC 2528

IN THE MATTER OF	An appeal by way of Case Stated from the determination of the Social Security Appeal Authority at Wellington under section 12Q of the Social Security Act 1964
BETWEEN	THE CHIEF EXECUTIVE OF THE MINISTRY OF SOCIAL DEVELOPMENT Appellant
AND	L Respondent

Hearing: 10 September 2018

Counsel: P J Radich QC and C M Hutchinson for Appellant
A J Ellis and S M Shone for Respondent

Judgment: 26 September 2018 at 3.00 pm

JUDGMENT OF COLLINS J

PART I

OVERVIEW

Introduction

[1] This judgment explains why members of a committee, established by legislation to review decisions made by a government department, may not use fictitious names and signatures when issuing their decisions.

Anonymous decision-makers

[2] Benefit Review Committees (Committees) are responsible for reviewing decisions made on behalf of the Chief Executive of the Ministry of Social Development (the Ministry) concerning an applicant's entitlement to benefits under the Social Security Act 1964 (the Act).

[3] Ms L applied to have the Committees review seven decisions concerning various benefits to which she says she was entitled under the Act. Decisions from the seven differently constituted Committees were duly delivered. It transpired, however, that in six of the Committees' decisions, the names of the Committee members and their signatures were fictitious.

[4] This revelation occurred when Ms L appealed the Committees' decisions to the Social Security Appeal Authority (the Authority). Prior to the scheduled hearing of the appeals, Mr van Ooyen, a senior manager at the Ministry, filed a memorandum with the Authority saying that the Ministry had decided that the true identities of the members of the Committees should be hidden in order to protect Committee members from the risk of being harassed and threatened by Ms L. Mr van Ooyen said Ms L had engaged in "abusive" and "harassing behaviour" and that she had also made death threats against Ministry staff. Mr van Ooyen's memorandum was not served on Ms L who, at the time, had the assistance of a lay advocate but was not represented by a lawyer.

[5] The Authority responded with a minute conveying its concerns that the Committees had issued decisions using fictitious names and signatures and that the Ministry had attempted to communicate with the Authority "in confidence" and without involving Ms L.

[6] Upon being notified of the Authority's concerns, the Ministry applied to the Authority to withhold from Ms L the true identities of the members of the six Committees who had used fictitious names and signatures.

Authority's decision

[7] In a decision dated 15 September 2017, the Authority dismissed the Ministry's application.[1] In doing so, it said there was "an absolute prohibition" on statutory decision-makers, such as members of the Committees, using fictitious names and signatures unless there was an express legislative basis for them to do so.[2] The Authority also said the Ministry's justification for claiming anonymity on the part of members of the Committees "lack[ed] substance … when weighed against the right to open justice" and that permitting the members of the Committees to maintain their anonymity would "seriously compromise" the Authority.[3]

[8] This was the second occasion the Authority had ruled the names of members of a Committee must be disclosed to an applicant. In an earlier decision, which did not involve Ms L, the Authority said that the true names of Committee members must be disclosed to an applicant.[4]

[9] The Ministry now appeals the decision of the Authority using the "question of law" case stated procedure prescribed in s 12Q of the Act. Two questions of law have been posed by the Authority, namely:

(1) "Did the Authority err in law in stating that there is an absolute prohibition on statutory decision-makers, in the absence of express statutory authority, remaining anonymous…"?; and

(2) "If so, did the Authority err in this case in the exercise of its discretion to [dis]allow anonymity…"?

Summary of this judgment

[10] The answer to the first question posed by the Authority is that it was correct to conclude the Committees required express legislative authority in order to lawfully use fictitious names and signatures when they issued the six decisions in question.

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1 *Re an appeal against a decision of a Benefits Review Committee* [2017] NZSSAA 052.
2 At [66].
3 At [67]–[68].
4 *Re an appeal against a decision of a Benefits Review Committee* [2015] NZSSAA 102.

This is because the use of fictitious names and signatures by the Committees prevented Ms L from challenging the appointment of Committee members on the grounds of bias or being otherwise ineligible to consider her application. This in turn breached her right to natural justice affirmed by s 27(1) of the New Zealand Bill of Rights Act 1990 (NZBORA).

[11] The Ministry also erred when it contended that the use of fictitious names and signatures could be justified in the discharge of its duties under the Health and Safety at Work Act 2015 to ensure the health and safety of its employees. Those provisions do not provide implicit authority for the use of fictitious names and signatures. Nor would they have provided a justified limit on Ms L's right to natural justice.[5]

[12] This conclusion renders it unnecessary to decide the second question asked in the case stated appeal. If, however, I am wrong in my conclusion in relation to the first question posed by the Authority, then I am satisfied there was no appealable error in the way it dealt with the issues raised by the second question posed for this Court's consideration.

Structure of judgment

[13] To assist in understanding this judgment, I shall explain in Part II further details about the background to this proceeding and the relevant statutory provisions. Part III focuses on the principles engaged in this case, and the reasons why my answer to the first question endorses the decision of the Authority. Part IV briefly examines the second question raised in the appeal. In Part V of this judgment I summarise my conclusions.

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5 New Zealand Bill of Rights Act 1990, s 5.

PART II

FURTHER BACKGROUND

Ms L

[14] Ms L is a challenging person, who has been engaged in extensive litigation with the Ministry concerning her entitlements to various benefits under the Act.

[15] In another decision, I noted Ms L had "taken 28 appeals to the Authority between 2009 and 2017 and [that] the hearing before me was the second that the High Court [had] conducted in [2016–2017] concerning Ms L's disputes with the [Ministry]".[6] I also noted Ms L suffers ongoing serious and debilitating health issues, including Chronic Fatigue Syndrome, Irritable Bowel Syndrome, chemical sensitivities and skin disorders. Although she has had some previous engagement with mental health services, Ms L is adamant she has never had a psychiatric condition.

[16] Ms L has sent highly abusive communications to employees of the Ministry, and on at least one occasion, she has threatened to kill a member of the Ministry staff. It is not necessary to repeat her exact words. Suffice to say that Ms L's comments are vulgar, aggressive and undoubtedly very disturbing to recipients.

[17] Records of Ms L's communications with the Ministry reveal that in August 2012 Ministry staff referred her threats to the police in the Taranaki town where she lives. The response from the police included an assurance that Ms L was "harmless" and would not "act on any of her threats". Nevertheless, she was arrested in April 2013 for threatening to kill an employee of the Ministry. She was sentenced on 20 January 2015 on the basis that she would be called upon for sentence if she reoffended within the following 12 months. The same sentence has also been imposed on Ms L for other offences she has committed, including using offensive language, offensive use of a telephone and wilful trespass. Ms L also has convictions for benefit fraud.[7]

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6 *[L] v The Chief Executive of the Ministry of Social Development* [2017] NZHC 967 at [4].

7 There is, however, no note of Ms L's convictions for fraud in her criminal and traffic convictions record. In her evidence before the Authority, Ms L said she had convictions for "benefit fraud".

Remote Client Unit

[18] The Remote Client Unit was established by the Ministry in 2004 to provide services to applicants and beneficiaries who, "due to unacceptable behaviour" or for other "exceptional reasons", are deemed by the Ministry to be best managed without direct contact with Ministry staff. There are approximately 1.1 million recipients of benefits from the Ministry of whom approximately 80 are managed through the Remote Client Unit. Ms L is one of those 80 persons. The Remote Client Unit is located in Wellington, approximately five hours drive from where Ms L lives.

[19] Persons managed through the Remote Client Unit communicate with Ministry staff through an answerphone, mail or electronic processes. They are not able to meet with, or talk directly with, the Ministry employees who manage their applications.

Benefit Review Committees

[20] The Committees are established pursuant to s 10A of the Act. As noted at [2], they review decisions made by Ministry employees concerning an applicant's entitlement to benefits under the Act.

[21] A Committee is appointed by the Minister for Social Development (the Minister). Each Committee comprises three persons, two of whom are officers of the Ministry. The third member of the Committee is appointed by the Minister "to represent the interests of the community" and is required to be "resident in or closely connected with the office of the department" where the decision in issue was made.[8]

[22] Section 10A(7) of the Act stipulates that no employee of the Ministry shall serve on a Committee if they have been involved in the decision that is being reviewed.

[23] Often statutory committees and other decision-making bodies are given wide powers to regulate their own procedures and to take whatever steps they consider necessary to discharge their statutory responsibilities.[9] Committees do not, however, have these broad powers.

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8 Social Security Act 1964, s 10A(3)(a).

9 See for example, Social Security Act 1964, s 12K(10), concerning the procedures for the Authority.

[24] The Supreme Court has explained that Committees make decisions on behalf of the Chief Executive of the Ministry. The decision of a Committee "either to confirm, modify or reverse the original decision, has the same standing as the decision the Chief Executive might have made if personally undertaking the review. It is a Departmental decision".[10] Committees do not have sufficient independence to be classified as a judicial body but are instead purely administrative decision-makers.[11]

[25] When a person who is being managed through the Remote Client Unit seeks to have a Committee review a decision, the protocol is that the applicant provides their submissions to the Committee in writing. Reviews are considered "on the papers" unless the applicant is represented by an agent, in which case a hearing may be conducted by way of a telephone conference. A telephone conference was held by at least one of the Committees considering Ms L's applications for review.[12]

[26] The protocol governing the Remote Client Unit business process provides that, following the "hearing" by the Committee, the Remote Client Unit will send an "outcome letter" to the applicant with the Committee member names removed. A Committee's decision must include its reasons and advice that the applicant has a right to appeal against the decision to the Authority.[13]

Health and Safety at Work Act 2015

[27] The Ministry has a "primary duty of care" to ensure, "so far as is reasonably practicable", the health and safety of its staff and other persons, including "the provision and maintenance of safe systems of work".[14] These obligations require the Ministry to eliminate or minimise risks to both the physical and mental health of its staff.[15]

[28] The term "reasonably practicable" is defined in s 22 of the Health and Safety at Work Act in a way that requires employers to follow a series of evaluative steps,

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10 *Arbuthnot v Chief Executive of the Department of Work and Income* [2007] NZSC 55, [2008] 1 NZLR 13 at [19].
11 At [27]–[28].
12 *Re an application for Review by [Ms L]* Benefits Review Committee 088/16, 17 June 2016.
13 Social Security Act 1964, s 10A(9).
14 Health and Safety at Work Act 2015, s 36(1), (2) and (3)(c).
15 Sections 16, definition of "health", and 30(1).

including those set out in the definition.[16] The definition refines the approach taken by Asquith LJ in *Edwards v National Coal Board*, in which he said:[17]

> "Reasonably practicable" is a narrower term than "physically possible" and seems to me to imply that a computation must be made by the owner, in which the quantum of risk is placed on one scale, and the sacrifice involved and the measures necessary for adverting the risk (whether in money, time or trouble) is placed in the other, and that, if it can be shown that there is a gross disproportion between them—the risk being insignificant in relation to the sacrifice—the defendants discharge the onus on them.

[29] The Ministry is acutely aware of its obligations under the Health and Safety at Work Act as, on 1 September 2014, a Mr Tully entered the Ministry's premises in Ashburton and shot at four of its employees, killing two of them. Following this tragedy, the Ministry was prosecuted for breaching its obligations under the Health and Safety in Employment Act 1992 on the basis that it had failed to take all practicable steps required of it to ensure the safety of its employees.[18] The Ministry pleaded guilty to the charge, accepting it had failed to put in place five of the six practicable steps the prosecution said the Ministry should have adopted. The Ministry contested, however, the claim that it was required to ensure that there were physical restrictions to clients accessing the staff working area. Following a disputed facts hearing, Chief Judge Doogue held that the Ministry was also required to take that step.[19]

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16 Health and Safety at Work Act 2015, s 22:
… **reasonably practicable** … means that which is, or was, at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters, including—
(a) the likelihood of the hazard or the risk concerned occurring; and
(b) the degree of harm that might result from the hazard or risk; and
(c) what the person concerned knows, or ought reasonably to know, about—
(i) the hazard or risk; and
(ii) ways of eliminating or minimising the risk; and
(d) the availability and suitability of ways to eliminate or minimise the risk; and
(e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

17 *Edwards v National Coal Board* [1949] 1 KB 704 at 712; see also *Buchanans Foundry Ltd v Department of Labour* [1996] 3 NZLR 112 (HC); and *Waimea Sawmillers Ltd v Worksafe New Zealand* [2016] NZHC 915 at [36].

18 The predecessor to the Health and Safety at Work Act 2015.

19 *WorkSafe New Zealand v Ministry of Social Development* [2016] NZDC 12806.

Focus of the abuse

[30] An examination of the offensive and threatening material sent by Ms L, which was attached to the affidavit of Mr van Ooyen, shows that her concerns appear to have been directed towards conduct of staff at the Remote Client Unit. In addition to naming managers and staff at the Remote Client Unit, Ms L also named in her communications politicians, including the then Prime Minister and Minister. At no stage does Ms L appear to have referred in her communications to a member of a Committee, by either their real or fictitious names, when complaining about the conduct of employees of the Ministry.

First Committee

[31] The first of Ms L's applications for review to which this proceeding relates was heard by a Committee on 25 November 2015. The members of that Committee used their real names and signatures when issuing their decision. That Committee expressed concern that staff in the Remote Client Unit dealing with Ms L's case had failed to provide the Committee with important information, thereby creating the possibility of the Committee being misled into reaching a "wrong and unfair conclusion".[20] The Authority recorded in its decision that "from that point forward, the members of the … Committees [reviewing Ms L's cases] used false names and signed decisions with false signatures".[21]

Real identities of the Committees

[32] A schedule attached to Mr van Ooyen's affidavit explained the true identities of the members of the other six Committees that heard Ms L's applications for review. The same community representative sat on four of those Committees. One employee of the Ministry sat on two of the Committees, including chairing a Committee on one occasion.

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20 *Re an application for Review by [Ms L]* Benefits Review Committee 039/16, 26 November 2015.
21 [2017] NZSSAA 052, above n 1, at [25].

Ministry's position before the Authority

[33] In the hearing before the Authority, the Ministry explained that it wished to continue to withhold from Ms L the true identities of the members of the Committees because of the 2014 shooting and the Ministry's subsequent conviction for failing to provide a safe work environment. The Ministry also maintained that Ms L was a person who exposed Ministry staff to danger and that it was necessary to mitigate that risk by withholding from her the identities of the members of the Committees that considered her applications for review.

[34] It is significant that all seven of the Committees that considered Ms L's applications for review – including the Committee that used its real names – did so after the 2014 shooting. In addition, all seven of the Committees were convened after Ms L's last conviction on 20 January 2015 for threatening to kill. There is no evidence to suggest that members of the first Committee were subject to any threats or abuse from Ms L, even though she knew their true identities.

PART III

FIRST QUESTION POSED BY THE AUTHORITY

[35] The answer to the first question posed by the Authority involves consideration of two interrelated issues. Those issues are:

(1) whether the use of fictitious names and signatures by Committee members breaches Ms L's right to the observance of the principles of natural justice by the Ministry; and if so,

(2) whether the Ministry had any lawful authority to breach Ms L's right to natural justice.

[36] The second of these issues involves an examination of the sources of government power and whether the common law can be "developed" to sanction the practice of Committees using fictitious names and signatures. It is also necessary to

briefly explain why breaches of Ms L's right to natural justice are not justified limitations of that right.

Right to natural justice

[37] Ms L's case engages her right to natural justice, and in particular, the right affirmed by s 27(1) of NZBORA "to the observance of the principles of natural justice by any … public authority which has the power to make a determination in respect of [her] rights, obligations or interests protected or recognised by law".[22]

[38] The right to natural justice is an immutable feature of our law, the origins of which can be traced from the Code of Hammurabi, through the Magna Carta, to modern manifestations found in NZBORA and international human rights instruments. The requirements of impartial decision-makers and fair hearings are but two examples of the right to natural justice.[23]

[39] For present purposes, the engagement of the right to natural justice concerns Ms L's desire to know the identities of members of the Committees hearing her reviews. This is so she can make an informed decision about whether or not to challenge the appointment of a particular member or members on the basis of actual or perceived bias, because of her long history of interaction with employees of the Ministry and Committees, or because a Committee member may be disqualified by reason of their prior involvement with the decision that is the subject of the review.

[40] There is authority for permitting a degree of tolerance when determining whether a non-judicial officer should be disqualified from participating in a decision

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22 Because Ms L's proceeding does not involve the minimum standards for a criminal trial, I have not referred to jurisprudence criticising the use of "faceless judges". See *Espinoza de Polay v Peru* Comm 577/1994, UN Doc CCPR/C/61/D/577/1994 (6 November 1997) at [8.8]; and Sarah Joseph and Melissa Castan *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd ed, Oxford University Press, Oxford, 2013) at [14.101].

23 William Wade and Christopher Forsyth *Administrative Law* (11th ed, Oxford University Press, Oxford, 2014) at 376.

on the grounds of bias.[24] For example, in *Moxon v The Casino Control Authority*, Fisher J said:[25]

> More freedom to manoeuvre seems intended where the decision-maker is a democratically elected body which will inevitably be influenced by political considerations … the decision-maker is intended to form its own policies, particularly where it can be expected that one policy will be applied consistently across a series of individual applications … the challenged aspect of the decision did not involve the application of tightly controlled legal consequences to facts once found, eligibility for appointment and hearing methodology suggest that its members were intended to draw upon their own prior views, experience or expertise, and/or the opportunity to be heard is limited or informal. In such cases intervention for bias or predetermination will usually be justified only where the decision-maker entered upon the hearing with a closed mind, that is to say the decision-maker was not amenable to proper argument or was unwilling to consider the case on its individual merits…

[41] The line of authority for which *Moxon* stands can, however, be distinguished from the present case in which Committee members must determine whether or not Ms L is entitled, as a matter of law, to benefits prescribed in the Act. This involves the application of statutes and regulations to the facts of her case. It does not involve the development and application of policies. Nor is there much scope for discretionary judgement by Committee members.

[42] There is also an important distinction between allowing flexibility in the degree of impartiality required before recusal becomes necessary and subverting a claimant's ability to even consider challenging the appointment of a Committee member. Ms L can either know the identities of her decision-makers and challenge their impartiality, or she cannot. This binary scenario leaves no middle ground that might exist when considering the merits of a recusal application or challenge to the impartiality of a Committee member.

[43] It should be noted that, as the Committees have consistently used the same fictitious names, it might be possible for Ms L to challenge the appointment of some Committee members if she believes there is a legitimate basis for doing so. However, that possibility does not adequately address the fact Ms L has had more than a decade

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[24] *Re Royal Commission on Thomas Case* [1982] 1 NZLR 252 (CA) at 277; *EH Cochrane Ltd v Ministry of Transport* [1987] 1 NZLR 146 (CA) at 150; *Turner v Allison* [1971] NZLR 833 (CA) at 843; and *Lower Hutt City Council v Bank* [1974] 1 NZLR 545 (CA).

[25] *Moxon v The Casino Control Authority* HC Hamilton M324/99, 24 May 2000 at [49].

of dealing with employees of the Ministry, many of whom she believes have treated her unfairly and dishonestly. The decision of the first Committee that I have referred to at [31] suggests there may be a basis for some of Ms L's concerns. The question that then arises is how she can make an informed decision about challenging the appointment of members of a Committee, for example, for bias, if she is prevented from knowing their true identities. The answer is clear. She cannot. To conclude otherwise would produce an outcome that is the antithesis of natural justice.

[44] As Dr Ellis, senior counsel for Ms L, rightly pointed out, it is no consolation that the Ministry keeps a record of the real names of all the Committee members and ensures that appointments are, in its view, appropriate. Affording proper respect to the right to natural justice requires the affected party to have the opportunity to satisfy themselves that adequate standards have been observed. In the context of a dispute, such as Ms L's reviews before the Committees, the 'equality of arms' principle means that she, and not just the Ministry, should have the opportunity to challenge the appointment of Committee members.[26]

The need for legislative authority

[45] The debate amongst constitutional scholars about the sources of government power has never been satisfactorily resolved.[27] In the present case, it is accepted that the prerogative powers are not engaged. Instead, there are in theory, three potential sources of authority for the Committees to use fictitious names and signatures namely, implied legislative authority, the "reasonably incidental doctrine" and a concept referred to as the "third source of government powers". Before examining those possibilities, I shall first set the scene by explaining the constitutional principles that underpin the need for there to be a source of power for government actions.

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26 See generally *Kracke v Mental Health Review Board* [2009] VCAT 646, (2009) 29 VAR 1 at [376].

27 See generally Stephen Sedley *Lions under the Throne* (Cambridge University Press, Cambridge, 2015) at 209–228. Compare *Malone v Metropolitan Police Commissioner* [1979] Ch 344, in which it was held that the Post Office in Britain could, at the request of the police, tap a citizen's telephone because no law prohibited it, with the passage from *R v Somerset County Council, ex parte Fewings* [1995] 1 All ER 513 (QB) cited below at [47].

Entick v Carrington

[46] Counsel before me both accepted the general proposition that public bodies, such as the Committees, cannot breach a right, such as natural justice, without authority to do so. This principle arises from *Entick v Carrington*, in which it was held that the Crown cannot, in the absence of statutory or common law authority, impose a liability or detriment upon a citizen or otherwise interfere with a citizen's liberty or property.[28] Professor Joseph notes "*Entick v Carrington* established that a positive rule of statute or common law must confer the … power" that the Crown wishes to exercise against a citizen.[29]

[47] Modern manifestations of *Entick v Carrington* can be found in *R v Somerset County Council, ex parte Fewings*, in which Laws J, as he then was, said the following in relation to public bodies in England and Wales:[30]

> … any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake; at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose … Under our law, this is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them.

[48] A similar theme can be observed in *Ministry of Transport v Payn*, where traffic officers entered Mr Payn's property to enforce blood-alcohol driving laws.[31] They refused to leave when instructed to do so by Mr Payn. The Court of Appeal held that the officers became trespassers and could not remain on Mr Payn's property pursuant to an implicit authority. Absent express statutory authority, the traffic officers could not forcibly enter private property to enforce the blood-alcohol driving laws.

[49] It is common ground that there is no express statutory provision that authorises Committee members to use fictitious names and signatures. Nor is there express common law authority for the practice. Mr Radich QC, senior counsel for the Ministry, submitted, however, that there may be implicit statutory authority for the

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28 *Entick v Carrington* (1765) 19 St Tr 1029.

29 See Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 178–180.

30 *R v Somerset County Council,* above n 27, at 524.

31 *Ministry of Transport v Payn* [1977] 2 NZLR 50 (CA).

practice. As foreshadowed at [45], it is also necessary to consider if there may be other sources of authority that permit such a practice.

Is there implicit statutory authority?

[50] There are two potential sources of implicit authority for the Committees to have used fictitious names. The first is s 10A of the Act, the key provisions of which have been explained at [20]–[26].

[51] The second arguable source of authority for Committees to use fictitious names and signatures is the provisions of the Health and Safety at Work Act, which imposes duties on the Ministry to ensure, so far as is reasonably practicable, the health and safety of its employees and others. The Health and Safety at Work Act does not, however, require an employer to ensure the complete protection of an employee or other persons. Rather, Parliament's use of the adjectives "reasonably" and "practicable" in s 36 of the Health and Safety at Work Act conveys its intention that the Ministry take the steps reasonably available to it to protect its employees and others, having regard to the non-exhaustive list of factors set out in the definition of "reasonably practicable".

[52] There is nothing in s 10A, or any other sections in the Act, that could be construed as implicitly authorising Committee members to use fictitious names and signatures because the practice constitutes a clear breach of Ms L's right to the observance of the principles of natural justice by the Ministry. Nor can the obligations placed upon the Ministry by the Health and Safety at Work Act be stretched to override the duty upon the Ministry to observe the principles of natural justice. This is because the right to natural justice is so deeply entrenched in both our common law and NZBORA that any legislative restriction on that right would need to be expressed very clearly and unequivocally. Constricting a citizen's right to the observance of the principles of natural justice by a public authority, such as the Ministry, cannot be implied from the text and purpose of s 10A of the Act or the statutory duties imposed upon the Ministry by the Health and Safety at Work Act.

Reasonably incidental doctrine

[53] The common law recognises that public bodies such as Committees may, without express statutory authority, do things that are reasonably incidental to their core statutory powers. The reasonably incidental doctrine evolved in the 19th century in response to the ultra vires doctrine in the context of statutory corporations.[32] Subsequent cases have applied this doctrine to public bodies,[33] and its application to Crown entities has now been given statutory recognition in ss 17–18 of the Crown Entities Act 2004. Professor Joseph suggests that, when applied to public bodies, this doctrine addresses the conundrums caused by the line of authority arising out of *Entick v Carrington*. Like the implicit statutory authority concept, the reasonably incidental doctrine is based on the requirement that the conduct in question can be traced, in some indirect way, to a statutory power.[34]

[54] The reasonably incidental doctrine enables public bodies to do things that are reasonably incidental to the discharge of their statutory functions provided they do not, in the absence of express statutory or common law authority, curtail the rights and interests of citizens. Examples of the use of the reasonably incidental doctrine include leasing a building and purchasing paperclips.[35]

[55] The reasonably incidental doctrine is of no assistance to the Ministry in this case because the use of fictitious names by the Committees undermines Ms L's ability to ascertain if decision-makers are biased or validly appointed, thereby breaching her right to natural justice. The reasonably incidental doctrine cannot be invoked to justify infringement of a citizen's rights, particularly a right as fundamental as the right to natural justice.[36]

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32 *Attorney-General v Great Eastern Railway Co* (1880) 5 AC 473 (HL). Compare *Ashbury Railway Carriage and Iron Co Ltd v Riche* (1875) LR 7 HL 653 (HL).

33 *Attorney-General v Fulham Corp* [1921] 1 Ch 440; and *Attorney-General ex relatione Lewis v Lower Hutt City* [1964] NZLR 438 (CA).

34 Joseph, above n 29, at 943.

35 At 179.

36 At 180.

The third source of government power

[56] The third source of government power refers to a source of authority for government action that is separate from statutory and prerogative powers. Professor Harris, who coined the term the "third source of authority for government action" has explained that the concept has been referred to by a variety of names, including "common law discretionary powers" and "common law personified powers".[37] The concept was recognised by the Court of Appeal as a potential source of authority for government action,[38] although ultimately the Supreme Court did not need to develop the third source analysis of the Court of Appeal as the government action in question was underpinned by statutory authority.[39]

[57] The third source of government power is, however, not a concept that assists the Ministry in this case because, as Professor Harris explains, "… third-source actions have no potential to override competing positive law rights". In other words, actions by the Ministry derived from the third source of government authority cannot override a citizen's right to natural justice.[40]

Can the law be "developed" in the way the Ministry suggests?

[58] Mr Radich submitted that, in the absence of authority for the practice of using fictitious names and signatures, the courts could develop the law to permit it in rare and exceptional cases. Mr Radich relied upon the House of Lords decision in *Scott v Scott* to demonstrate by analogy how courts may, in exceptional circumstances, develop the common law to overcome the consequences of applying ordinary principles of justice; in that case, the principle that court proceedings should be conducted in public.[41]

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37 Bruce Harris "The 'Third Source' of Authority for Government Action Revisited" (2007) 123 LQR 225 at 225–226.

38 *Minister for Canterbury Earthquake Recovery v Fowler Developments Ltd* [2013] NZCA 588, [2014] 2 NZLR 587.

39 *Quake Outcasts v Minister for Canterbury Earthquake Recovery on appeal from Minister for Canterbury Earthquake Recovery v Fowler Developments Ltd* [2015] NZSC 27, [2016] 1 NZLR 1.

40 Bruce Harris "A Call to Maintain and Evolve the Third Source of Authority for Government Action" (2017) 27 NZULR 853 at 855. This statement was adopted by the Court of Appeal in *Minister for Canterbury Earthquake Recovery*, above n 38, at [77]–[78].

41 *Scott v Scott* [1913] AC 417 (HL).

[59] *Scott* involved a hearing in chambers to determine whether the applicant's marriage was void because of her husband's inability to consummate their marriage. After associated suppression orders were breached, it became necessary for the Courts to consider whether there was any jurisdiction to conduct the annulment hearing in chambers contrary to the principle of open justice. Ultimately, the House of Lords concluded that in exceptional circumstances a hearing could be held in chambers where it was "strictly necessary for the attainment of justice".[42]

[60] The primary concern of the House of Lords was to ensure that justice was done in that proceeding and it accordingly reasoned that it was acceptable to depart from the principle of open justice when it was strictly necessary to do so in order to ensure overall justice between the parties. That is very different from the present case where the competing interest advanced by the Ministry is the safety of decision-makers, a consideration wholly external from justice between the parties. *Scott* is therefore not persuasive authority for permitting the Ministry to deny Ms L's right to the observance of the principles of natural justice.

[61] Only Parliament can sanction breaches of Ms L's right to the observance of the principles of natural justice by authorising Committee members to use fictitious names and signatures when determining her applications for review. This is especially because anonymous decision-makers are a rare and unusual feature of a system of justice in any jurisdiction that respects the rule of law. I would be trespassing beyond my constitutional role were I to usurp the functions of Parliament by authorising the practice followed by the Ministry in this case.

Section 5 of the New Zealand Bill of Rights Act 1990

[62] Mr Radich submitted that Ms L's right to natural justice, affirmed by s 27(1) of NZBORA, could be justifiably limited pursuant to s 5 of NZBORA through the Ministry complying with its obligations under the Health and Safety at Work Act.[43]

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42 *Scott v Scott*, above n 41, at 437.

43 New Zealand Bill of Rights Act, s 5:
Justified limitations
Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[63] This argument could, however, never assist the Ministry's case, but rather it creates an additional hurdle that the Ministry would have to overcome. The reason for this is that the Ministry has to demonstrate some statutory authority to allow its practice of using fictitious names and signatures. Just because such a practice might have been a justified limitation on the right to natural justice under s 5 of NZBORA does not mean there is authority for that practice. It simply means that if there were authority for the practice, then the practice would not be inconsistent with NZBORA. Regardless, I address the NZBORA analysis below for the sake of completeness.

[64] Following the approach of the Supreme Court in *R v Hansen*, I shall first determine if the Ministry's duties under the Health and Safety at Work Act are arguably inconsistent with Ms L's rights under s 27(1) of NZBORA.[44] The answer to this question involves ascertaining the meaning of the relevant provisions of the Health and Safety at Work Act by reference to the text and purpose of that legislation and determining whether that meaning gives rise to an arguable inconsistency with s 27(1) of NZBORA.[45]

[65] It is at this point the approach taken by the Ministry hits a further insurmountable hurdle. This is because, as I have previously emphasised, the Health and Safety at Work Act places a qualified obligation on the Ministry to ensure that the health and safety of its employees and other persons is not put at risk, "so far as is reasonably practicable".[46] The Health and Safety at Work Act does not confer powers on the Ministry to take any steps in relation to Ms L, and its obligations under the Health and Safety at Work Act cannot be interpreted as placing a requirement on the Ministry to breach its duty to observe the principles of natural justice.

[66] If further support for this conclusion is required, one need only consider the efficacy of the steps the Ministry may reasonably and practicably take to protect Committee members from perceived risks of harm to their health and safety from persons such as Ms L. Those steps, many of which the Committees already take, include:

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44 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

45 See Claudia Geiringer "The Principles of Legality and the Bill of Rights Act: A Critical Examination of *R v Hansen*" (2008) 6 NZJPIL 59 at 68–69.

46 Health and Safety at Work Act 2015, s 36.

(1) managing and hearing Ms L's case by persons who are physically remote from her and in circumstances where she cannot enter a building and see the Committee members;

(2) protecting Committee members from direct and face-to-face communications from Ms L, by requiring communications to be through mail or electronic form, or conducted by telephone conference or by agents alone;

(3) making available counselling and other rehabilitative procedures for any Committee member who is distressed or otherwise affected by Ms L's behaviour; and

(4) referring Ms L's conduct to the police if it is thought she has or may commit a crime.

[67] Nothing advanced by the Ministry demonstrates why it is necessary to take the additional and extraordinary step of Committee members using fictitious names and signatures when releasing their decisions and in circumstances where doing so breaches the Ministry's obligations under s 27(1) of NZBORA. This conclusion is underscored by the fact that the first of the Committees that heard Ms L's current applications used their real names and signatures without any hint of adverse consequences for the members of that Committee.

[68] My conclusion that the text and purpose of the relevant provisions of the Health and Safety at Work Act are not inconsistent with s 27(1) of NZBORA renders it unnecessary to examine s 5 of NZBORA. But, in any event, I add that limiting Ms L's rights under s 27(1) of NZBORA could not be justified under s 5 of NZBORA. This is because, as the Court of Appeal explained in *Drew v Attorney-General*, where the principles of natural justice are engaged there is "no room and no need for the operation of s 5" of NZBORA.[47] What the Court of Appeal was saying in *Drew* is that the rights to natural justice are so inviolate that they cannot be justifiably limited in a

[47] *Drew v Attorney-General* [2002] 1 NZLR 58 (CA) at [67].

free and democratic society. In large part, this is because the principles of natural justice already internally balance the competing interests at stake.[48]

[69] The conclusions I have reached in relation to the first question posed by the Authority may be distilled to the following points. First, the use of fictitious names and signatures by Committees breached Ms L's right to the observance of the principles of natural justice. Second, there is no legislative or common law authority for Committees to have used fictitious names and signatures when determining Ms L's applications. Third, the common law cannot be "developed" to permit the practice followed by the Committees in this case. Fourth, s 5 of NZBORA cannot be invoked to salvage the Committees' practice of using fictitious names and signatures. These conclusions lead ultimately to my decision that, absent express legislative authority, the Committees could not use fictitious names and signatures when determining Ms L's applications.

PART IV

THE SECOND QUESTION POSED BY THE AUTHORITY

[70] The answer to the first question posed by the Authority renders it unnecessary to dwell upon the second question it has asked this Court to answer.

[71] It is sufficient to record that even if the Authority had a discretion to grant the Ministry's application to withhold the true names of the members of the Committees from Ms L, there was no necessity to do so.

[72] The reasons for this are primarily factual, but must be considered in light of the importance of natural justice, as I have outlined earlier in this decision. If there were a discretion to allow Committees to use fictitious names, there would need to be a very high threshold before it would be appropriate to exercise such a discretion. I am far from convinced that Ms L's case comes close to meeting that high threshold. In particular, I note that:

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[48] See also *Fairmount Investments Ltd v Secretary of State for the Environment* [1976] 1 WLR 1255 (HL) at 1263.

(1) Ms L has never directed any threats or abuse to a member of a Committee.

(2) The police have previously assessed Ms L as being harmless and unlikely to carry out her threats.

(3) The courts have, when considering Ms L's abusive and threatening behaviour, treated her very leniently. This indicates that her conduct, whilst criminal, was not considered particularly serious.

(4) The other practical measures put in place by the Ministry to protect members of the Remote Client Unit and the Committees have adequately ensured the health and safety of those who might otherwise have been adversely affected by Ms L's conduct.

(5) Other employees of the Ministry, such as Mr van Ooyen, have not considered it necessary to disguise their true identities when dealing with Ms L.

(6) As noted at [67], one of the Committees that considered Ms L's applications used its real names and signatures without incurring any issues or difficulties.

[73] In finding for Ms L in this case, it should not be thought that I countenance her conduct. On the contrary, I consider her abusive and threatening communications to be totally unacceptable. Nevertheless, the Ministry did not act lawfully when it took the extraordinary step of having members of the Committees issue their decisions using fictitious names and signatures.

PART V

CONCLUSION

[74] The two questions posed by the Authority and set out at [9] are answered "No". That is to say, the Authority did not err in law in stating that there was an absolute

prohibition on statutory decision-makers using false names and signatures in the absence of express statutory authority allowing such conduct. The Authority also did not, in any event, err in disallowing anonymity in the circumstances of this case.

[75] Ms L is entitled to costs on a scale 2B basis. This was a case that justified two counsel.

D B Collins J

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