[2016] NZSSAA 104

Reference No. SSA 39/14 &
SSA 40/14

IN THE MATTER of the Social Security Act 1964

AND

IN THE MATTER of a proposed appeal by way of case stated to the High Court by **XXXX** of XXXX

DECISION OF THE CHAIRPERSON OF THE SOCIAL SECURITY APPEAL AUTHORITY

[1] The Authority issued a decision in relation to an appeal by the appellant on 27 February 2015 under the reference [2015] NZSSAA 010. The appeal to the Authority related to the calculation of the appellant's disability costs and therefore the amount of Temporary Additional Support payable to her from 20 November 2013. These issues were also dealt with by the Authority in decision numbers [2013] NZSSAA 96 and [2014] NZSSAA 96.

[2] The issue in this particular appeal was whether or not certain disability costs should be assessed to be a greater amount than the amount allowed. The Authority was not persuaded that they should. It dismissed the appeal.

[3] The appellant has lodged an appeal by way of case stated in respect of the Authority's decision.

[4] Appeals from the Authority's decisions are limited to appeals by way of case stated on a question of law. There is no general right of appeal.

[5] In accordance with the provisions of the Social Security Act 1964, the appellant was requested to lodge a draft case stated which includes the questions the appellant would like to put to the High Court.

[6] The appellant first lodged a draft case stated with the Authority on 11 March 2015. In August 2015, the appellant was advised that the Authority was not satisfied

that the draft case stated posed any question of law arising from the decision of the Authority.

[7] A further draft case stated was lodged with the Authority on 16 August 2016 containing four questions.

[8] On 1 November 2016, I issued a minute explaining why I did not consider the questions posed in the new draft case stated to be questions of law which should be stated to the High Court. The appellant has been given an opportunity to respond. Two questions have now been proposed to replace the questions in the earlier draft case stated.

[9] In a recent High Court decision: *Lawson v Chief Executive of the Ministry of Social Development*,[1] the Court noted the following:

(i) The Authority is not obliged to recognise all questions of law proposed as justifying the stating of a case for the decision of the High Court.

(ii) The Authority must retain final control over a case stated and ensure that a case is confined to errors of law alone.

(iii) Not every legal issue is to be submitted to the High Court. Where some have obvious answers then there is no question to refer to the Court.

(iv) Questions of law must raise some tenable basis for suggesting an error has been made.

[10] In addition, I also note that it is important that a party intending to state a case be precise in identifying any potential errors of law.[2]

[11] Some of the applicable principles and factors as to what constitutes a question of law which should be put to the High Court were conveniently summarised by the District Court in *O'Neill v Accident Compensation Corporation*:[3]

(i) The issue must arise squarely from the decision challenged and not from non-material comments.

(ii) The contended point of law must be capable of bona fide and serious argument.

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1 [2016] NZHC 910.
2 *Hoe v Manningham* City Council [2011] VSC 37.
3 DC Wellington Decision No. 250/2008, 8 October 2008 at [24].

(iii) Care must be taken to avoid allowing issues of fact to be dressed up as questions of law.

(iv) Where an appeal is limited to questions of law, a mixed question of law and fact is a matter of law.[4]

(v) A decision-maker's treatment of facts can amount to an error of law but only where there is no evidence to support the decision, the evidence is inconsistent with and contradictory of the decision, or the true and reasonable conclusion on the evidence contradicts the decision.

(vi) Whether or not a statutory provision has been properly construed or interpreted and applied to the facts is a question of law.

First Proposed Question

Is the Benefit Review Committee required to abide by the rules of natural justice?

[12] This question arises from concerns about the practice of the Ministry of Social Development using anonymous Benefits Review Committees in certain circumstances. Mr Fraser has formulated this question suggesting that the Appeal Authority should seek clarification of this issue from the High Court.

[13] In the first instance, a question by way of case stated to the High Court must arise out of the determination of the Authority. In this case, the Authority made no determination in relation to the processes of the Benefits Review Committee.

[14] The Authority has on a number of occasions found that the principles of natural justice do apply to Benefits Review Committees. There appears to be no dispute regarding the matter.

[15] Hearings before the Authority are *de novo*. As a result, any defects in the Benefits Review Committee hearing process are immaterial to the Authority's determination of the matter to which the appeal relates.

[16] The jurisdiction of the Authority is limited to decisions of the Chief Executive which have been confirmed or varied by a Benefits Review Committee. The processes of the Benefits Review Committee are not decisions of the Chief Executive.

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[4] But not where the law has been correctly understood and subsequently applied: *Bryson v Three Foot Six* [2005] 3 NZLR 733 (SC).

[17] The Authority is not obliged by the provisions of the Social Security Act 1964 to comment on the processes of Benefits Review Committees.

[18] For these reasons, I am not satisfied that the appellant's proposed first question is a question which should be put to the High Court.

[19] In the event that the appellant's advocates wish to challenge the Benefits Review Committee process, then the appropriate course is to lodge judicial review proceedings in the High Court.

Second Proposed Question

In an appeal to the Social Security Appeal Authority from the Benefits Review Committee hearing what material is the Ministry required to supply to the Authority?

[20] I understand that this question arises from the appellant's contention that the Ministry had not included all of the information in its possession, including information provided to the Benefits Review Committee about the appellant's claims. I note that at the hearing before the Authority it was submitted that the Benefits Review Committee had not been provided with all the documentation that had been sent to the Ministry.

[21] Crown counsel have already acknowledged the obligation on the Ministry to provide all relevant documentation under s 12K(4) of the Act therefore there would appear to be no dispute about the issue.

[22] Furthermore, the Authority notes that there is an obligation on an appellant before the Authority to produce any relevant evidence and information she wishes to be taken into account. Failure by a party to adduce evidence available does not constitute an error of law: *Campbell v Chief Executive of the Ministry of Social Development*.[5]

[23] At the relevant time, the Authority understands the appellant routinely faxed the information she provided to the Ministry. It is likely that she would have copies of all relevant information. If there were gaps in the information provided by the Ministry, then it is highly likely that it was within the power of the appellant to provide that information.

[24] The Authority expressed its concern about the appellant's claims to have provided information to the Ministry and the quality of the information provided by the appellant to the Authority in decision [2014] NZSSAA 96 at paragraphs [25] and [27].

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5 [2013] NZHC 3381.

[25] In this case the Authority reviewed the material accompanying the Ministry's report. It also considered the list of costs and submissions put forward by the appellant's advocate. It based its finding on that information.

[26] The appellant has not identified precisely what documentation she alleged was missing from the Section 12K Report which was relevant to this appeal.

[27] There is no indication of how the alleged information which the appellant claims was not before the Authority was relevant.

[28] I note this question appears to be a question of clarification rather than a question of law. The Authority can only state questions relating to errors of law arising from the determination of the Authority.

[29] I am not satisfied that the question posed constitutes a question of law which should be put to the High Court.

[30] Finally, I note that two cases have already been stated to the High Court in relation to the appellant's disability costs and Temporary Additional Support in respect of the same period to which this appeal relates. It would be an abuse of process to lodge a further case stated in these circumstances.

[31] I am not satisfied that the appellant has proposed any questions of law in this case which should be put to the High Court. I am not therefore prepared to state a case to the High Court in relation to this matter.

DATED at WELLINGTON this 9th day of December 2016

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Ms M Wallace
Chairperson