

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 63/2023
[2023] NZSC 92

BETWEEN TANYA FELICITY DUNSTAN
Applicant
AND ATTORNEY-GENERAL
Respondent

Court: Ellen France, Williams and Kós JJ

Counsel: Applicant in person
S P R Conway for Respondent

Judgment: 27 July 2023

JUDGMENT OF THE COURT

- A The application for an extension of time to apply for leave to appeal is dismissed.**
- B The applicant must pay the respondent costs of \$2,500.**
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REASONS

Introduction

[1] Ms Dunstan has filed an application to appeal directly from a decision of the High Court.¹ In that decision, Powell J struck out proceedings brought by Ms Dunstan relating to a hearing undertaken by a Benefits Review Committee on behalf of the

¹ *Dunstan v Ministry of Social Development* [2022] NZHC 3319. The Court of Appeal declined Ms Dunstan's application to add the Attorney-General as a party for the purposes of representing the High Court and granted the Ministry of Social Development's application to substitute the Attorney-General as the sole respondent: *Dunstan v Ministry of Social Development* [2023] NZCA 164. This judgment's intitling reflects that decision.

Ministry of Social Development. As the application is out of time, an extension of time is required.

Procedural background

[2] The current application has its genesis in a hearing of the Benefits Review Committee convened to consider whether payment of Ms Dunstan's disability allowance should be backdated. There is no dispute that Ms Dunstan was not notified of the hearing because the notice of the hearing was sent to the wrong address. Ms Dunstan sought judicial review of the decision of the Benefits Review Committee arguing that conducting the hearing in her absence was in breach of her rights to natural justice in terms of s 27(1) of the New Zealand Bill of Rights Act 1990. Ms Dunstan sought costs and damages for distress caused by having to pursue these proceedings. After the Attorney-General applied to strike out the proceedings, Ms Dunstan appealed the Benefits Review Committee decision to the Social Security Appeal Authority.

[3] In striking out the claim, Powell J accepted that Ms Dunstan may have had a "reasonably arguable case" that the Benefits Review Committee acted unfairly in depriving her of the right to attend the hearing. However, the Judge considered that omission had effectively been rectified because the Ministry continued to offer Ms Dunstan the opportunity of a further Benefits Review Committee hearing. Further, Ms Dunstan was continuing on with her appeal to the Appeal Authority and the Authority would consider afresh whether payment should be backdated. Accordingly, the Judge found that the claim that Ms Dunstan's rights to natural justice under s 27(1) were breached was now moot. The Court said that the claim was properly struck out on the basis it was frivolous and otherwise disclosed no reasonably arguable cause of action.

[4] The High Court also accepted the submission for the respondent that the claim was in essence one for administrative law damages. Where the only arguable breach was the mistake in sending the notice to the wrong address, this was not a case which would meet the standard for an award of damages. It was particularly so in the circumstances where Ms Dunstan could have either a further hearing before the

Benefits Review Committee or could argue her case afresh on the appeal to the Appeal Authority.²

[5] The other procedural step we need to note is that Ms Dunstan filed an appeal from the decision of the High Court in the Court of Appeal. She did not pay security for costs after having unsuccessfully challenged the requirement to pay security.³ The Court of Appeal struck out the appeal.⁴

The proposed appeal

[6] As the respondent submits, the Court has not finally resolved whether s 69(c) of the Senior Courts Act 2016 bars this Court from hearing an appeal against the decision of the High Court to strike out a proceeding.⁵ We do not need to determine that issue here because, as we shall explain, we are satisfied that the application does not meet the criteria for leave to appeal directly from the decision of the High Court.⁶ To meet those criteria, Ms Dunstan must show both that it is necessary in the interests of justice for this Court to hear and determine the appeal and that there are exceptional circumstances that warrant taking the proposed appeal directly to this Court.⁷ She has not done so. We add that the application for leave to appeal directly is out of time so an extension of time is necessary.

[7] The essence of Ms Dunstan's case is that the leave criteria are met because, unless the proposed appeal is heard, there will be a miscarriage of justice. That is because her rights have been breached and a remedy is not otherwise available. In developing this point, Ms Dunstan says that various errors were made by the

² The Judge also accepted the respondent's submission that the proceeding was effectively leverage to obtain a settlement. Given the other two reasons adopted by the Judge, this aspect appears to be of only peripheral importance, at best.

³ *Dunstan v Ministry of Social Development* [2023] NZCA 60. Ms Dunstan unsuccessfully applied for a recall of that decision: *Dunstan v Ministry of Social Development* [2023] NZCA 133.

⁴ *Dunstan v Attorney-General* [2023] NZCA 255.

⁵ *Ceramalus v Chief Executive of the Ministry of Business, Innovation and Employment* [2018] NZSC 26, (2018) 24 PRNZ 8 at [8]. Section 69(c) of the Senior Courts Act 2016 makes it clear the Court has no jurisdiction to hear an appeal against a decision of the High Court "made on an interlocutory application".

⁶ To the extent Ms Dunstan's application encompasses the minute of Powell J of 28 October 2022 addressing various timetabling issues, that too may raise a question as to the Court's jurisdiction to hear an appeal from that decision. But, in any event, Ms Dunstan has not demonstrated why the leave criteria are met in relation to that decision which is now inconsequential.

⁷ Senior Courts Act 2016, ss 74 and 75.

High Court in proceeding to strike out the claim. For example, Ms Dunstan challenges the accuracy of the High Court's statement that the Ministry was willing to provide for a further Benefits Review Committee hearing. As to the effect of the exercise of the appeal right to the Appeal Authority, Ms Dunstan says that they are unable to deal with the allegation of a breach of the Bill of Rights Act. Ms Dunstan also challenges the decision of the High Court to decline her request for a transcript of the hearing before Powell J on 18 November 2022.⁸

[8] The decision of the High Court rests on the particular combination of circumstances in this case. No question of general or public importance arises.⁹ Nor does anything raised by Ms Dunstan give rise to the appearance of a miscarriage of justice as that term is defined in the civil context.¹⁰ The point being made by the High Court was that while there had been an error, either a rehearing or the appeal to the Authority could address the question of whether the payment should be backdated. The fact that the claim was moot was, as the High Court acknowledged, not necessarily determinative. But, in circumstances where the failure to notify Ms Dunstan was accurately treated as in the category of an administrative bungle which could be rectified, we see no appearance of a miscarriage of justice in the approach of the High Court. In these circumstances, the proposed challenge to the decision relating to release of a transcript of the hearing adds nothing.

[9] The application for an extension of time to apply for leave to appeal is accordingly dismissed. The respondent having been put to the cost of filing submissions, is entitled to costs. The applicant must pay the respondent costs of \$2,500.

Solicitors:
Crown Law Office, Wellington for Respondent

⁸ *Dunstan v Ministry of Social Development* [2022] NZHC 3537.

⁹ Senior Courts Act, s 74(2)(a).

¹⁰ *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369.