IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 94/2021
[2021] NZSC 148

BETWEEN	LILLIAN ALICE TAYLOR Applicant
AND	ATTORNEY-GENERAL (ON BEHALF OF THE MINISTRY OF SOCIAL DEVELOPMENT) Respondent

Court: William Young, Glazebrook and Williams JJ

Counsel: Applicant in person
M J Bryant and S Deng for Respondent

Judgment: 4 November 2021

JUDGMENT OF THE COURT

A The application for an extension of time to apply for leave to appeal is granted.

B The application to amend the application for leave to appeal is granted.

C All other interlocutory applications are dismissed.

D The application for leave to appeal is dismissed.

E There is no order as to costs.

F A copy of this judgment is to be provided to the Ombudsman.

REASONS

Background

[1] Ms Taylor has applied for leave to appeal the decision of the Court of Appeal dated 23 July 2021.[1] There is considerable background to this application, and it will be useful to set it out in some detail.

[2] Ms Taylor is approaching her mid-70s. She suffers from a long-term physical disability. She receives Temporary Additional Support, which can, if needed, include an allowance for additional power costs incurred due to disability. Ms Taylor sought such an allowance. She advised the Ministry of Social Development (the Ministry) that her power costs for the year ending July 2013 were $1,845.38. In November 2013, the Ministry determined that Ms Taylor did not have any additional power costs attributable to her disability. On review, the Benefits Review Committee (BRC) increased this to a subsidy of 96 cents per week ($49.92 a year).

The 2015 Authority decision

[3] Ms Taylor appealed to the Social Security Appeal Authority (the Authority).[2] The Authority considered three methods for calculating her additional power costs, but identified difficulties with all of them.[3] One such method the Authority considered was to use the Powerswitch calculator. The Powerswitch calculator is a website operated by Consumer New Zealand that provides (among other things) a method for calculating average household electricity use. The Ministry had used it to estimate the ordinary cost of power for a one to two-person household in order to determine how much of Ms Taylor's power costs were incurred due to her disability. The Authority noted it might be appropriate to reduce the Powerswitch estimate by 10 per cent to reflect a single-person household, and a further 5 per cent for other factors.[4] But the Authority ultimately rejected this approach because it could not verify the figures used

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1 *Taylor v The Attorney-General on behalf of the Ministry of Social Development* [2021] NZCA 329.
2 *Re XXXX* [2015] NZSSAA 24.
3 At [18], [22] and [24].
4 At [16]–[17].

by the Ministry.[5] The Authority reassessed Ms Taylor's additional disability-related power costs to be 15 per cent of her total power costs:[6]

> In this particular case we consider the most appropriate option is to simply set a percentage figure based on the appellant's actual costs, her level of disability and need for additional power. In this case we assess the appellant's additional power costs to be 15% of her total usage. Fifteen percent of $1,845.38 amounts to $276.80 per annum. The appellant's additional power costs for the 52 weeks commencing on 8 November 2013 are to be assessed on this basis …

The 2016 High Court proceeding

[4] Ms Taylor then appealed to the High Court, arguing that the 15 per cent figure had no proper basis and that the Authority applied incorrect methodology in calculating her extra power costs. Appeals to the High Court from the Authority are limited to matters of law.[7] In June 2016, Whata J upheld the Authority's decision.[8] He held that the 15 per cent figure had been arrived at partly on the basis of points Ms Taylor had herself raised:[9]

> The Authority identified the Consumer Powerswitch website discount estimate for a one person household as 10% (at [16](i) of the decision), adjusted that estimate by 5% to take into account the matters raised by Ms Taylor (at [17]) and specifically referred to the additional needs identified by Ms Taylor (at [19]) in accordance with her evidence (see summary below at [35]). See also [18] of the case on appeal. In the final part of the decision, the Authority arrived at a figure of 15% to represent Ms Taylor's additional power costs. Plainly the Authority has assembled the information referred to in the earlier parts of the decision (and as contained in the evidence) to arrive at the 15% figure. That was an assessment of fact and an evaluative judgment available to it that is not otherwise reviewable by this Court on a case stated on a question of law.

[5] The judgment also recorded a summary of Ms Taylor's power usage for heating and laundry:

> [35] Ultimately, the Authority examined a number of options for assessing Ms Taylor's needs, including by reference to the Powerswitch website estimate, and decided to take an approach that is both fair to Ms Taylor and administratively practicable. This involved identifying her specific needs and fixing an amount by reference to them. This assessment was based on

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5 At [18].
6 At [24].
7 Social Security Act 1964, s 12Q.
8 *Taylor v The Chief Executive of the Ministry of Social Development* [2016] NZHC 1160.
9 At [25].

evidence given by Ms Taylor and helpfully summarised by the respondent, namely:

(a) She used the clothes dryer two or three times per week, although some weeks not at all.

(b) She used the clothes dryer when home help was not available because she cannot hang her washing on the clothesline herself.

(c) She did not need heating in the summer months and that her use of heating was seasonal.

(d) When she did turn on the heat pump it was usually in the evenings. Furthermore, she kept warm with a blanket until she felt the need to turn it on.

(e) The heating would be turned on for around four or five hours from approximately 7.00 pm.

(f) In winter she would occasionally use heating during the day, such as an oil filled heater or a fan heater.

(g) She would not have the heating on all day "unless it was particularly miserable".

[6] Ms Taylor then applied for leave to appeal to the Court of Appeal. The Court declined the application on the ground that the questions Ms Taylor posed in her application did not constitute questions of law.[10] Nor did they meet the relevant statutory criteria.[11] Further, the Court agreed with the High Court that there was ample basis for the figure of 15 per cent and that the Authority used the correct methodology.[12] That was the end of the road for the issues then raised by Ms Taylor in her challenge of the Authority's 2015 decision.

The September and October 2016 Ministry decisions

[7] In September 2016, the Ministry again reassessed Ms Taylor's allowance. The Ministry wrongly removed her power costs subsidy for a second time. This error was corrected when the Ministry reassessed the position again a month later (in October 2016). The Ministry increased Ms Taylor's additional power costs but only by a small amount. In June 2017, the BRC "overturned" the Ministry's

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10 *Taylor v The Chief Executive of the Ministry of Social Development* [2016] NZCA 489 at [15].

11 Section 303(2) of the Criminal Procedure Act 2011 applies to appeals to the Court of Appeal under s 12R of the Social Security Act: at [16].

12 At [14].

September 2016 decision and re-instated Ms Taylor's 15 per cent subsidy. Ms Taylor then appealed the BRC decision to the Authority in October 2017, but later withdrew her appeal after January 2018, when the Authority indicated that the High Court's June 2016 decision was binding on it so there would be no point.

The judicial review proceeding

[8] Ms Taylor then commenced judicial review proceedings in 2019. It was not clear to the High Court judges dealing with the matter what decisions Ms Taylor challenged and why, but she ultimately confirmed that she wished to challenge the Ministry's September 2016 decision because only one of two aspects she raised had been addressed. In a minute dated 24 October 2019, Palmer J, in a bid to bring some shape to the proceeding, identified the following issues from Ms Taylor's amended statement of claim that was before him at that time:

(a) Did the Authority pre-determine Ms Taylor's appeal in its pre-hearing direction on 30 January 2018?

(b) Did the Ministry's decision, communicated on 31 October and 22 November 2016, applying the 15 per cent methodology, overlook relevant considerations, take into account irrelevant considerations or fetter its discretion? In particular, did the Ministry fail to follow its own internal procedures, because the 15 per cent methodology had not become part of its MAP process and did it fail to make allowance for daily line charges and assume prompt payment of power bills?

[9] In early 2020, Ms Taylor's claims against the Authority were discontinued by consent, so only the second issue above fell to be considered.

[10] The substantive judicial review was heard by Brewer J in April 2020 by telephone (due to the Covid-19 lockdown), a course Ms Taylor opposed at the time.[13] The Judge considered that only the Ministry's October 2016 reinstatement decision could be reviewed, as the September 2016 decision was acknowledged to be wrong

[13] Ms Taylor therefore did not appear at the hearing.

and had been superseded.[14] The Judge held that given Ms Taylor had not provided the Ministry with any evidence of a change in her electricity consumption, the Ministry had to take into account the High Court's June 2016 decision upholding the 15 per cent subsidy adopted by the Authority.[15] There was also no obligation for the Ministry to use its internal procedure guidelines.[16] The Ministry's October 2016 decision was therefore upheld.[17]

[11] Ms Taylor appealed to the Court of Appeal. That Court noted that Ms Taylor was concerned with the Ministry's use of the Powerswitch calculator to determine additional power costs, not just the decisions made in respect of her own entitlements.[18] But the Court considered that Ms Taylor had not identified a specific decision involving use of the Powerswitch calculator that could be reviewed.[19] It noted that that Court had, in 2016, declined Ms Taylor leave to appeal the June 2016 High Court decision in relation to the 15 per cent subsidy, so the issues raised in that case could not be reopened in the appeal against Brewer J's decision.[20] Her appeal was dismissed because, in the Court's view, Ms Taylor's submissions did not engage with the issues that Brewer J had determined in the High Court.[21]

[12] Ms Taylor now applies for leave to appeal this Court of Appeal decision.

Interlocutory applications

[13] In the early stages of her leave application, Ms Taylor applied for the following interlocutory orders:

(a) that she be provided with a copy of the transcript of the hearing of 17 June 2021 in the Court of Appeal;

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14 *Taylor v The Attorney-General on behalf of the Ministry of Social Development* [2020] NZHC 852 at [34]–[35].
15 At [41], [49] and [52].
16 At [45].
17 At [54].
18 *Taylor v The Attorney-General on behalf of the Ministry of Social Development* [2021] NZCA 329 (Courtney, Mander and Hinton JJ) at [34].
19 At [37].
20 At [39].
21 At [40]–[42]. The Court did consider it unfair that Ms Taylor had to proceed with her judicial review by telephone, but that did not warrant setting aside the decision: at [46]–[47].

(b) that her application for leave to appeal filed electronically at 5 pm on 20 August 2021 be accepted for filing;

(c) granting her an extension of time to file submissions;

(d) granting her leave to amend her 20 August 2021 application to align it with hard copies, name herself as applicant rather than appellant, and include the file note of a Clare Loudon dated 29 September 2016, a decision of Brown J dated 31 July 2020 and details of the commercial significance of the matter;

(e) that all her applications be heard "fairly, in open court, and in reasonable time"; and

(f) that the respondent "declare any conflict of interest".

[14] Ms Taylor then advised that the incorrect leave application had been accepted for filing, and applied to adjourn her leave application until:

> … the correct application for leave to appeal has been accepted for filing; Covid-19 protocols allow the unconditional provision to her of a transcript or copy of the recording taken at the hearing of 17 June 2021; the decisions *relevant* to the decisions appealed against (as advised in the original application) are delivered to the court by courier; her individually filed Interlocutory Applications 1-6 to be filed 7 September 2021 are fairly heard, and Covid-19 protocols for courts allow her to physically attend all hearings.

Transcript

[15] Ms Taylor submitted that the transcript of the Court of Appeal hearing was "integral to the preparation of her application for leave to appeal". She has, however, already filed submissions in support of that application. In the circumstances, a transcript is no longer needed. This application is dismissed.

Application be accepted for filing

[16] Ms Taylor's application for leave to appeal was submitted on 20 August 2021, but the fee waiver form was not filed until after 5 pm that day. The application was therefore accepted for filing on the first following working day, being 23

August 2021.[22] There is no need for a further order that it be accepted for filing. It is, however, one day out of time. In the circumstances, we grant an extension of time to apply for leave to appeal.

Extension of time to file submissions

[17] As Ms Taylor has already filed submissions, this application is now moot.

Amendment of application

[18] The respondent not opposing, the application to amend the application for leave is granted.

Oral hearing

[19] There is no right to appear before this Court on an application for leave to appeal,[23] or on an interlocutory application. These applications are dealt with on the papers, except in exceptional circumstances. The fact that, for various reasons, this has also been the procedure adopted in the Courts below in this matter is well noted, but that is not a sufficient reason for this Court to depart from its usual practice in this case. This application is dismissed.

Conflict of interest

[20] Ms Taylor appears to suggest that the Attorney-General's involvement in the appointment of High Court judges gives rise to a conflict of interest. There is no basis for this suggestion. Judges are, by law, independent of the government of the day and take that independence very seriously indeed. The application for this order is dismissed.

Adjournment

[21] The application for an oral hearing being declined, there is no basis for an adjournment. This application is dismissed.

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22 See Supreme Court Rules 2004, r 10(5).
23 Senior Courts Act 2016, s 76(2).

The present application

[22] It is appropriate therefore to deal with Ms Taylor's application for leave now.

[23] Ms Taylor has filed at least seven memoranda, three amended applications for leave to appeal, an affidavit, a synopsis of argument, and a list of issues on appeal identifying some 37 questions, relating to multiple different decisions, that she says arise from her case—many of which are procedural complaints. The essence of her substantive arguments comes down to one main point: the Ministry is incorrectly using the Powerswitch website generally when determining how much power a person in a client's position would use if they did not have the disability.

[24] First, Ms Taylor says that the Ministry is comparing a client's actual usage not to how much power a person in their circumstances would use without the particular disability, but to what that client's own usage might cost on other plans with other companies. The Powerswitch website offers two types of estimate: 1) an estimate of a person's potential power costs with other providers if they know their actual power usage; and 2) an estimate of the cost of normal usage for various household sizes if the person does not know their actual power usage. Ms Taylor says that the Ministry is using the first type of estimate to assess whether clients have additional power costs, which is inappropriate. Ms Taylor has filed a copy of a Ministry file note dated 29 September 2016 showing the application of this estimate:[24]

> *Based on kWh used 5263*, POWERSWITCH calculated an annual cost between $1610.00-$2031.00. Client's confirmed Contact Energy power bills=$1362.22, so no excess power used for the year 16/07/15-15/07/16.

[25] Second, Ms Taylor says that the Ministry considers there is no way to reduce the Powerswitch result for a one to two-person household to that of a one-person household.

[26] Ms Taylor claims that this methodology is used for all clients, and that as a result, thousands of disabled beneficiaries will be deprived of their true and correct entitlement. Ms Taylor says that she offered evidence of this methodology being used with another client, but it was not admitted by the Courts below.

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[24] Emphasis added.

[27] Indeed, part of Ms Taylor's complaint now is that the above issues are what she sought to review after the Ministry reassessed her additional power costs to nil again in September 2019, but the BRC did not address them. Nor did the Courts subsequently when she brought her judicial review. From her perspective, therefore, her real argument was never acknowledged and thus never dealt with from the beginning.

Respondent's submissions

[28] The respondent submits that the October 2016 decision is specific to Ms Taylor and has no wider application. It also superseded the September 2016 decision. No matter of general or public importance therefore arises. Nor is there a risk of a miscarriage of justice, as Ms Taylor has not identified any error of fact or law made by the Court of Appeal.

Our assessment

[29] As Ms Taylor's application is in respect of the Court of Appeal decision dismissing her appeal from Brewer J's High Court decision, any appeal to this Court could not resolve the core issue Ms Taylor is concerned with outlined above, as that issue was not dealt with in those Courts. Ms Taylor has not identified any error in the Court of Appeal's judgment that would meet the criteria for leave.[25] We therefore dismiss the application for leave to appeal.

[30] We note, however, that the reasoning recorded in the Ministry file note quoted at [24] above appears to be unsound. This error has been overtaken in Ms Taylor's particular case, but it would be concerning if it reflects a wider systemic approach, in which case steps ought to be taken to correct it.

Result

[31] The application for an extension of time to apply for leave to appeal is granted.

[32] The application to amend the application for leave to appeal is granted.

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[25] Senior Courts Act, s 74(2).

[33] All other interlocutory applications are dismissed.

[34] The application for leave to appeal is dismissed.

[35] There is no order as to costs.

[36] We direct that a copy of this judgment be provided to the Ombudsman.

Solicitors:
Crown Law Office, Wellington for Respondent