

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA692/2022
[2023] NZCA 164**

BETWEEN

TFD
Appellant

AND

MINISTRY OF SOCIAL DEVELOPMENT
Respondent

Court: Brown and Courtney JJ

Counsel: Appellant in Person
SPR Conway and C D Fuller for Respondent

Judgment: 10 May 2023 at 3.30 pm
(On the papers)

JUDGMENT OF THE COURT

- A Ms D’s application to add the Attorney-General as a party for the purpose of representing the High Court is declined.**
- B The Ministry of Social Development’s application to substitute the Attorney-General as the sole respondent is granted.**
- C Ms D’s application for transcripts of the first call on 25 October 2022 and the hearing on 18 November 2022 is declined.**
-

REASONS OF THE COURT

(Given by Courtney J)

[1] The Benefits Review Committee (the Committee) made a decision on behalf of the Ministry of Social Development about Ms D’s disability allowance. Ms D had not been given notice of the hearing and, consequently,

the Committee’s decision was made in her absence. Ms D brought judicial review proceedings to challenge the Committee’s decision. In addition, she sought damages for breach of her rights under s 27(1) of the New Zealand Bill of Rights Act 1990 (NZBORA).

[2] The respondent asserted that the Committee’s decision was only amenable to appeal and the High Court had no jurisdiction to review it. It indicated its intention to apply to strike out the judicial review proceedings. At a first call of the matter on 25 October 2022, Powell J made timetable directions for the intended strike-out application. These were recorded in a minute dated 28 October 2022.¹ The strike-out application was heard on 18 November 2022. In a written decision delivered on 15 December 2022, Powell J granted the application and struck out the proceeding.² Ms D has appealed both the direction that the strike-out application be heard and the substantive decision granting it.

[3] Before us are two applications by Ms D and one by the respondent.

Applications to add the Attorney-General as a party

[4] Ms D applies to add the Attorney-General as a party to the appeal “representing the High Court”. The respondent opposes the application to the extent that Ms D seeks to incorporate allegations against the High Court in her current appeal. However, it accepts that the Attorney-General is the appropriate, sole, respondent and seeks an order substituting the Attorney-General as such.³

[5] Section 14 of the Crown Proceedings Act 1950 allows the Crown to be joined as a third party to any civil proceedings to which it could be a defendant under that Act and for the Attorney-General to represent the Crown, in prescribed circumstances.

[6] Section 14 of the Crown Proceedings Act relevantly provides:

¹ *D v Ministry of Social Development* HC Auckland CIV-2022-404-1871, 28 October 2022 (Minute of Powell J).

² *D v Ministry of Social Development* [2022] NZHC 3319.

³ According to the respondent’s memorandum of 22 December 2022. This issue was not raised in the High Court but the respondent now seeks to have the position corrected.

14 Method of making Crown a party to proceedings

...

- (2) Subject to the provisions of this Act and any other Act, civil proceedings under this Act against the Crown shall be instituted against—
- (a) the appropriate government department in its own name if the department may be sued apart from this section; or
 - (b) the appropriate officer of the Crown in the name in which he or she may be sued on behalf of the Crown or of any government department if the officer may be sued on behalf of the Crown or of any government department apart from this section; or
 - (c) the Attorney-General if there is no such appropriate department or officer or if the person instituting the proceedings has any reasonable doubt whether any and, if so, which department or officer is appropriate; or
 - (d) any 2 or more of them jointly.

...

- (4) The Crown may be joined as a defendant or third party to any civil proceedings to which it could be a defendant under this Act by joining as a defendant or third party—
- (a) any government department against which, or officer of the Crown against whom, the proceedings could be instituted under subsection (2); or
 - (b) the Attorney-General if there is no such department or officer or if the person seeking to join the Crown as a defendant or third party has any reasonable doubt whether any and, if so, which department or officer should be so joined; or
 - (c) any 2 or more of them jointly.

...

[7] To be named as a party to civil proceedings against the Crown, a government department must be capable of being sued in its own name.⁴ The Ministry of Social Development is not such a department. The respondent correctly identifies that s 14(2)(c) applies in the present case and the Attorney-General is the appropriate respondent. The Attorney-General should therefore be substituted for the Ministry of Social Development.

⁴ See for example *Rahiman v Attorney-General* HC Auckland A900/82, 9 November 1983 at 4–6.

[8] The grounds of Ms D's appeal against Powell J's decisions, set out in her notice of appeal, are:

1. Justice Powell unlawfully obstructed my right to a hearing, instead delaying matters to set down a hearing for a strike out application not yet in existence – dated 28 October 2022.
2. This decision to strike out proceedings dated 15 December 2022 is a breach of my rights to justice s27 BORA 1990.
3. This decision must be overturned with the COA directing the matter to be heard to uphold my rights, free from discrimination against, inclusive of financial hardship.
4. Para [12] is in [error] as outlined in my memorandum before the court dated 5 November 2022.
5. Para [16] [is] in [error] and disregards the statement of claim highlighting the Breach of s9, s19 and s27 BORA 1990. In addition to s21 of the Human Rights Act 1993 – fully and frankly before Justice Powell at the hearing.

[9] The ground stated for Ms D's application for leave to add the Attorney-General as a party to represent the High Court is:

It is in accordance with natural justice for this direction to be made, for a neutral legally versed party such as the "crown" to represent the attorney general.

[10] Ms D says that the High Court's conduct in respect of the strike-out decision should be brought to the Attorney-General's attention, and that it is in the interests of the expeditious handling of the issues raised in her appeal for there to be scrutiny of the High Court's role in obstructing her right to a hearing, or otherwise breaching her rights under the NZBORA.

[11] The respondent submits, correctly, that it is not open to Ms D to incorporate allegations against "the High Court" into her appeal. The role of the High Court was to determine the proceeding before it. The only avenue for challenging the High Court's decision is an appeal based on error in the Judge's reasoning. There is no basis on which Ms D can, in the context of the present appeal, purport to add a claim against the Judge for breach of NZBORA rights. There is, accordingly, no basis on which the Attorney-General could be added in the capacity that Ms D proposes.

Application for order requiring transcripts to be provided

[12] Following the release of Powell J’s decision striking out the judicial review proceedings, Ms D applied to the High Court for a transcript of the hearing of the strike-out application held on 18 November 2022. Powell J declined the application.⁵ Ms D has not appealed that decision. She has, however, applied to this Court for an order requiring the High Court to provide a transcript of both the first call of the judicial review proceedings on 25 October 2022 and the hearing of the strike-out application on 18 November 2022. The respondent opposes the application.

[13] Ms D states her ground for the application as follows:

It is paramount to the integrity of the reputation of justice for the courts “to be seen” to be upholding natural justice and acting consistently in accordance with legal precedents.

[14] No transcript of either hearing presently exists. For that reason, Ms D’s request does not fall within the Senior Courts (Access to Court Documents) Rules 2017.⁶ Nor do those Rules require a document not in existence to be prepared.⁷ Because of the time and expense to the courts in having transcripts prepared, a court will not direct that to be done unless there is a good reason in the interests of justice for doing so.⁸

Transcript of first call on 25 October 2022

[15] The ground for Ms D’s appeal against the orders contained in the Judge’s minute of 28 October 2022 is, essentially, that the Judge erred in permitting the strike-out application to be filed and heard rather than simply setting the substantive judicial review application down for hearing. It is said that this was a breach of Ms D’s rights under s 27 of the NZBORA. In submissions, Ms D says that she has sought the transcript:

⁵ *D v Ministry of Social Development* [2022] NZHC 3537.

⁶ Rule 4 of the Senior Courts (Access to Court Documents) Rules 2017 defines “document” (in relation to a civil proceeding) as meaning “any written material in the custody or control of the court that relates to the proceeding ...”. See *Wiki v Police* [2018] NZHC 2378 at [5]–[11].

⁷ Senior Courts (Access to Court Documents) Rules, r 3(3).

⁸ *Siemer v Heron (Recusal)* [2011] NZSC 116, [2012] 1 NZLR 293 at [9].

... to substantiate the fully informed situation before the participants, of whom counsel for the respondents was not privy – to indicate why the matter may have been transferred from Mr Fong to Mr Conway. In accordance with transparency and a clear understanding of the judicial directions made – as to whether these were in ... error or according to the spirit of the High Court Rules 2016 and the function of the High Court – not to dispose of matters, but to determine them on their merit – as presented at the time of determination.

[16] This explanation does not disclose any good reason to justify the cost and time of diverting court resources to the preparation of a transcript. The reasons for the Judge’s directions are fully set out in his minute of 28 October 2022. Ms D will be able to advance her arguments on the appeal by reference to those reasons.

Transcript of hearing on 18 November 2022

[17] In her notice of appeal, Ms D said in relation to the hearing on 18 November 2022:

I seek the [Court of Appeal] mandate the High Court to release the transcript from the hearing of 18 November 2022 for full transparency of how “justice” is conducted before Justice Powell and the distortion of evidence in hearings and the decisions he manufactures despite it.

[18] Ms D’s application must fail in relation to the hearing on 18 November 2022. Powell J declined her application for a transcript of that hearing and Ms D did not appeal that decision. It is not for this Court to circumvent the Judge’s decision by considering a fresh application where no challenge has been made to it. We note that Ms D says she did not appeal Powell J’s decision because she did not wish to waste her time or the courts’ time. That motivation does not, however, entitle her apply to this Court afresh or enable this Court to entertain such an application.

[19] We add that, in any event, we see no error in Powell J’s decision to decline Ms D’s application. Powell J had declined Ms D’s application for a transcript of the 18 November 2022 hearing on the basis that she had not shown that there was a “good reason in the interests of justice” for directing a transcript to be prepared. We agree with that assessment. The substantive decision under appeal is supported by full reasons and Ms D will be able to advance her appeal by

reference to those reasons. There is no good reason to require a transcript to be prepared and no apparent error in the Judge's conclusion.

Result

[20] Ms D's application to add the Attorney-General as a party for the purpose of representing the High Court is declined.

[21] The Ministry of Social Development's application to substitute the Attorney-General as the sole respondent is granted.

[22] Ms D's application for transcripts of the first call on 25 October 2022 and the hearing on 18 November 2022 is declined.

[23] The Ministry does not seek costs in relation to these applications.

Solicitors:
Crown Law Office, Wellington for Respondent