

Our Ref: 3
Contact: S G

28 May 2014

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Auckland 1

Dear Mi

Ombudsmen Act complaints: Health and Disability Commissioner

I refer to two separate complaints you have made against the Health and Disability Commissioner ('HDC') regarding decisions made by the HDC. You submitted the first complaint to this Office on 13 November 2013 about HDC file C11HDC and the second complaint was submitted on 16 December 2013 about HDC file C12HDC.

Please accept my apologies for not being in a position to progress consideration of your complaints sooner. I have discussed both complaints in my response.

You have claimed that the HDC's assessment of your complaints to that agency was unreasonable. The first complaint related to services you received from two (CAD) counsellors employed by the Waitemata District Health Board ('WDHB') and the second related to services received from Dr a WINZ commissioned designated assessor. You claim that the HDC decided to take no further action on your complaints because it was under financial constraints and had an increased workload. You consider that an Ombudsman's investigation is justified because there is no other way for you to resolve your concerns. You have asked that I review the HDC's decision-making processes and then make various recommendations to the HDC, under section 22(3) of the Ombudsmen Act 1975.

Ombudsman's role

I should first explain the role of an Ombudsman

An Ombudsman is not an appeal authority against decisions made by the HDC. While Ombudsmen have authority to investigate decisions made by the HDC relating to a "matter of administration", an Ombudsman's review of bodies such as the HDC, is limited. The HDC was established by Parliament as specialist reviewer of issues concerning complaints relating to the health and disability services sector. An Ombudsman's role when considering complaints about the HDC is limited to considering the fairness and

effectiveness of the process followed by the HDC, the specialist decision-maker, and to determine whether the decision arrived at is one that is reasonably open to the decision-maker to have made.

By statute the HDC is the only authority capable of determining whether a health professional has breached the Code of Health and Disability Services Consumers' Rights ('the Code'). No other authorities, including a coroner, can make determinations about the Code.

It follows that an Ombudsman cannot substitute his/her view on the question of whether breach of the Code has occurred (indeed this is a general limitation on the Ombudsman). I am therefore unable to 'investigate and provide an opinion' on the standard of treatment you received from _____ counsellors or Dr _____. This, as I explained, is a matter for the HDC to determine. What I may do is to consider whether the HDC, in forming any view (in this case to take no further action on either complaint) followed processes that were fair and reasonable and resulted in decisions that were reasonably open to the HDC to have made.

The provision of the Ombudsmen Act 1975 that you refer to, section 22(3), only comes into operation if the Ombudsman concludes (following an investigation) that an agency complained about has acted apparently contrary to law, unreasonably or in one of the other ways identified in section 22(1) or (2). Any recommendation made following an investigation, is non-binding.

The first complaint

The main concern you have about HDC's investigation process is the HDC's alleged failure to consider all the material and evidence you originally submitted on 8 August 2011. It is clear that when you submitted this large volume of material that the HDC's computer system 'froze' and that the HDC asked you to provide a summary of your concerns. It is also apparent that when the HDC first asked the Waitemata District Health Board ('WDHB') for a report on your complaint, the HDC advised the DHB that your "complaint is of an unusual length and complexity, and, as such, rather than responding in detail to each individual issue raised, it may be helpful to instead provide a general overview of his care".

However it seems to me that the HDC was reasonable to ask you to provide a summary of your concerns and to advise the WDHB that not every point had to be addressed – given the very large number of issues raised. The HDC went through the material you provided and sought responses the HDC deemed relevant to his consideration of the complaint. You will be aware that the HDC has discretion to determine how to conduct his assessment and to seek information as he considers necessary for the purpose.

When you were not satisfied with the HDC's initial decision about your complaint, the HDC agreed to review the file and gathered further information from WDHB. You were aware at that time that the HDC's "examination of your complaint was based on the revised version, dated 9 August 2011, along with the attached documentation" (HDC's

letter dated 16 May 2012 refers). Furthermore, it is apparent that the HDC considered all the emails you sent in early 2012, most of which contained large attachments. It was at that stage that the HDC advised that it did not have the resources to process the amount of material you were sending in and you were asked "out of consideration to our staff, and with an interest in ensuring that important points are not overlooked, it would be helpful if you could keep any future correspondence as concise as possible".

Later, in 2013, the file was reviewed for the third time. On 14 June 2013 the Deputy HDC, Ms Theo Baker advised that following this review, no further action would be taken on the complaint. She noted that all relevant information pertaining to your complaint had been considered and that further correspondence from the HDC on this complaint would not be appropriate. However the HDC did respond to your further correspondence. The HDC's Associate Commissioner, Legal and Strategic Relations, Katie Elkin explained in a letter dated 5 October 2013 that the HDC can decide to take no further action on a matter and that this discretion is exercised "only after careful assessment of all relevant information".

I appreciate that you remain dissatisfied with the HDC's decision to take no further action on your complaint but it is not clear to me that in making that decision, the HDC failed to take all the information into account. I note your concerns that by "summarising" material you presented to the HDC that you felt the HDC ignored some salient facts. However, given the amount of material you submitted to the HDC, it seems reasonable for the HDC to have summarised key points, in order to assess the material efficiently and fairly. The fact that the WDHb was not asked to consider every detail presented in the hundreds of pages you submitted to the HDC does not indicate that the relevant material was not considered by the HDC. There is nothing in the material I have seen to indicate that the HDC's decision was based on "inadequate consideration of the facts".

You will also be aware that under section 14(1)(m) of the Health and Disability Commissioner Act 1994 ('the Act'), that the HDC may "gather such information as in the Commissioner's opinion will assist the Commissioner in carrying out the Commissioner's functions under this Act". The HDC is under no obligation to interview witnesses.

The second complaint

I understand that between 30 June and 2 July 2012 you lodged a complaint about alleged breaches of professional conduct by a WINZ designated assessor, Dr David [redacted] from the [redacted] Health Centre. The material submitted included the initial letter and 10 subsequent emails, each with attached PDF documents. Following receipt of this material, the HDC asked Dr [redacted] to consider your concerns. The Deputy HDC, Ms Theo Baker, assessed the complaint and concluded that in accordance with section 38(1) of the Act, no further action would be taken. In making her decision, she considered both the information you provided and Dr [redacted] comments in response to your complaint. Reasons for her decision were provided.

You advised the HDC that certain major points of your complaint had not been addressed or responded to at all, and that Ms Baker's decision was "unacceptable". Between 25 and

27 April 2013, you submitted considerable correspondence to the HDC about your concerns. Ms Elkin wrote to you in September 2013 advising that the HDC's initial decision stood. When you complained again, Ms Elkin responded on 25 November 2013 setting out the reasons why there was no basis to reopen the file.

However you have complained to this Office that the HDC:

- failed to provide relevant information to Dr [redacted] and to ask him to comment on certain issues raised in your complaint;
- failed to interview third parties you identified as key to your complaint;
- unreasonably made comments concerning the lapse of time between the submission of the complaint and the events being complained about when you had been unable to make your complaint to the HDC earlier because related matters had been the subject of a Judicial Review hearing;
- Was reluctant to investigate a complaint against a non-treating doctor (who still falls within HDC jurisdiction); and
- May not have considered its obligations under the UN Convention concerning persons with disabilities when considering your complaint.

With regard to the first issue, the HDC has advised me that your entire 20-page letter of complaint was sent to Dr [redacted] on 18 September 2012. However the HDC notes that it is unclear whether the substantial documentation attached to the complaint letter had been sent. A later follow-up communication with Dr [redacted] occurred on 22 November 2012 when the HDC asked him to respond particularly to the issue about communication. It is for the HDC to determine what information he requires for the purpose of his assessment of a complaint.

On the second matter, as noted previously, the HDC has discretion under section 14(1)(m) of the Act to gather such information as he/she sees appropriate.

In relation to the third issue, I note this matter was referred to in Ms Baker's 24 April 2013 letter when she explained that further investigation into Dr [redacted]'s style of communication was contrary to yours and that "further investigation into this matter will [not] provide any new information that will help resolve this discrepancy, especially given the amount of time that has elapsed since your assessment". It seems to me that this was not an unreasonable comment to have made in the circumstances, given the inherent difficulty for parties to recall discussions which took place some years ago. It is noted that notwithstanding the passage of time, the HDC assessed your complaint.

Regarding the fourth issue, Ms Elkin explained in her letter of 17 September 2013 that although complaints against non-treating doctors contracted to a third party may fall within the commissioner's jurisdiction under the Act, in this case, most of the concerns you had raised against Dr [redacted] related to processes and policies of WINZ and of the

Medical Appeals Board, which are outside the HDC's jurisdiction. I see that Ms Elkin also noted that even where jurisdiction can be established, the Act gives the HDC (and Deputy HDC) a wide discretion to take no further action under section 38.

Finally, there is nothing in the HDC's correspondence to indicate that the HDC did not take into consideration any obligations it had to you as a health and disability consumer, under the Act.

I further note that the HDC made no finding about Dr [redacted]'s record keeping as you claim.

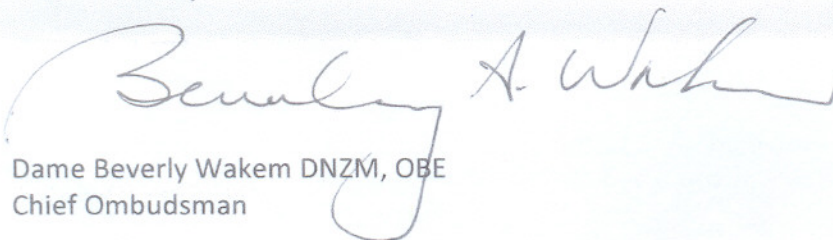
Conclusion

At this stage I do not intend to commence Ombudsmen Act 1975 investigations into either of the complaints you have made to this Office. I appreciate that you will be disappointed with this decision but I hope you will understand that in the absence of any indication that the HDC's decision-making processes themselves were unreasonable or defective, it is difficult for an Ombudsman to investigate a complaint against the HDC.

I should also add that even if I had concluded that there were grounds to investigate your complaints and went on to uphold either or both complaints, the most likely remedy would be for the complaints to be referred back to the HDC for the HDC's consideration. However, as I have already noted, the HDC would not be bound to follow an Ombudsman's suggestion or even an Ombudsman's recommendation made pursuant to section 22 of the Ombudsmen Act 1975. Furthermore, if the HDC did agree to review the files afresh (by either Ms Baker or Mr Hill) there is always the possibility that the same findings would be open to the HDC to make.

In light of this I have now closed this file and I regret that I am unable to assist you with these matters.

Yours sincerely



Dame Beverly Wakem DNZM, OBE
Chief Ombudsman