IN THE DISTRICT COURT
AT WELLINGTON

I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA

[2021] NZACC 90 ACR 232/19

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPLICATION FOR LEAVE TO APPEAL TO THE HIGH COURT ON A QUESTION OF LAW UNDER SECTION 162 OF THE ACT
BETWEEN	IRENE GOH Applicant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing: On the Papers

Judgment: 24 June 2021

JUDGMENT OF JUDGE K D KELLY

Introduction

[1] This is an application for leave to appeal to the High Court against a decision of her Honour Judge AA Sinclair delivered on 4 September 2020.[1]

Background

[2] Mrs Goh suffered an injury in a motor vehicle accident on 1 August 1997. As a result she received weekly compensation until 15 March 1998 at which time compensation ceased. From 15 March 1998 Mrs Goh then received from the Ministry of Social Development (MSD) the domestic purposes benefit and invalid's benefit.

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[1] *Goh v ACC* [2020] NZACC 119

[3] Some years later, in August 2005, the Corporation determined that the chronic pain condition that Mrs Goh was suffering from was caused by the motor vehicle accident in 1997. As a result, the Corporation determined Mrs Goh was entitled to retrospective weekly compensation from 15 March 1998.

[4] Section 252 of the Accident Compensation Act 2001, and s 71A of the Social Security Act 1964 both require the Corporation to refund MSD the benefit paid either to the extent of the retrospective compensation payment, if it is less than the benefit paid, or the full benefit paid where, as is more common, the compensation payable exceeds the benefit paid.[2]

[5] On 18 November 2005, MSD wrote to the Corporation requesting reimbursement by way of a letter known as 'ACC Form 172'.

[6] Three days later, on 22 November 2005, the Corporation then wrote to Mrs Goh setting out the details of her back dated weekly compensation as follows:

Total (before tax):	95,891.90
Less the amount owed to Work and Income[3]	58,453.64
Total you are owed	37,438.26

[7] The Corporation paid $48,404 of the $58,453 to MSD, and $10,049 to the Commissioner of Inland Revenue. The balance was paid to Mrs Goh on 14 December 2005 being $23,072 after the deduction of $14,365 tax.[4] For completeness, as noted by the Court of Appeal in *Goh v Commissioner of Inland Revenue*,[5] Mrs Goh challenged the right of MSD to require ACC to reimburse the $48,404. This right was upheld by the Social Security Appeal Authority although the sum was reduced to $35,591.00. This decision was, in turn, upheld in the High Court in *Goh v Chief Executive of the Ministry of Social Development*.[6]

[8] Mrs Goh has subsequently challenged the arrears calculations on a number of occasions and in a number of respects.[7] In essence, these challenges concern whether, and how much,

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[2] *Goh v Commissioner of Inland Revenue* [2011] NZCA 344 at [3]
[3] Work and Income New Zealand (WINZ), a division of MSD
[4] above n 2, at [13]
[5] above n 2, at [15]
[6] *Goh v Chief Executive of the Ministry of Social Development* HC Auckland CIV-2008-485-2391, 30 June 2009
[7] including *Goh v Chief Executive of the Ministry of Social Development* [2010] NZCA 110; *Goh v Commissioner of Inland Revenue* [2011] NZCA 344; *Accident Compensation Corporation v Goh* [2014] NZACC 294; *Goh v Accident Compensation Corporation* [2015] NZACC 191; *Goh v Accident*

the arrears of compensation payment should affect Mrs Goh's entitlement to benefit payments which she received from MSD. That is, can Mrs Goh retain more than one stream of state assistance over the same period.

Review decision

[9] On 3 April 2019 Mrs Goh lodged a late review application against the Corporation's decision of 22 November 2005.

[10] This was a second review sought by Mrs Goh against that decision. In 2014 the Corporation accepted an earlier application for the review of the Corporation's decision. That application was subsequently dismissed on review. Mrs Goh then appealed to the District Court. That appeal was dismissed by her Honour Judge Henare in a decision dated 14 April 2016.[8]

[11] In his decision on the 2019 review, the reviewer Mr Paul Munro said:[9]

> Mrs Goh sought to review ACC's decision of 22 November 2005. ACC accepted the late lodgement of the application. Mrs Goh sought to argue that the decision of the [Human Rights Review Tribunal] in the matter of *Hennessy v Attorney-General*[10] made the actions of ACC wrong. As noted in ACC's submissions that decision was not applicable to Mrs Goh's situation, and I agree with ACC's submission.
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> At the heart of Mrs Goh's review application is her belief that she should have been entitled to retain her WINZ benefit and receive the full payment of the backdated weekly compensation. This issue was addressed in the Court of Appeal decision[11] and the decision of Judge Henare dated 14 April 2016.[12]
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> Mrs Goh previously lodged a review application of ACC's decision of 22 November 2005 which was dismissed by Mrs Vogel.
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> ACC submitted that the current review application lodged by Mrs Goh was a collateral attack on the previous decisions of the Courts. I agree with ACC's submission and find that Mrs Goh has not advanced adequate grounds or provided additional evidence that

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Compensation Corporation [2015] NZHC 3353, and *Goh v Accident Compensation Corporation* [2016] NZACC 95

[8] *Goh v Accident Compensation Corporation* [2016] NZACC 95

[9] Review Number 6493152 dated 16 August 2019 at page 6

[10] *Hennessey v Attorney-General* [2019] NZHRRT 4

[11] i.e. *Goh v Commissioner of Inland Revenue* [2011] NZCA 344 applied by Judge Henare in *Goh v Accident Compensation Corporation* [2016] NZACC 95 at [27]

[12] i.e. *Goh v Accident Compensation Corporation* [2016] NZACC 95

would warrant a further review of ACC's decision of 22 November 2005. As such I dismiss the review application.

[12] The reviewer also found that Mrs Goh did not act reasonably in lodging the review application, for the reasons mentioned, and declined to award costs.

[13] Mrs Goh appealed this second review decision to the District Court.

District Court decision

[14] Judge Sinclair summarised Mrs Goh's arguments on appeal as follows:[13]

> Mrs Goh's arguments in this appeal appear to be:
>
> (a) Mrs Goh did not discover the ACC 172 form until after 3 April 2019. She disputes the validity of this form and says it shows that the reimbursement amount was incorrectly calculated, and the benefit reimbursement was unlawful.
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> (b) The decision of the Human Rights Tribunal in *Henessey v Attorney-General* "confirms that an income-tested benefit revoked by the amount of ACC entitlement is unjust." Mrs Goh contends that this decision is new information which raises questions as to whether the reimbursement of benefit payments by the Corporation to the Ministry under s 252 was justified.
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> (c) Costs ought to have been awarded on the review hearing where Mr Martin Murphy appeared as her advocate.

[15] The Corporation submitted that the doctrine of res judicata (cause of action estoppel) applied and that Mrs Goh was estopped from seeking a redetermination of the Corporation's decision of 22 November 2005. Alternatively, the Corporation said that its decision to reimburse MSD was correct and that the matters raised by Mrs Goh did not alter that position.[14]

[16] After considering the question of res judicata, and whether there are special circumstances preventing the operation of the doctrine, her Honour Judge Sinclair determined that:

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[13] above n 1, at [21]
[14] above n 1, at [22]

ACC 172 Form

[a] The ACC 172 form was not new because it was set out in full by the High Court in *Goh v Commissioner of Inland Revenue*[15] delivered in 2009, and that:[16]

> Clearly, the letter was before the Court in that claim and it is reasonable to infer that Mrs Goh had a copy. In addition, the calculation of the reimbursement amount was reviewed by the Social Security Appeals Authority. Again, it is reasonable to infer that the Authority and Mrs Goh had this letter and attachments as part of that review.

[b] In any event, the arguments which Mrs Goh raised have no merit: "The reimbursement amount is calculated by the Ministry. As has been made plain by the High Court and Court of Appeal and again by Judge Henare, s 252(4) is mandatory, and the Corporation does not have any discretion as to the amount paid to the Ministry"; [17]

Hennessey decision

[c] Notwithstanding that *Hennessey* was not determined until 2019, Mrs Goh was asking the Court to consider a legal argument that she could have made at the time of the review proceedings in 2014;[18]

[d] In any event, *Hennessey* has no relevance in the present case:[19]

> In summary, Mrs Hennessey contended that the operation of s 71A and s 198 discriminated against her on the ground of her employment status, namely by being a recipient of a benefit as defined in the Social Security Act 1964. The Tribunal accepted that Mrs Hennessey was materially disadvantaged because her income-tested benefit was abated at 100% of the payment received under her ACC entitlement and made the declarations of inconsistency which I note were made by consent. However, Mrs Goh's situation is materially different. Rather it is more akin to the group described in the Tribunal's decision as the "comparative group" where the benefit was abated at the rate of no more than 70% of the income received.

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[15] *Goh v Commissioner of Inland Revenue* HC AK CIV 2009-404-3258
[16] above n 1, at [29]
[17] above n 1, at [30]
[18] above n 1, at [32]
[19] above n 1, at [33]

[e] a declaration of inconsistency does not affect the validity, application or enforcement of the law in question (per s 92K of the Human Rights Act 1993).[20]

[17] In addition to her findings in relation to the ACC 172 form and the *Hennessey* decision, Judge Sinclair noted that in her 2014 judgment Judge Henare considered that Mrs Goh's earlier review and appeal was essentially a re-litigation of the issues which had already been pursued by Mrs Goh. Her Honour Judge Sinclair found that: [21]

> This second late review and appeal is plainly in the same category. In addition it is also an attempt to relitigate Judge Henare's decision. Such collateral attacks upon earlier decisions are an abuse of process[22] and the appeal is dismissed on this ground also.
>
> The High Court and Court of Appeal in their various decisions have gone to considerable lengths to explain to Mrs Goh the meaning and effect of s 252 and its application in her situation. There are no grounds for dispute. While Mrs Goh may not agree with the outcome, it is time to stop this litigation.

[18] In relation to the issue of costs, Judge Sinclair agreed with the reviewer and considered that his decision not to award costs was correct.

Application for leave to appeal

[19] Mrs Goh submits, in essence, that the Corporation acted wrongfully when deducting the total sum of the benefit she received from MSD (i.e. $58,453.64). Mrs Goh said that she has no statutory obligation to repay this amount and that the Corporation acted unlawfully in doing so without her authority. In particular, it is submitted by Mrs Goh that the benefit should have been abated by 70% under s 71A of the Social Security Act 1964 when the retrospective payment was made. That is, the Corporation should only have reimbursed MSD 70% of the benefit she received such that she was entitled to retain the rest.

[20] Mrs Goh relies on that part of Judge Sinclair's decision where her Honour said in relation to *Hennessey*: "However, Mrs Goh's situation is materially different. Rather it is more akin to the group described in the Tribunal's decision as the 'comparative group' where the benefit was abated at the rate of no more than 70% of the income received." In essence Mrs Goh contends that Judge Sinclair determined that only 70% of the benefit she received

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[20] above n 1, at [34]
[21] above n 1, at [36] – [37]
[22] *Buis v Chief Executive of the Ministry of Social Development* CIV-2011-485-1008, 18 November 2011, Brewer J.

should have been reimbursed by the Corporation. As a result, it is submitted that Judge erred in not modifying or quashing the decision of the reviewer instead of dismissing her appeal pursuant to the doctrine of res judicata.

[21] Mrs Goh submits that the questions of law raised by Judge Sinclair's decision are as follows:

> [a] "Judge AA Sinclair accepted the fact during the period form 15 March 1998 to 11 September 2005, Work and Income paid benefit total of $58,453.64 (gross). Was she correct in law in finding 'res judicata' still applies to this further appeal considering that ACC's decision was in fact to reimburse Work and Income $58,453.64 even when she found the 100% benefit abatement of s 71A did not apply?
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> [b] Does section 252 also hide the fact that the ACC uses the benefit to substitute for the payment of accident compensation when a beneficiary receives a retrospective grant of accident compensation?"

Corporations' submissions

[22] Leave to appeal is opposed by the Corporation on the basis that Mrs Goh has raised no valid question of law capable of bona fide and serious argument.

[23] It is submitted that Judge Sinclair found that the cause of action was estopped by virtue of res judicata because Judge Henare had already determined the issue in 2016. This, it is submitted is a factual finding that is not amenable to appeal.

[24] It is also submitted that Judge Sinclair found no reason to override res judicata, and that Mrs Goh's appeal was an abuse of process.

[25] The only possible legal question proposed by Mrs Goh, it is submitted, is whether res judicata can apply in circumstances where, as Mrs Goh contends, the original decision was wrong. This, it is submitted, is not capable of bona fide argument as res judicata can apply even where the original decision is wrong in law.

[26] In any event, there is no merit in Mrs Goh's argument because the High Court and Court of Appeal have already found that:

[a] Mrs Goh is not entitled to 'double dip' by retaining two streams of state assistance over the same period;

[b] MSD is responsible for calculating the overpayment and the miscalculation has already been settled as between MSD and Mrs Goh; and

[c] s 252 is mandatory: the Corporation has no discretion when it receives a request for repayment from MSD.

[27] It is submitted that Mrs Goh's application for leave to appeal is yet another attempt to relitigate a matter that has already been decided between the parties and determined by the Court of Appeal in proceedings against MSD and the Commissioner of Inland Revenue.[23]

First question proposed

[28] In relation to the first question proposed by Mrs Goh, the Corporation submits that it is difficult to identify the question of law being raised by Mrs Goh but that it appears to be that MSD's miscalculation (which was subsequently settled between MSD and Mrs Goh) means that the Corporation's decision of 22 November 2005 was wrong in law such that it should have been quashed or modified.

[29] It is submitted that Judge Sinclair correctly identified the legal principles of cause of action estoppel/res judicata and, in particular, for cause of action estoppel to apply the cause of action sought to be estopped must be precisely the same as that upon which there has been an earlier adjudication.

[30] It is submitted that Judge Sinclair found that the subject of the appeal was whether the benefit reimbursement by the Corporations in its decision dated 22 November 2005 was correct. As this issue had already been determined by Judge Henare in 2016, the application of action estoppel, it is submitted, is a factual finding not amenable to appeal.

[31] It is also submitted that Judge Sinclair correctly identified the circumstances in which res judicata may be overridden in exceptional circumstances but concluded none of the circumstances raised by Mrs Goh warranted a further review. That Judge Sinclair found that

[23] *Goh v Chief Executive of the Ministry of Social Development* [2010] NZCA 110; *Goh v Commissioner of Inland Revenue* [2011] NZCA 344

the ACC 172 form and *Hennessy* were not applicable, are factual findings that are not amenable to appeal.

[32] It is also submitted that, as already noted, the arguments raised by Mrs Goh were found to have no merit.

Second question proposed

[33] In relation to the second question raised by Mrs Goh, the Corporation submits that this question is again asking whether res judicata can apply when the appellant still contends that the original decision was incorrectly decided. As already stated, it is submitted that this question is not capable of bona fide and serious argument.

Abuse of process

[34] It is also submitted that Mrs Goh has not challenged Judge Sinclair's finding that the appeal was an abuse of process. Even if the other matters raise a question of law, it is submitted, the appeal would be moot and it cannot be in the public interest to use the Court's time and resources to hear it.

[35] Accordingly, it is submitted that the application for leave to appeal should be dismissed.

Applicant's submissions in reply

[36] In reply to ACC's submissions, Mr Goh repeats her submission that as Judge Sinclair concluded her income-tested benefit should be abated at no more than 70%, she is entitled to retain part of the benefit. Mrs Goh submits that:

> Obviously, Mrs Goh can partly retain the payment of benefit. Her benefit entitlement won't be totally revoked by her ACC entitlement. The appellant was actually entitled to two streams of state assistance for the same period, but the benefit should be paid at the reduced rate.

[37] Mrs Goh says that she disagrees with the submissions of the respondent that she is not entitled to 'double dip' by retaining two streams of state assistance over the same period.

[38] It is also submitted that neither Judge Sinclair nor Judge Henare provided any legal explanation or analysis was to why her entire benefit entitlement should be revoked by the ACC entitlement. Mrs Goh also submits that the High Court and Court of Appeal judgments lacked any explanation as to why her benefit entitlement should be totally revoked by her ACC entitlement as they did not consider whether her benefit ought to have been abated at some level other than 100% under s 71A of the Social Security Act 1964.

[39] Mrs Goh says she "requires an explanation of why her benefit entitlement must be revoked by her ACC entitlement."

Analysis

[40] Section 162 of the Act provides that an applicant is entitled to appeal to the High Court on questions of law. The questions of law must be capable of bona fide and serious argument. As Doogue J summarised in *Impact Manufacturing Ltd v Accident Rehabilitation and Compensation Insurance Corporation*:[24]

> Whether or not a statutory provision has been properly construed or interpreted and applied to the facts is a question of law: *Commissioner of Inland Revenue v Walker* [1963] NZLR 339, 353-354 (CA); *Edwards v Bairstow* [1955] 3 All ER 48, 57; *P & O Services (NZ) Ltd v ARCIC*.
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> Even where, as in this case, an appeal is limited to questions of law, a mixed question of law and fact is assailable as a matter of law: *CIR v Walker* , 354; *P & O Services (NZ) Ltd v ARCIC*, 6.
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> It is well settled that a decision-maker's treatment of facts can amount to an error of law. There will be an error of law where there is no evidence to support the decision, the evidence is inconsistent with, and contradictory of the decision, or the true and only reasonable conclusion on the evidence contradicts the decision: *Edwards v Bairstow* , 57.
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> The Court of Appeal in *Lang v Eagle Airways Ltd* [1996] 1 ERNZ 574, 576, cited *Edwards v Bairstow* in support of the following statement:
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> > "If those conclusions were not reasonably open to the Judge then this Court can rule, as a matter of law, that they are unsustainable and should be set aside . . ."
>
> Whether or not particular evidence is relevant to a particular issue is a question of law: *Ogilvy & Mather (New Zealand) Ltd v Turner* [1996] 1 NZLR 641, 651-652.

[24] *Impact Manufacturing Ltd v Accident Rehabilitation and Compensation Insurance Corporation* (wellington High Court, 6/7/2001, AP266/00, Doogue J and [4] – [9]

[41] This application appears to be premised on a misreading of Judge Sinclair's decision, and of *Hennessey*.

[42] In *Hennessey*, the Human Rights Review Tribunal did not determine what level of abatement ought to have applied to Ms Hennessey per se. While the parties there agreed that the appropriate comparator in relation to an 'income-tested benefit who also receives weekly compensation' is 'a person who receives income tested benefits who receives wages or other income', that was for the purposes of determining whether the effect of s 71A of the Social Security Act 1964 and s 198 of the Social Security Act 2018 (which substantially re-enacts s 71A), are inconsistent with the New Zealand Bill of Rights Act 1990.

[43] Judge Sinclair, in turn, also did not determine that Mrs Goh's income-tested benefit ought to have been abated at the rate of 70%. That was not a question that was before Judge Sinclair for determination. Subtly different, the question before Judge Sinclair was whether *Henessey* was new information such that the reimbursement of benefit payments by the Corporation to the Ministry under s 252 was unjustified and that the earlier decision of Judge Henare was wrong (the question in that case being whether Mrs Goh should have retained benefit payments as well as received the total amount of weekly compensation payable over the same period.). Her Honour found that *Hennessey* is not new information. This is not a question of law but a question of fact.

[44] Moreover, as her Honour pointed out, *Hennessy* is of no relevance.[25] That case was ultimately about whether s 71A discriminated against persons who receive an income-tested benefit and wages or other income. It did not provide the Court the jurisdiction to determine that, in this case, Mrs Goh's benefit should be abated such that ACC ought to have reimbursed MSD otherwise than it did.

[45] The ultimate issue that Mrs Goh seeks to challenge is whether she was in some respect, entitled to receive two streams of state assistance, or more correctly one stream and part of another, over the same period. As her Honour Judge Sinclair said:[26]

> The subject of the present appeal is the Corporations' decision dated 22 November 2005 and the correctness of the benefit reimbursement by the Corporation to the Ministry.

[25] above n 1, at [32]
[26] above n 1, at [24]

> This issue has already been determined in the decision by Judge Henare in 2014. I agree with the Corporation that cause of action estoppel clearly applies.

[46] That the issue had been determined by Judge Henare is a question of fact. Moreover, Judge Sinclair cited the Court of Appeal in *Goh v Chief Executive of the Ministry of Social Development* which said: [27]

> The legislation is designed to place the person largely in the position she would have been in had she received compensation from ACC throughout the period. The applicant's argument is that she should retain both the full amount of her benefit and some of the accident compensation calculated on a weekly basis in respect of exactly the same period. Such duplication resulting in an unjustified windfall would entail a preposterous result.

[47] I would note that the Court of Appeal said further that a similar argument was rejected by the Court of Appeal it in *Tapp v Chief Executive Officer of the Department of Work and Income*.[28]

[48] I agree with counsel for the Corporation that even if there is a question of law about the application of res judicata applies in circumstances where the appellant still contends that the original decision was incorrectly decided, this question is not capable of bona fide and serious argument. Nor is the question about whether Mrs Goh should be able to retain both the full amount of her benefit and some of the accident compensation calculated on a weekly basis in respect of exactly the same period.

[49] Moreover, her Honour Judge Sinclair dismissed the appeal as an abuse of process, which Mrs Goh has not challenged.

[50] In short, as Judge Sinclair said, the meaning and effect of s 252 and its application to Mrs Goh's situation has been explained by the High Court and Court of Appeal and there are no grounds for dispute.[29] The 'one benefit' principle has already been determined and as Judge Sinclair says, while Mrs Goh may not agree with the outcome, as she clearly does not, it is time to stop this litigation.[30]

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[27] *Goh v Chief Executive of the Ministry of Social Development* [2010] NZCA 110 at [15]
[28] *Tapp v Chief Executive Officer of the Department of Work and Income* [2003] NZFLR 761
[29] above n 1, at [37]
[30] above n 1, at [37]

Decision

[51] For the reasons stated, I can discern no question of law arising from this application that has not already been determined or which is otherwise capable of capable of bona fide and serious argument.

[52] Accordingly, the application for leave to appeal to the High Court is dismissed.

K D Kelly
District Court Judge

Solicitors: Buddle Findlay, Auckland, for the respondent