IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2005-404-6807

	BETWEEN	THE COMBINED BENEFICIARIES UNION Plaintiff
	AND	THE AUCKLAND CITY COGS COMMISSION Defendant

Hearing: 28 June 2007

Appearances: G Minchin and A Crabb for Plaintiff
B H Arthur and K Stephen for Defendants

Judgment: 25 September 2007 at 11:30am

(RESERVED) JUDGMENT OF ANDREWS J

This judgment was delivered by Justice Andrews on
25 September 2007 *at* ***11:30am***
pursuant to r 540(4) of the High Court Rules.

……
Registrar/Deputy Registrar

Date: ……

Solicitors: Quinn Law, P O Box 3396, Shortland Street, Auckland
Crown Law, PO Box 2858, Wellington
Counsel: G E Minchin, PO Box 78-274, Grey Lynn, Auckland
Mr A Crabb, P O Box 20706, Glen Eden, Auckland

Introduction

[1] The plaintiff, the Combined Beneficiaries Union ("the Union"), is an incorporated society, established in 1978. Since 1985 the Union has offered its assistance and advocacy services free to any person on a benefit, pension or accident compensation, and to casual and low-paid workers. As a charitable organisation in the voluntary welfare sector it relies totally on grants from private and public funders, and donations.

[2] One of the potential sources of grant funding for the Union is the Community Organisation Grants Scheme (COGS). At issue in this proceeding is the procedure adopted for applications for funding under the scheme for the 2005/2006 funding round. The Union argued that it was not advised of changes introduced for that round, and in particular, that a time limit was enforced as being mandatory and inflexible, contrary to previous practice.

The Community Organisation Grants Scheme

[3] The COGS scheme began in 1986 and is designed to provide government funding to voluntary organisations providing essential social services. Local committees (rather than Central Government) decide on funding priorities, and allocate grants accordingly. Invariably, applications vastly exceed the amount available for distribution. In the 2005/2006 funding round, 3965 applicants applied for a total of $54m; $11.4m was distributed to 3448 of these applicants.

[4] Since 1990 administration of the scheme has been managed by the Local Government and Community Branch of the third defendant, the Department of Internal Affairs ("the Department"). The Branch services 37 Local Distribution Committees ("the Committees"), who are charged with allocating funding to applicant organisations.

[5] The structure of COGS, and the roles and responsibilities of the Department and the Committees, are set out in a Handbook for Local Distribution Committees.

By way of an overall view, the Local Government and Community Branch provides advice to the Minister, and manages the administration of COGS, including training and support of regional advisors, managing systems development, and managing development of resources, publicity materials and training. It appoints COGS Local Advisors, who provide advice, training, and ongoing support to the Committees, promote COGS in the community and assist COGS applicant groups. The Committees establish local funding priorities, make grants to community groups, and represent community issues on a National COGS Committee.

[6] Administration of the scheme has changed somewhat over the years. Since 2001, applicants have been able to apply online, although some information must be supplied in hard copy – for example, any documents that must be signed. The ability to apply online was designed to make the process easier for organisations who were second (or subsequent) time applicants, as much of the required information would already be held.

[7] In 2005, changes were made that affected the processes for electing the Local Distribution Committees, provided for accountability by recipients and the Committees, and provided a single web portal for online applications for grants under the COGS scheme and for grants from the New Zealand Lotteries Board. The changes were designed to put the administration of COGS funding, and other funding schemes managed by the Department, on a "best grant-making practice" model, so as to increase efficiency and cost-effectiveness. It is in the course of these changes, the Union argued, that the mandatory and inflexible time limit was introduced.

The 2005/2006 funding round

[8] Community organisations that had previously applied for grants were advised by way of a COGS newsletter in March 2005 that, in respect of the 2005/2006 funding round, applications for COGS grants would open on 1 June 2005 and close on 29 July 2005. These dates were repeated in a letter sent to organisations on 27 May 2005. That letter encouraged groups to apply online, and noted that a number of new questions had been added, and that there were new financial requirements.

[9] On 28 July 2005 the Union submitted an online application to the Auckland COGS Committee (the first defendant). The Union requested a grant of $132,876. On 29 July 2005 the Union submitted an online application to the Waitakere COGS Committee (the second defendant). Again, the Union requested a grant of $132,876.

[10] The applications were screened by the COGS advisor for each of the Committees. Mr Cyril Howard was the advisor for the Auckland Committee, Ms Lorna Pritchard had that position for the Waitakere Committee. Both are employees of the Department.

[11] It was noted that both applications lacked some of the required information. As a result letters were sent to the Union on 1 August 2005 (in respect of the Waitakere application) and 4 August 2005 (in respect of the Auckland application) signed by the respective advisor. Both letters set out the information required, and stated that it was to be received within ten working days.

[12] The letters were in similar terms, as follows:

> COGS APPLICATION – DOCUMENTATION TO COME
>
> Thank you for your group's application to the Community Organisation Grants Scheme (COGS) which was received on [date received]. The [relevant Committee] will sit to allocate funds during October 2005. Prior to that meeting you may be contacted by a committee member with regard to your application. In order to fully consider your group's application we require the following information to be sent to this office within 10 working days.
>
> [List of items required]
>
> If you have any questions please contact me at the number below.

[13] Ms Pritchard's letter included a sentence to the effect that if the requested information had already been provided, it did not have to be re-sent.

[14] The Union did not provide the requested information, in respect of either application, within ten working days. Letters were sent to the Union on 22 August 2005 (from Waitakere) and 25 August 2005 (from Auckland). They were in identical terms, as follows:

INCOMPLETE COGS APPLICATION

> On [date], a letter was sent to you, acknowledging receipt of your Group's application to the Community Organisation Grants Scheme (COGS) and requesting that the following information be received by this office within 10 working days:
>
> [List of information requested]
>
> As the requested information has not been supplied, your Group's application *is incomplete and will not be considered in this year's funding round*. If you have any questions or would like to discuss any future application to COGS please contact me at the number below.
>
> (Emphasis added)

[15] The next step in the application process is the holding of a "pre-allocation meeting" by each Committee. These meetings are held for the purpose of confirming local funding priorities, to allocate completed applications to Committee members for review, and for Committee members to complete a Conflict of Interest Register and familiarise themselves with the COGS Committee assessment process.

[16] The Waitakere Committee held a pre-allocation meeting on 29 August 2005. The Minutes record, under the heading "Incomplete Applications" that:

> The following applications will not be considered by this Committee, due to additional information not being received within the set timeframe: …
>
> 2 Combined Beneficiaries Union
>
> …
>
> The committee moved that the above applications would not be considered for the 2005/2006 funding round. … CARRIED

[17] The Auckland Committee held its pre-allocation meeting on 8 September 2005. The Minutes of that meeting record, under the heading "Incomplete Applications" the following:

> The committee will not consider the following applications during this funding round, due to required additional information not being received within the specified timeframe:
>
> 1 Combined Beneficiaries Union
>
> …

> After sending incomplete letters to the above group's on 25 August 2005, Cyril received letters from the Combined Beneficiaries Union and … for the committee to reconsider the decision and include their applications in this year's funding round. … The committee agreed that the above applications considered incomplete would not be considered for the 2005/2006 COGS funding round. CARRIED
>
> Letter to be sent to all the above groups advising the committee considers the applications incomplete.

[18] On 27 August 2005 Ms Capel (President of the Union) wrote to Mr Howard (advisor to the Auckland Committee), enclosing additional information, asking that the two Committees consider the applications for grants, and setting out circumstances in support of that request. That letter was received by Mr Howard on 30 August 2005. Two matters need to be noted in respect of this letter:

a) By the time it was received the Waitakere Committee had held its pre-allocation meeting on 29 August 2005.

b) Mr Howard said in his affidavit evidence that not all of the required information was included with Ms Capel's letter.

[19] The Union then initiated a review process, by lodging a complaint with the Regional COGS Office. That complaint was also rejected. In her affidavit evidence Ms Capel said that she was advised:

> That the Department's decision was final. In [the view of the COGS National Manager] it was important the Scheme was administered in a cost effective and efficient manner and accordingly the 10 day rule was mandatory and inflexible; and the Committees cannot accept late applications. …

Issues for determination

[20] The Union says that the procedure adopted by the Department and the Waitakere and Auckland Committees for the 2005/2006 funding round was, first, in breach of natural justice (in being procedurally unfair), and, secondly, a breach of s 27 of the New Zealand Bill of Rights Act 1990 ("NZBORA"). It also argued that there had been an abuse of process, or illegality, in that the Department had usurped the role of the local Committees, by rejecting the Union's applications for funding

before the Committees had met to consider them. The Union's argument rested on two factual assertions:

a) The changes introduced for the 2005/2006 funding round effected a significant change in the way applications were dealt with, by introducing a mandatory and inflexible time limit. Thus, for the Union, if the requested information was not provided within the 10-day period, its application would not be considered further. Previously, the procedure had been much more flexible.

b) It was given no notice of such a significant change to the former, informal and flexible way in which applications were dealt with.

[21] Before turning to the heading of procedural fairness, and s 27 of the NZBORA, it is necessary first to consider whether the 2005 changes did effect such a significant change. The question of what notice was given, or should have been given, can then be considered in the context of procedural fairness.

The former procedure and the changes introduced for the 2005/2006 funding round

[22] Ms Capel said in her affidavit that she was a member of the Auckland Committee for six years in the late 1990s and early 2000s, and had become extremely knowledgeable about COGS processes and policy, and how funding applications were viewed and decided on. She said:

a) The Committee generally was very knowledgeable about the main applicant organisations (such as the Union).

b) Decisions on applicant funding were based inherently on the merits of the organisation. It was general policy that the well-established groups that had proved their worth in the community would receive funding without a lot of fuss.

c) The Committee had control over policy decisions and could set rules as to time frames and deadlines, including as to applications and supplementary paperwork. These were often debated but invariably a relatively flexible approach would be taken.

d) Ultimately, decisions on applications would be made on whether the organisation had merit, given the objectives of community funding.

e) Thus, a certain leeway was given for applications. An application would be denied if the Committee had not received important information after significant attempts had been made (repeat telephone calls and letters) and the organisation had had plenty of opportunity to provide it.

[23] Ms Capel's description was not challenged by the defendants in submissions. Indeed, "informality, accessibility and flexibility" was listed as being a "distinctive and unique strength" of the COGS scheme in a report commissioned by the Department in 2003: *Helping to Make a Real Difference*.[1] That report also noted, however, that one of the "issues" with the way the COGS scheme operated at the time was said to be that there was "considerable variation around the country" in (amongst other things) closing dates and location funding rules.[2]

[24] Following this review, the Department looked to upgrade the COGS systems, to put COGS administration on a "best grant-making practice" model and to standardise opening and closing dates for applications throughout the country. Ms Woodley, who is Director Operations, of the Local Government and Community Branch of the Department said in her affidavit that the "grants online" process, adopted for the 2005/2006 COGS funding round, introduced:

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[1] *Helping to Make a Real Difference*: A report on issues and options for the operation of the Community Organisation Grants Scheme (COGS), prepared for the Department of Internal Affairs by JR Consulting Group, November 2003, at Appendix 2. (Affidavit M Woodley, 6 June 1007, Ex "MW-2")

[2] See fn 1 at Appendix 1, Powerpoint Slide 11

a) An initial eligibility and completeness check list, which would generate template letters if requirements were not met;

b) Set time frames under which departmental staff were required to deal with applications and action various matters; and

c) Deemed an application to be ineligible for consideration if an applicant did not supply missing information after ten working days, or the date applications closed, whichever was the latter.

[25] I am satisfied that the changes introduced for the 2005/2006 COGS funding round introduced a significant change to the procedure for considering applications for COGS grants. The previous procedures had been informal and flexible, the new procedure was governed by a computer-generated process under which an application was deemed to be ineligible for consideration if (as relevant to the Union) information was not received within the ten-day period.

Was the ten-day period a "mandatory and inflexible" time limit?

[26] The Union argued that the ten-day period was "mandatory and inflexible", such that if the required information were not supplied within that period, the application would not be eligible for consideration. The Union also argued the related point, that the Committees made an error of law in fettering their discretion by applying a mandatory and inflexible rule set by the Department. That argument will be considered separately.

[27] The defendants argued that there was no inflexible rule. They pointed to the following:

a) Notwithstanding the closing date for applications being 29 July 2005, applicants were given a further ten days to provide missing information.

b) In fact, in 2005, because of technical problems with grants online, a further five days was given.

c) Any correspondence received from an applicant after the ten-day period, but before a committee held its pre-allocation meeting, would be considered.

I do not accept the defendants' argument on this point.

[28] First, it is inconsistent with Ms Woodley's evidence that, under the new "best grant-making practice" model, an application would be deemed ineligible if required information was not provided.

[29] Second, it is inconsistent with the evidence as to what actually occurred in relation to the Union's two applications:

a) The letters of 22 and 25 August 2005 (set out at [14]) show that before the pre-allocation meeting the Union was advised that because its applications were incomplete, they would not be considered in that year's funding round.

b) Ms Harris, Chairperson of the Auckland Committee, said that it was "common knowledge" that if required information was not received on time, the organisation would be deemed ineligible for funding and no funding would be granted.

c) Ms Taumaunu, Chairperson of the Waitakere Committee said that late applications were not considered because the applicants had gone over the time frame. She said further:

> We needed to get the message through to applicants that Committees needed to immediately begin work on all of the applications that were completed and did not have time to spend chasing up missing information.

d) Mr Howard (the Department's Auckland Committee Adviser) referred to the need for the application process to be consistent throughout the country. This was achieved by the systems set up to deal with applications. He said that the online process labelled applications for

which requested documentation was not received within the ten-day period as "Incomplete" (and therefore ineligible for consideration). He went on to say that the status of "Incomplete" was ratified, in almost all cases, at the local committee meeting. It would only be in extremely unusual circumstances, he said, that the Committee would not confirm the status.

e) The Minutes of the two pre-allocation meetings (set out at [16] and [17]) confirm that the Union's applications would not be considered by the Committee, due to additional information not being received within the "set" or "specified" time frame.

[30] I therefore conclude that the ten-day period was a mandatory requirement. If information were not received within that time, the application would be deemed ineligible, and would not be considered. I accept the Union's argument that this was a rule introduced for the 2005/2006 funding round, and that it was a significant change from the previous procedure.

Was there procedural unfairness?

[31] The Union's key argument was that they were given insufficient notice of the significant change introduced for the 2005/2006 funding round, under which the ten-day period became a threshold requirement: its application would not be considered if information were not received within that period.

[32] I have found that the changes introduced for the 2005/2006 COGS funding round introduced a significant change to the procedure for considering applications for COGS grants. I accept that the past procedure for COGS funding gave rise to a legitimate expectation that that procedure would continue to be followed unless or until adequate notice was given of the significant change. If adequate notice is given of a change in procedure, then the expectation based on past procedure is destroyed.[3]

[3] de Smith, Woolf & Jowell *Judicial Review of Administrative Action* (5th edn), Sweet & Maxwell, London, at 8-063

[33] It is necessary, therefore, to consider what notice was given of the change, and whether in the circumstances of the case such notice as was given, was adequate to meet the requirements of fairness.

What notice was required to be given?

[34] The notice required will be determined by an assessment of what was required for fairness in all the relevant circumstances. The requirements of natural justice depend on the nature of the power being exercised, the effect which the decision may have on persons affected by it, and the circumstances of the particular case.[4]

[35] The circumstances of the present case are that of an application being made for public funds for charitable purposes. While the decisions that the Union's applications would not be considered because they were "incomplete" had a serious effect on the Union, the context is administrative rather than adjudicative. This does not mean that there is no requirement to act fairly, rather that the level of fairness ought to accord with context. It has been noted that:[5]

> Since the purpose of notice is to enable participation, the content of the notice must be such as to allow its recipient to participate fully and effectively in whatever manner is found to be appropriate in the circumstances of the particular case.
>
> …
>
> A key requirement of notice is certainty. … the notice must advise the time, date and location of any hearing, or the closing time …

[36] In the present case, in order for the Union to be "heard" (in the sense of putting its interests before the two Committees), a completed application (including all required information) had to be provided before the end of the ten-day period. The failure to give notice that applications would be deemed incomplete and ineligible for consideration after the ten-day period would essentially deprive the Union of the ability to put its case to the Committees. In this sense, notice of the

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[4] *Birss v Secretary for Justice* [1984] 1 NZLR 513 (CA), at 516

[5] Aronson, Dyer and Groves *Judicial Review of Administrative Action* (3rd edn), Lawbrook Co, Sydney, at 499-500

effect of failing to meet the ten-day period is directly linked to the Union's right to be heard by way of a submitted application before the Committees. Accordingly, the Union needed to be aware of both the rule, and the consequences of not complying with it.

[37] There is some similarity between the issues considered in *SmithKline Beecham (NZ) Limited v Minister of Health*[6] and those requiring determination in the present case. SmithKline Beecham challenged a decision of the Minster of Health in his application of the policy as to funding certain drugs. One of the allegations was that there had been a breach of the duty to act fairly and in accordance with the principles of natural justice, in that the company was not informed of changes to the policy, and this meant that it was not given an adequate opportunity to be heard. At 368 Greig J stressed the importance of notice being given of the change in policy, particularly where the applicant had made previous applications under the former policy:

> … The policy must be known so that a substantial argument about its change can be properly made. Equally, I think, the policy must be known so that the party concerned can make proper submissions as to the application or non-application of it in the particular circumstances. This is all the more important where, as here, the party, SmithKline Beecham, has been, with its predecessors, a frequent applicant in respect of various drugs, and in particular this drug, under a policy which undergoes a substantial change. There must be an absence of fairness if the party, however, innocently, remains in the dark about the change. …
>
> The result is that the submissions by SmithKline Beecham were mounted and pursued on a basis which no longer had the relevance and meaning it had before. They were thus deprived of the full opportunity to state their case to the Department and to the Minister on the basis upon which he was going to decide it.

[38] There is also some similarity between the issues considered in *Fairmont Holdings v Christchurch City*[7] and those in the present case. In *Fairmont Holdings*, the High Court considered legitimate expectation in the context of an application for town planning approval. At 470-471 Holland J said:

> In the circumstances of this case, the plaintiff at the time of lodging its application for town planning approval had a legitimate expectation that the application would be considered under the then existing scheme and that no

[6] *SmithKline Beecham v Minister of Health* [1992] NZAR 357
[7] *Fairmont Holdings v Christchurch City* (1989) 13 NZTPA 461

> change would be introduced to the scheme having the effect of barring or hindering the plaintiff's application without (1) giving the plaintiff precise notice of its intention to consider the initiation of a scheme change, and (2) giving careful consideration to the possible injury or harm to the plaintiff, as against any public interest demanding an immediate scheme change ...

[39] The factual circumstances of these two cases are, of course, different from the present case. In *SmithKline Beecham* the concern was the substantive policy to be applied, and the requirement that there be some consultation as to the policy. Here the concern is as to notice, not consultation. In *Fairmont Holdings* it was the terms of the (then) District Scheme. Here, the Union's concern is as to the underlying unfairness of a unilateral change in policy, without adequate notice being given of the change. However, the underlying concern is common to all three cases.

[40] In this case, the Union had been a regular applicant for funding, and had relied on the informal and flexible procedure that was followed before the 2005/2006 funding round. It had a legitimate expectation that that procedure would be followed until given notice of a change. Such notice was required, so that the Union would not deprived of the opportunity to have its application considered.

[41] I therefore conclude that the Union was required to be given notice that clearly put it on notice that the ten-day period was a mandatory requirement, and that if all required information was not provided within that time, its application for funding would be deemed ineligible for further consideration. In other words, it had to be made clear to the Union that time was of the essence. Without such notice, the Union had an expectation that the past procedure would continue to be followed.

[42] That is not to say that it was not open to the Department and the Local Committees to make changes in the manner in which applications were funding were dealt with. Nor can the Department and the Committees be criticised for introducing changes that would bring efficiency and consistency. Clearly, the Department and the Committees were entitled to come to the view that it was important to impose meaningful time limits for applications for COGS funding. They were entitled to make changes to the procedure to ensure that complete applications were filed so that the Committees did not have to spend scarce time and resources following up applicants.

[43] However, against the background of the flexibility and informality that had prevailed in the administration of the COGS scheme, they were in this instance required to give affected parties notice of the changes, when their effect was to render incomplete applications immediately ineligible.

What notice was given?

[44] The Union argued that it was not put on notice of the consequences of failing to comply with the ten-day period for providing required information.

[45] It is clear that the letters of 1 and 4 August 2005 (set out at [12]) contained no express statement or warning that the application would be ineligible for consideration if the required information were not received within the ten day period.

[46] The defendants argued, however, that notice was given. They referred to:

a) Organisations having been made aware of the 2003/2004 review of the COGS administration process; and

b) The statement in the letters of 1 and 4 August that:

> In order to fully consider your group's application we require the following information to be sent to this office within ten working days.

[47] On the evidence before me, I do not understand there to be any other form of notice given.

Was the notice given adequate?

[48] The defendants submitted that the notice given was adequate. They argued that:

a) The Union in fact had 58 working days (i.e., the application period of 1 June to 29 July, plus the ten-day period, plus the five further days allowed for the technical problems); and

b) Other applicants had provided all required information in time.

[49] I cannot agree that the matters referred to by the defendants constitute adequate notice. Adequate notice required the Union being clearly put on notice of the peril of their applications being deemed ineligible, and not considered for a grant, if all required information were not provided within the specified period. The defendants could not point to any document through the course of the 2003/2004 review process, or in any of the information sent out to community organisations before the 2005/2006 funding round, or in any of the computer-generated correspondence sent to the Union, where such notice was given.

[50] I have noted earlier at [29] that Ms Harris in her affidavit evidence referred to "common knowledge" that the consequence of an application lacking required information was ineligibility for funding. That is, however, inconsistent with Ms Capel's evidence (supported by the Review Report) that the earlier procedure was flexible and informal, and that information was often chased up by the Committees through telephone calls and visits. I therefore cannot accept that there was "common knowledge" as to the consequences of failing to comply with the time limit introduced for the 2005/2006 funding round.

[51] I record also that the defendants in submissions referred to evidence by Mr Howard that the Union had been told (in relation to the Auckland application) in a telephone call on 18 August 2005 that it was late in providing information and that if the information were not provided, it was "likely the application would be withdrawn". However, when the record of this conversation is examined, it is clear that it does not refer to the Union's COGS application.

[52] Accordingly, I accept the Union's submission that adequate notice was not given that the rules had changed, and that the consequence of failure to provide required information within the ten-day time period would be that the Union's application for COGS funding would be deemed ineligible and not considered. Because of the failure to give notice, the Union was deprived of the opportunity to have its application considered, and as such there was procedural unfairness.

[53] As a post-script on this point, I note that the computer-generated letter sent out for the 2006/2007 funding round specifies the date by which information is to be provided and includes the following sentence:

> Failure to provide the information to this office by the due date will almost certainly result in the Committee considering your application ineligible for this funding round.

Section 27(1) New Zealand Bill of Rights Act 1990

[54] I have found that there was procedural unfairness, resulting from the failure to give notice that failure to provide all required information within the ten-day period would render the Union's application ineligible for consideration. The Union also argued that there was a breach of its right under s 27 of the NZBORA:

> **27 Right to justice**
>
> (1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.
>
> …

[55] The defendants argued that s 27(1) does not apply to the determinations at issue in this proceeding. They submitted that s 27(1) applied to determinations of an adjudicative nature, whereas the determinations in respect of the Union's application for funding were not adjudicative but were:

a) Assessments that its applications were incomplete; and

b) Decisions not to process the applications further

[56] This argument reflected the Court of Appeal's comments as to the meaning of "determination" in *Chisholm v Auckland City Council*[8] at [32]:

> The word 'determination' in its context has an adjudicative connotation. Whatever the width of the phrase 'in respect of' … s 27(1) is not engaged unless the determination is of an adjudicative character. Section 27(1) is not expressed on the basis of a determination which may have some indirect

[8] *Chisholm v Auckland City Council* CA 32/02, 29 November 2002

> general impact on another person's rights etc. … that would widen its scope beyond its purpose, which is primarily to affirm the general rule in relation to the operation of the principles of natural justice.

[57] However, the Union pointed to the discussion of *Chisholm* by Miller J in *Unitec Institute of Technology v Attorney-General*[9] at [159]-[160]:

> [159] It is well established that the New Zealand Bill of Rights Act is to be given a generous and purposive approach … The Act is intended to affirm, protect, and promote the rights and freedoms contained in it.
>
> [160] That being so, care must be taken to avoid treating the references in *Chisholm* to determinations of an "adjudicative character" as a substitute for the language of the statute. In *Chisholm* the Court was concerned to avoid extending obligations of natural justice to a decision to which they were unsuited. … The High Court had held that the council's action did not determine the plaintiff's rights: indeed the plaintiff exercised them by applying to the Environment Court for an enforcement order. The Court of Appeal held that it was not the purpose of s 27(1) to widen the operation of the principles of natural justice. Conversely, there is no policy reason why s 27(1) ought not to apply to a decision to exercise a statutory power or statutory power of decision of a kind that ordinarily would require the observance of natural justice.

[58] In *Unitec*, Miller J held that there was a breach of Unitec's rights to natural justice, where the Minister of Education had instructed the New Zealand Qualifications Authority to stop processing Unitec's application for university status. He also held (at [163]) that there was a breach of Unitec's right to natural justice under s 27(1).

[59] In my view, Miller J was right not to read the Court of Appeal's comments in *Chisholm* as meaning that in order for s 27(1) to apply, the determination must be "adjudicative" in the traditional sense. The wording of the section, in particular the reference to "any other public authority" with the power to make a determination in respect of a person's "rights, obligations, or interests protected or recognised by law" does not support the limitation sought by the defendants. The better reading of s 27(1) is that there is no reason why decisions traditionally subject to the requirements of natural justice should not also be subject to s 27(1).

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[9] *Unitec Institute of Technology v Attorney-General* [2006] 1 NZLR 65

[60] In the present case, the relevant determination (making compliance with the ten-day period for providing required information mandatory) was one which affected key interests of the Union. The determination deprived it of the opportunity for its application for funding to be considered. I therefore conclude that there has been a breach of the Union's right to natural justice under s 27(1).

Abuse of process/illegality

[61] The Union also pleaded that there had been an abuse of process, or illegality, in that the Department's advisors to the Committees determined that the Union's applications were incomplete, and therefore ineligible for consideration, before the Committees considered them, and that the Committees then adopted the inflexible rule as to incomplete applications, and did not consider the Union's applications on their merits. Essentially, the Union contends that the Committees fettered their discretion to consider incomplete applications by applying a mandatory and fixed policy determined by the Department.

[62] In response, the defendants argued that the determination that the Union's applications were incomplete (which they described as an assessment) was not the final arbiter. All incomplete applications were listed in the schedule of applications provided to the local Committees at the pre-allocation meetings. Mr Howard (the Auckland advisor) and Ms Pritchard (the Waitakere advisor) said in their affidavits that incomplete applications were tabled, together with any correspondence received, at the meetings. Committee members then voted on a motion that incomplete applications not be considered for the funding round. Thus, they had a discretion to allow incomplete applications to be considered.

[63] Mr Howard said that "in almost all cases" the Committees confirm the advisor's assessment – it would only be in "extremely unusual circumstances" that a late application would be considered.

[64] G.D.S Taylor, in the text *Judicial Review: A New Zealand Perspective*[10] notes at 344:

[10] G.D.S. Taylor *Judicial Review: A New Zealand Perspective* Butterworths, Wellington, 1991

> Reliance on policy is not unlawful. What is unlawful is the blind following of policy. The normal rule is that each case must be considered on its own merits; a claim that the policy should not be followed in a particular case must be considered. This does not mean that an exception to policy must be made, but only that the authority should be open to persuasion in deciding that.

So, as noted earlier, the Committees are entitled to apply fixed time limits (subject to giving notice), and their ability to impose meaningful time limits and processes (again, subject to notice) should not be unduly limited. However, they must not close their minds to potential exceptions in worthy cases on the basis of the policy.

[65] As noted at [18], Ms Capel (President of the Union) had sent a letter dated 27 August 2005 to Mr Howard, noting that Officers of the Union had been overseas, or ill, and unable to sign documents required to be provided. The letter was clearly intended for both the Auckland and Waitakere Committees, and asked that the Committees consider the Union's applications for funding. That letter was received by Mr Howard on 30 August 2005.

[66] It is apparent from the Minutes of each of the pre-allocation meetings that the motion that "incomplete" applications not be considered was passed in respect of all applications so assessed. In the case of the Auckland Committee, the Minutes noted that a letter had been received from the Union (and one other applicant), asking the Committee to "reconsider the decision and include their applications in this year's funding round". There is no record of any specific consideration given to the letter.

[67] In the case of the Waitakere Committee, there is no reference to any correspondence from the Union, although Ms Pritchard said that if any had been received before the meeting, it would have been tabled. It would seem at least likely that if the letter were not received by Mr Howard until 30 August 2005, it would not have been received by Ms Pritchard before the Waitakere meeting on 29 August.

[68] I am satisfied that both the Waitakere and Auckland Committees, at their pre-allocation meetings, failed to exercise their discretion as to whether the Union's application should be further considered. Rather, they simply followed the "Online application" procedure established by the Department.

Remedy

[69] The final issue for consideration is what remedy the Union is entitled to, if any. In its initial statement of claim the Union sought declarations and an order that the applications be reconsidered. However, there are no funds remaining from the 2005/2006 funding round, so an order for reconsideration would be futile. Accordingly, in its amended statement of claim the Union claims damages and/or compensation.

[70] The only possible avenue for an award of damages is under the NZBORA. I have found that there was a breach of the Union's right under s 27(1). The possibility of an award of damages for breach of the NZBORA was recognised by the Court of Appeal in *Baigent's Case*.[11] Damages are clearly a discretionary remedy, and may be refused where there is another more effective remedy. There can be no expectation of compensation as of right.

[71] The Union argued that it is entitled to an award of damages as the breach of s 27(1) denied them the chance for their applications to be considered. The Union's long history of being an established provider of services, and of being awarded grants from COGS each year over a 12 year period, made it "highly likely" that a grant would have been made in the 2005/2006 funding round. The Union sought $10,000, as representing the loss of chance with both applications.

[72] The defendants opposed an award of damages, submitting that compensation is not available for a breach of s 27(1) as a matter of course, and that there was nothing exceptional about the present case so as to make compensation an appropriate remedy.

[73] In *Attorney-General v Udompun*[12] at [168]-[169] the Court of Appeal held that compensation should not be available for breaches of natural justice as a matter of course:

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[11] *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667
[12] *Attorney-General v Udompun* [2005] 3 NZLR 204

> [168] … In our view, there is force in the proposition that compensation should not be available for breaches of natural justice as a matter of course. It should not lightly be assumed that BORA has overtaken the existing law on administrative law damages to this extent.
>
> [169] In normal circumstances it would be a sufficient remedy for a breach of natural justice to have the impugned decision set aside, a declaration that it was not properly made and, if possible, an order to make the decision anew. Where there already is an effective remedy, BORA compensation is not needed …

[74] However, in *Percival v Attorney-General*[13] John Hansen J noted at [51]-[52] that the comments in *Udompun* did not mean that monetary compensation is never available:

> [51] Recent comments from the Court of Appeal in [*Udompun*] affirm that monetary compensation for breaches of the s 27 right to natural justice is likely to be appropriate only in a limited number of cases. …
>
> [52] I do not think that this can be read to mean that monetary compensation is never available. Instead, it will be in circumstances only where there is no other appropriate remedy that compensation can be awarded. …

[75] In the present case, the breach of natural justice deprived the Union of the opportunity to press its case for the allocation of a grant in the 2005/2006 funding round. However, I am not satisfied that it is appropriate to make an award of damages.

[76] There are in this case good reasons not to exercise the Court's discretion to award damages. I accept that the breach was not egregious. It occurred in the context of a legitimate attempt to improve the efficiency and functioning of the COGS scheme. In the 2006/2007 funding round, clear notice is given of the importance of the ten-day requirement. I also accept that the interest at stake was the loss of the ability to apply for a grant from limited public funds (its success in so applying, and in the amount of any grant, should it be awarded, being matters of chance), not individual liberty.

[77] Further, I am satisfied that the cases where damages have been awarded under NZBORA, the circumstances are materially different from those applying

[13] *Percival v Attorney-General* [2006] NZAR 215

here. For example, in *Upton v Green (No 2)*[14] damages assessed at $15,000 were awarded to the plaintiff, who had not been given the opportunity to be heard at a sentencing hearing, and was sentenced to three months' imprisonment. The award of damages was assessed as reflecting the plaintiff's loss of chance in not having been able to put his case, and the reasonable possibility that had be been heard, a lesser sentence would have been imposed.

[78] In *Binstead v Northern Region Domestic Violence (Programmes) Approval Panel*[15] the plaintiff sought judicial review when the approval for programmes he owned and managed was not renewed. A consent order was made that there had been a breach of natural justice and the defendant agreed to reconsider his application. However, it failed to do so for a period of some months. The plaintiff was awarded damages to compensate for "some modest part" of his claimed loss of income.

[79] Arguments of natural justice and fairness are intended to promote better administration and decision-making. I do not consider that those purposes would be served by awarding damages in the present case. I have concluded that a declaration that there has been a breach is sufficient.

Result

[80] There will be a declaration that the defendants breached the Union's rights to natural justice, at common law and pursuant to s 27(1) of the NZBORA.

[81] The Union is entitled to costs. There does not appear to be any agreement as to the appropriate costs category noted in any of the pre-trial memoranda filed. 2B would seem to apply.

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[14] *Upton v Green (No 2)* (1996) 3 HRNZ 179
[15] *Binstead v Northern Region Domestic Violence (Programmes) Approval Panel* [2002] NZAR 865

[82] If counsel are unable to agree on costs, memoranda are to be filed within 14 days (on behalf of the Union) and a further 14 days (on behalf of the defendants) including advice as to whether the matter requires a hearing or may be determined on the papers.

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Andrews J