[2018] NZSSAA 003

Reference No. SSA 028/16

IN THE MATTER of the Social Security Act 1964

AND

IN THE MATTER of an Appeal by **XXXX** of **Dunedin** against a decision of The Social Security Appeal Authority

IN THE SOCIAL SECURITY APPEAL AUTHORITY

DECISION
NO CASE ON APPEAL TO BE STATED

Background

[1] It appeared that the appellant filed a notice of appeal in the Dunedin Registry of the High Court, served it on the Chief Executive, and delivered it to the Authority. He then submitted a draft case on appeal.

[2] The Authority issued a direction on 18 July 2017 identifying why the draft case was patently non-compliant; and that it did not identify any question of law that had a tenable basis for suggesting the Authority had made an error in its decision.

[3] That direction set out the requirements to advance an appeal, and gave the appellant an opportunity to file a draft case stated that did comply with the Social Security Act 1964 and the High Court Rules 2016.

[4] It suffices to observe the draft case on appeal failed to engage with the decision of the Authority, and instead pursued other matters. The Authority's decision was a factual one that the appellant accessed funds and gains that disentitled him to a benefit. There is no general right of appeal, instead a limited right of appeal to the High Court on points of law. The draft case did not raise a question of law relating to that finding.

[5] The Authority allowed time for the parties to respond to the indication from the Authority regarding the merits of the draft case on appeal.

The Chief Executive's response – a procedural issue

[6] The Authority's direction contained a statement regarding the correct procedure for commencing an appeal. Central to that process is the obligation to file a notice of appeal in the High Court at Wellington, and lodge a copy with this Authority.

[7] As the issue is separate from the merits of the draft case stated, I will address that issue first.

[8] In *Crequer v Chief Executive of the Ministry of Social Development* [2015] NZHC 1602, Gendall J set out the requirement to file a notice of appeal in the High Court at Wellington. He stated:

> [15] The time frame set by r 21.5 is 20 working days from the date of the decision. In this case, the date set by the Social Security Act, namely 14 days, plainly prevails.[1] Each **notice of appeal** is required to specify the decision appealed from (or relevant part thereof), the error of law alleged, the question of law or fact requiring resolution and the relief sought.[2] Rule 21.7 sets out the principles applicable to determining **where the notice of appeal is to be filed**. However, in this case s 12Q(6) expressly specifies the High Court at Wellington as the place of filing. (emphasis added)

[9] Counsel for the Chief Executive submitted this Authority should depart from the view that an appellant should file a notice of appeal in the High Court. They said:

> The reference to "filing" in paragraph [15], to which the Authority refers, is to the Chairperson of the Authority filing the settled case, not the appellant filing the notice of appeal.

[10] That could only be true if Gendall J failed to recognise the difference between a case stated and a notice of appeal, and twice used the wrong term. Aside from the implausibility of that proposition, it is perfectly clear Gendall J did understand what he was referring to, given r 21.5 and 21.7 unambiguously refer to the notice of appeal and he referred to those rules in relation to notices of appeal. He went on to discuss r 21.9 in relation to the contents of the case on appeal, again referring to the appropriate rule. Gendall J took the view that the requirement to file the case on appeal in the Wellington Registry of the High Court in s 12Q(6) implied that was also the registry for filing the

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1 Footnote in quoted text: "It is important to observe that the High Court Rules cannot override the express provisions of the Social Security Act; to the extent there is a difference, the provisions of the latter must prevail "

2 Footnote in quoted text: "Rule 21.6: *Crequer v Chief Executive of the Ministry of Social Development* [2012] NZHC 2575, [2012] NZAR 951."

notice of appeal. It is unsurprising both the notice of appeal and the case on appeal would be filed in the same registry.

[11] Accordingly, I find no merit in this inauspicious submission from counsel for the Chief Executive. This Authority is required to follow decisions of the High Court, the decision is not *per incuriam*, as counsel for the Chief Executive imply.

[12] I note counsel for the Chief Executive also referred to *Cook v Chief Executive of the Ministry of Social Development* [2016] NZHC 1892. That case is not relevant, it concerns an attempt to progress an appeal where the appellant filed a notice of appeal in the High Court, but the chairperson of the Authority declined to state a case. The Court did not suggest the notice of appeal was inappropriate, instead it considered and agreed with the decision not to state a case.

[13] More relevantly, counsel for the Chief Executive stated that in fact the notice of appeal has not been filed in the High Court. They stated:

> … on 10 July 2017, the Christchurch Registry of the High Court informed the appellant it was returning the appellant's notice of appeal …

[14] Counsel for the Chief Executive provided no submissions on the merits of the draft case on appeal, and was not required to do so as the Authority had indicated the draft case was patently defective.

The appellant's response

[15] Counsel for the appellant responded to the Authority's directions, and replied to the submissions from counsel for the Chief Executive.

[16] She responded to the issue of filing the notice of appeal saying she had filed the document, but did not dispute that the High Court rejected it.

[17] In terms of the substantive issues counsel for the appellant failed to address the substance of the issues raised in the Authority's directions, and essentially reiterated the original position. She did provide an amended draft case on appeal, but it did not address the issues of substance raised by the Authority.

Discussion

Procedural issue

[18] In the absence of evidence that the appellant has successfully filed a notice of appeal in the High Court, I must conclude this appeal has not been commenced. If that is the case, then only the High Court can

give permission to commence the appeal out of time. Section 12Q(9) of the Act provides:

> The court or a Judge thereof may in its or his discretion, on the application of the appellant or intending appellant extend any time prescribed or allowed under this section for the lodging of a notice of appeal or the stating of any case.

[19] There is no corresponding power given to this Authority. However, where there has only been a misapprehension of the proper process, this Authority would usually settle a case on appeal. That course allows the High Court to readily see the merits of the grounds of appeal, and accordingly assess one of the factors likely to be relevant when considering an application to bring an appeal out of time. Of course, the decision whether to extend time would lie with the High Court.

[20] Accordingly, while I am satisfied it appears the appeal has not been commenced, I will consider the merits of the draft case on appeal.

The principles this Authority is to apply to settling a case on appeal

[21] Unfortunately, there have been many occasions when unmeritorious appeals have been brought from this Authority's decision to the High Court. Accordingly, in *Lawson v Chief Executive of the Ministry of Social Development* [2016] NZHC 910 the High Court emphasised it is necessary to ensure that there is proper compliance with the appeal process, and the restrictions on matters subject to appeal are observed.

[22] Dobson J made these specific observations in the *Lawson* case:

> [122] The extent of questions posed in these three appeals exemplifies a matter of some concern to the Court. This arises out of the volume of such cases stated and the inclusion of questions that either raise entirely well-settled and conventional applications of the law where inconsistent applications of the settled law are untenable, or contrived formulations of questions that might arguably constitute questions of law but really masquerade as a vehicle for attempting to re-argue factual findings.

[23] As Dobson J noted the High Court had previously reviewed the process for commencing appeals, and determined this Authority must control the process. He observed:

> [124] The Authority is not obliged to recognise all questions of law proposed as justifying the stating of a case for the decision of this Court. I respectfully adopt the careful analysis of the context and mode of working of s 12Q reflected in the Gendall J's judgment in *Crequer v Chief Executive of the Ministry of Social Development*. As

> that judgment demonstrates, the Chair of the Authority must retain final control over a case stated and ensure that a case is confined to errors of law alone and that such issues are genuinely in contention between the parties. 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.
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> [125] I respectfully urge that the Authority exercise the requisite rigour in requiring applicants for the stating of a case to justify the gravamen of their concern as raising a genuine question of law, and that such questions of law raise some tenable basis for suggesting an error has been made.

[24] It is accordingly necessary for this Authority to ensure that those disciplines apply when persons seek to have this Authority lodge a case stated appeal with the High Court. In the *Crequer* case Gendall J observed:

> [29] I think that once this issue is contextualised, it becomes apparent that stating a case is a judicial act. While s 12Q(1) provides the parties a right of appeal by way of case stated, it is limited to questions of law. It is also telling that this right of appeal is qualified by the subsequent provisions, which variously require the draft case to be referred to the secretary of the SSAA, and the chairman of the SSAA. The chairman has, on the plain words of the Act, final control of the case. As s 12Q(6) provides:
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> > The Chairman shall, as soon as practicable, and after hearing the parties if he considers it necessary to do so, settle the case, sign it, send it to the Registrar of the High Court at Wellington, and make a copy available to each party.

[25] It follows that I must on that basis evaluate the draft case stated, considering the content and particularly the question of law posed. Counsel for the appellant was put on notice of the Authority's concerns regard the merits of the question of law posed. Accordingly, this is a final determination.

The decision appealed from

[26] When considering the proposed question of law, it is necessary to first consider the decision under appeal.

[27] The case concerned an allegation that the appellant had received income, or deprived himself of income, which disqualified him from receiving a benefit which he claimed by not accurately reporting his circumstances.

[28] The Ministry called evidence regarding business activity conducted by the appellant and financial transactions between him and a company. The Ministry claimed that the appellant received money and

non-monetary gains from those sources which disentitled him to benefits that he claimed under the Social Security Act 1964. The appellant did not give evidence regarding the allegations against him.

[29] The Authority found all the witnesses for the Ministry were credible and well qualified to give the evidence they gave. Furthermore, counsel for the appellant did not put in issue the key evidence given by the chartered accountant who gave evidence for the Ministry. She gave the following evidence:

[29.1] The appellant used a vehicle, claimed reimbursements of private expenses, and accessed funds.

[29.2] She quantified the items that were defined as income for the purposes of the Social Security Act 1964. They included funds and gains accessed from the company, and also the appellant's personal commercial activity.

[29.3] She also identified that the financial statements of the company treated some income as capital.

[30] A technical officer in the Ministry's Fraud Intervention Services Unit gave evidence that the quantum identified by the chartered accountant disqualified the appellant from receiving a benefit. Counsel for the appellant did not put those calculations in issue.

[31] Another Ministry officer gave evidence of transactions where the appellant used company funds for personal purposes.

[32] The Ministry also called evidence from the chartered accountant who prepared the financial statements for the company. He gave evidence regarding discrepancies in the company's financial statements, and the appellant's personal use of company resources.

[33] In its decision, the Authority noted that the appellant failed to answer the evidence relating to his activities, observing at [52]:

> XXXX [the appellant] has had the opportunity of responding after receiving notice of the information, and the potential conclusions. The financial transactions in which XXXX has been engaged are matters where he has alone has a full knowledge of the circumstances at the time. XXXX has elected not to give evidence in person and to proceed with his appeal on a less than comprehensive disclosure of what those circumstances were; and failed to provide a full income analysis for the relevant period.

[34] The Authority concluded:

> It follows, the Ministry has raised a serious concern regarding XXXX's control over [the company], and quantified the extent of apparent profit available in [the company] and from his personal trading. That evidence demonstrated that XXXX apparently controlled [the company] and deprived himself of income by leaving it in the company's hands though it was available to him. It also demonstrated that XXXX received income he did not report.
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> XXXX has largely failed to engage with this evidence, and has not provided any sensible explanation. Accordingly, the evidence of Mr McMillan and Ms Manhire satisfies us that:
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> a) Amounts classified as deductible expenses arising from entertainment, travel, food, clothing and personal use of phone and vehicle fell within the definition of income in the Act.
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> b) [the company] made a profit on some transactions.
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> c) XXXX had access to the profits of [the company].
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> d) XXXX had assets including bank deposits which he did not declare as income when providing the information required by the Ministry to establish his eligibility for benefits.

[35] In short, this was a case where the appellant accessed funds and gains that disentitled him to a benefit and the Authority made a factual decision to that effect.

The question of law proposed

[36] The appellant proposes the following questions of law (in his amended draft case on appeal following the Authority's memorandum regarding the first draft):

> The question of law for the opinion of the Court is whether the Authority is erroneous in point of law and in particular:
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> 1. Whether in holding that the Appellant may have the financial transactions of a company attributed to him as income [and] did the Appeal Authority properly, or at all, apply the corporate entity doctrine?
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> 2. Whether in holding the Appellant may have the financial transactions of a company attributed to him as income did the Appeal Authority properly acknowledge the separate legal ownership and nature of that ownership, of the shares in the company?

[37] The questions are wholly inapt when evaluating the Authority's decision. What the Authority found as a fact, is that the money and gains in issue were not the company's property, because the appellant appropriated the money and benefits for himself. Having made that

factual finding, it followed that under the Social Security Act 1964, they were taken into account for the purpose of assessing the appellant's entitlement to a benefit.

[38] The Authority found:

[38.1] The appellant personally engaged in commercial activity and failed to calculate the income produced (decision at [54]).

[38.2] The appellant also in fact controlled the company in issue and deprived himself of income by leaving it in the company's hands (decision at [60]).

[38.3] The appellant personally benefitted from the company paying for entertainment, travel, food, clothing, telephone and vehicle expenses which he used (decision at [61(a)]).

[38.4] To the extent the company made profits the appellant had access to them and used the company as a repository for those funds (decision at [61(c)]).

[38.5] The appellant failed to declare income to the Ministry when it assessed his entitlement to benefits (decision at [61(d)]).

[39] The proposed questions of law are misconceived. In its decision, the Authority pointed out corporate personality and control of the company were of little relevance (decision at [55] to [57]). However, it did find the appellant exercised actual control over the company and assets held in the company's name (decision at [60]). The Authority's conclusions turned not on "attributing the financial transactions of a company to [the appellant]". The finding of the Authority was, that the appellant appropriated or had conferred on him certain benefits from the company and they amounted to income. This was a simple case of the appellant controlling and using money, and his failing to report it to the Ministry when claiming benefits.

[40] Whether the appellant's relationship with the company entitled him to take the money is beside the point. He did take and use it, and the consequence is that this disentitled him to a benefit.

[41] The central principles of law on which the decision relied were:

[41.1] That there was evidence to support the factual findings that the appellant received or appropriated money and gains.

[41.2] Having found that the appellant received or appropriated money and gains, was that income or otherwise a basis for

disentitling the appellant to the benefits he claimed? (decision at [7] to [11]).

[42] The draft case on appeal fails to raise any material issue relating to those matters, and instead focuses on supposed issues of law that have no material relevance to the decision the Authority reached.

Conclusion

[43] I decline to state a case on appeal as the appellant:

[43.1] Has not commenced the appeal process, and this Authority has no power to extend time for that to occur;

[43.2] Failed to identify a genuine question of law arising from the Authority's decision; and

[43.3] Failed to raise some tenable basis for suggesting an error has been made in the Authority's decision.

[44] I accordingly decline to state a case.

Dated at **Wellington** this 17th day of January 2018

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G Pearson
Chairperson