IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-3258

UNDER	the High Court Rules, Part 30 Judicial Review
IN THE MATTER OF	the Income Tax Act 2004 and s 252 Injury Prevention, Rehabilitation and Compensation Act 2001
BETWEEN	IRENE YEH LENG GOH Plaintiff
AND	COMMISSIONER OF INLAND REVENUE Defendant

Hearing: 11 November 2009

Appearances: Plaintiff in person (assisted by M Murphy as McKenzie friend)
R L Roff for the Defendant

Judgment: 11 November 2009

ORAL JUDGMENT OF WOODHOUSE J

Solicitors / Parties:
Mrs I Goh
Mrs R L Roff, Crown Law Office, Wellington

[1] On an application for judicial review the plaintiff, Mrs Goh, challenges a decision of the defendant Commissioner of Inland Revenue disallowing a claim to a tax credit of approximately $10,000 for the 2006 tax year. That is perhaps an over-simplification of the claim, but it conveys the essence for the purposes of an introduction.

[2] The Commissioner has applied to strike the claim out on two principal grounds. It is submitted that the claim is an abuse of process because the only means of challenging the Commissioner's decision is pursuant to the disputes procedures under Parts 4A and 8A of the Tax Administration Act 1994. It is separately submitted that the claim is untenable. The essence of the submission is that Mrs Goh is not entitled to the $10,000 she claims, whatever the form her claim might take.

Facts

[3] Following is a broad outline of the facts. The facts alleged in the claim are assumed to be correct on a strike out application, but there is very little fact pleaded. However, except perhaps in only one peripherally relevant respect, the facts are not in dispute. The figures I use in the following paragraphs are all rounded for convenience.

[4] Between March 1998 and September 2005 Mrs Goh received a Domestic Purposes Benefit from the Ministry of Social Development (the Ministry). The total was $58,000. Of that, $48,000 was paid directly to Mrs Goh. $10,000 was paid on her behalf by the Ministry to the Inland Revenue Department as tax. Mrs Goh acknowledges that the tax was payable on the benefit. She has expressly acknowledged in her submissions that the $10,000 tax was paid on her behalf.

[5] Mrs Goh had a claim to accident compensation. In November 2005 the claim was settled. Mrs Goh was assessed to be entitled to $96,000 for the period March 1998 to September 2005 over which period the benefit had been paid. The $96,000 in accident compensation was a gross sum; that is to say, there was tax payable on it.

[6] The Accident Compensation Corporation, purportedly pursuant to s 252 of the Injury Prevention, Rehabilitation and Compensation Act 2001, made certain deductions from the $96,000. In broad terms, s 252 requires the Corporation to refund what is referred to as an "excess benefit payment" to the Ministry. The Corporation was also required to make a separate tax payment.

[7] In respect of the $58,000 paid to, or for, the benefit of Mrs Goh for the Domestic Purposes Benefit the following payments, or effective payments, were made:

a) $48,000 was repaid directly to the Ministry.

b) $10,000 was paid to the Inland Revenue Department. This payment was made in accordance with inter-departmental arrangements. There is evidence before me, which I accept, that the $10,000 has in turn been credited in an appropriate way to the Ministry.

[8] After dealing with the $58,000 in this way there was a sum of approximately $38,000 remaining. In respect of that sum a further payment of, I am informed, approximately $14,000 was paid by the Accident Compensation Corporation to the Inland Revenue Department for further tax due in respect of the total compensation.

[9] Mrs Goh considered that the $10,000 deduction should not have been made, but because it was deducted and then paid to the Inland Revenue Department it in effect amounted to a tax payment by her. The following occurred in that regard:

a) For the 2006 tax year in her tax return Mrs Goh claimed a credit in the sum of $10,000.

b) On 20 August 2007 this was disallowed by the Commissioner.

c) On 14 December 2007 Mrs Goh challenged the Commissioner's decision. The challenge was pursuant to the provisions of Part 4A of the Tax Administration Act by notice of proposed adjustment from Mrs Goh.

d) On 5 February 2008 the Commissioner rejected the proposed adjustment.

e) On 31 March 2009 in an adjudication report the Commissioner ruled that the plaintiff was not entitled to the claimed tax credit of $10,000.

[10] This application for judicial review followed. It was filed on 29 May 2009. The principal relief sought by the plaintiff is as follows:

> The Commissioner of Inland Revenue credits an amount of $10,049.08 against the plaintiff's tax liability for the 2006 tax year.

There are claims for interest and costs, but those are not material to the present issue.

[11] The Commissioner's application to strike out was filed on 24 July 2009.

[12] I have received careful written submissions for the Commissioner in support of the application and from Mrs Goh, who has appeared on her own behalf with the assistance of Mr Martin Murphy as a McKenzie friend. Mr Murphy obviously also assisted Mrs Goh with the written submissions which he signed together with Mrs Goh. Mrs Goh presented her submissions with competence.

Discussion : abuse of process

[13] I am satisfied, and to the standard that I am required to be satisfied on a strike out application, that this proceeding must be struck out as an abuse of process. The reasons can be stated briefly. In stating my reasons with brevity I do not intend any disrespect to the careful submissions I received from Mrs Goh. But the law is clear.

[14] The Tax Administration Act makes clear that in almost all cases the only means of challenging a decision of the Commissioner of Inland Revenue is pursuant to the procedures contained in Parts 4A and 8A of the Act. This issue was dealt with by the Court of Appeal in *Westpac Banking Corporation v Commissioner of Inland Revenue*[1]. I will simply set out the head note, which is as follows:

[1] *Westpac Banking Corporation v Commissioner of Inland Revenue* [2009] 2 NZLR 99 (CA)

> 1 Judicial review was available where what purported to be an assessment was not an assessment. For example, it was available in exceptional cases and cases of conscious maladministration, where an assessment of this sort would fall outside the scope of ss 109 and 114 of the Tax Administration Act, and thus not engage those sections (see paras [59], [74]).
>
> 2 It was inconsistent with the policy underlying ss 109 and 114 to allow taxpayer litigants like Westpac to trawl through processes antecedent to the view to identifying and then relying on perceived departures from internal department procedures. Such breaches could hardly be regarded as exceptional (in the sense of being rare) and to allow them to invalidate later assessments would have left little scope for ss 109 and 114. Where the officer issuing an assessment believed, as in this case, that it was well founded on the facts and the law, and that there was no legal impediment to its being issued, an inadvertent departure was not conscious maladministration and not an exceptional circumstance in the relevant sense of excluding the operation of ss 109 and 114. This was especially so where, as here, the alleged departure from departmental procedures was entirely collateral to the accuracy or otherwise of the assessment (see paras [94], [95]).

[15] There was an application for leave to appeal to the Supreme Court from the Court of Appeal's decision in *Westpac*. The application was dismissed. [2]

[16] Nothing has been put before me which comes close to suggesting that this is an exceptional case. What is more, Mrs Goh herself embarked on the correct procedures at the initial stages. As it is apparent that Mrs Goh was not satisfied with the Commissioner's adjudication decision of 31 March 2009, Mrs Goh should have taken the next appropriate step as provided in the Tax Administration Act.

[17] Mrs Goh's notice of opposition referred to s 138N of the Tax Administration Act, which has provision for transfer of certain proceedings from the High Court to the Taxation Review Authority. That provision does not enable this Court to transfer an application for judicial review to the Taxation Review Authority. I do note that this present proceeding was commenced within the two month limitation period for a referral of the dispute to the Taxation Review Authority, or within a few days of the time limit. It may be that this would provide a foundation for an application by Mrs Goh to the Taxation Review Authority under s 138D of the Tax Administration Act for leave to proceed outside the requisite time period. But that is not a matter that I can express any view on.

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[2] *Westpac Banking Corporation v Commissioner of Inland Revenue* (2009) 24 NZTC 23,435 (SC)

[18] For these reasons, and in respect of which the law is clear, the present proceeding must be struck out.

Discussion : claim untenable

[19] It is appropriate to consider this ground, which is a distinct alternative ground, for two reasons. The first is the more conventional reason; that is that I may be wrong in respect of the matters just dealt with. The second involves a liberal approach to the present proceeding, and giving full recognition of powers of amendment, which need to be considered on an application to strike out. Mrs Goh's claim might be converted into a claim to recover a sum of $10,000 unlawfully deducted from her compensation payment from the Accident Compensation Corporation. Since it is not in dispute that that deduction was paid by the Corporation to the Inland Revenue Department it may be that the appropriate defendant would in such circumstances be the Inland Revenue Department.

[20] Approaching the matter in this way the underlying question is whether the $10,000 should have been deducted along with the $48,000.

[21] At the heart of this question is the interpretation of s 252 of the Injury Prevention, Rehabilitation and Compensation Act. And, within that, is the interpretation of the expression "excess benefit payment" used in s 252. It is the excess benefit payment that is required to be deducted.

[22] This question was directly in issue in *Buis v Accident Compensation Corporation*[3]. Following consideration of a range of arguments advanced by a person in a broadly similar situation to Mrs Goh, Rodney Hansen J concluded that the Accident Compensation Corporation is statutorily bound to do, in effect, what happened in this case. That is to say, the excess benefit payment is the "grossed up" sum. Both the net amount, after tax, and the tax portion, are required by s 252 to be withheld from the person entitled to compensation and dealt with in accordance with

[3] *Buis v Accident Compensation Corporation* (HC AK, CIV 2007-404-4703, 6 March 2009, Rodney Hansen J)

other statutory provisions or interdepartmental arrangements. The requirement is that the total sum is to be refunded to the Ministry.

[23] With respect, I agree with the conclusion of Rodney Hansen J, and for the reasons fully set out in his judgment. I note that his decision has more recently been followed in *Reddell v Accident Compensation Corporation*[4] and *Hollis v Commissioner of Inland Revenue*[5].

[24] In *Buis* the relevant statutory provision was not s 252 but s 373 of the Accident Insurance Act 1998. The Accident Insurance Act was replaced by the Injury Prevention, Rehabilitation and Compensation Act. Section 252 of the latter is, in all material respects, the same as s 373 of the former.

[25] Mrs Goh submitted that the decision in *Buis* was wrong. She referred, in particular, to what the Judge said at [31]. I do not agree with Mrs Goh's submission that the Judge "misunderstood" the meaning of the expression "excess benefit payment" in s 252.

[26] In fact, with respect, I consider that the statements by the Judge at [29]-[32], under the heading 'Practical outcomes', succinctly set out the reasons why, in a practical sense, the arguments advanced for the plaintiff in that case, and Mrs Goh in this case, cannot be right. The result of what has happened, and in respect of which Mrs Goh makes her complaint about the $10,000, is that Mrs Goh is in the same position she would have been if she had never received the Domestic Purposes Benefit in the first place. The accident compensation has replaced the benefit, and with a legitimate surplus to Mrs Goh ($96,000 less tax compared with $58,000 less tax for the same period). If Mrs Goh's contentions were correct, and by some means or another she gets a credit for the $10,000, then she would receive a windfall of that amount.

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[4] *Reddell v Accident Compensation Corporation* (HC AK, CIV 2008-485-2736, 24 June 2009, Stevens J)

[5] *Hollis v Commissioner of Inland Revenue* (HC NAP, CIV 2009-441-74, 30 October 2009, Randerson J)

[27] It does seem to me that Mrs Goh's submissions under this heading were all directed to what I would call, in a broad sense, matters of procedure; more specifically the proper means by which the necessary adjustments were required to be made once Mrs Goh's accident compensation entitlement had been determined. Mrs Goh submitted to me that at the heart of her arguments (using my own words) is a letter from Work and Income NZ (WINZ) to the Accident Compensation Corporation dated 18 November 2005. It is a short letter so I will set out the relevant part of it.

> Please find attached details of reimbursement required for Irene Goh. Please pay the total reimbursement only.
>
> | | |
> |---|---|
> | Net | $48,404.56 |
> | Gross | $58,453.64 |
> | | |
> | Total for reimbursement | $48,404.56 |

[28] Mrs Goh submitted, and supporting her submission by reference to statutory provisions in the Social Security Act 1964, that the maximum sum that could be deducted from her accident compensation payment was the amount sought by WINZ - $48,404.56. She submitted that, because WINZ did not also seek the tax portion of $10,000 (in round figures), the $48,000 is the limit of the amount that could be deducted.

[29] I do not agree. There are two reasons. The first is that what WINZ did was in accordance with the statutory provisions contained, in particular, in ss 83A and 85A of the Social Security Act. In essence, what s 85A provides is that, in the circumstances that arose in this case, the $48,000 was recoverable by WINZ as a "debt due to the Crown". Section 83A(5) provides that if tax has been paid on a benefit and that benefit exceeds the entitlement of the recipient this tax is not recoverable "as a debt due to the Crown" within the meaning of s 85A. But s 83A(5) goes on to provide that the tax portion may be recovered by two alternative means specified in sub-section (5). One of those, in s 83A(5)(b), is by "making such other arrangements for [refund of the tax] as are agreed with the Commissioner". The taxed portion of $48,000 was recoverable by WINZ (or the Ministry) in the way it was recovered as recorded in the letter. The letter from WINZ did not refer to the tax portion because of s 83A.

[30] Mrs Goh submitted that the Ministry purported to recover the $10,000 tax portion as a debt contrary to s 83A. In consequence, it was submitted, in as many words, that the $10,000 was unlawfully paid to, and unlawfully received by, the Inland Revenue Department. However, WINZ did not seek to recover the sum of $10,000 as a debt due to the Crown. What WINZ (or the Ministry) did was to recover the tax portion in a way expressly authorised by s 83A(5)(b).

[31] The separate reason why I consider that the letter from WINZ of 18 November 2005 does not create some form of cap on the maximum that is recoverable is that a letter from WINZ cannot override a statutory requirement. The statutory requirement is that the total of $58,000 is to be recovered by the Ministry. The only point is that the process for recovery of the tax portion is different from the process for recovery of the balance.

[32] For these reasons I am satisfied to the requisite standard that the claim is not tenable or sustainable and that it should be struck out on this alternative ground.

[33] I note that Mrs Goh submitted that two affidavits filed on behalf of the respondent were inadmissible. The essence of the reason was that the deponents, being employees of the Ministry and the Inland Revenue Department, deposed that they were authorised to give the affidavit evidence, but evidence of their authority had not been produced. As I indicated to Mrs Goh during her submissions, there appeared to be a confusion between the need for proof of delegated authority to make decisions pursuant to a statutory power, and authority simply to give evidence as to what has occurred on a particular matter. I am quite satisfied that the statements by the deponents that they were authorised to give the evidence are sufficient; certainly in the absence of any positive evidence to the contrary, and there is none.

Judicial Review : discretion

[34] Mrs Goh has carefully traversed a number of statutory provisions for the purpose of seeking to persuade the Court that the processes have not been followed in accordance with the relevant statutory provisions. Even if I was persuaded that

that were the case, and I am not, the case in its essence would still come back to the basic point I made earlier; that is that if Mrs Goh is correct then she will receive a windfall of $10,000. Mrs Goh is entitled to full compensation, which she now has, from the Accident Compensation Corporation, with the benefit earlier received having been refunded. Mrs Goh is not entitled to an additional $10,000 and there is simply no question from an arithmetical point of view that, if Mrs Goh were correct, there would be that windfall.

[35] For that reason, even if there was jurisdiction to consider an application for judicial review, the ultimate discretion of the Court on an application for judicial review could not be exercised in favour of Mrs Goh. The law is clear. Even if there has been some error of law demonstrated on an application for judicial review, the Court retains an ultimate discretion to withhold relief on a number of different grounds. In my judgment relief would have to be withheld if some form of statutory irregularity would result in a windfall to an individual at the expense of taxpayers as a whole. That would be what would happen if relief was granted to Mrs Goh.

[36] The proceeding is, in consequence, struck out.

Costs

[37] The Commissioner applied for costs. The intention to apply for costs was made clear in the application to strike out.

[38] Mrs Goh opposed an order for costs. Her submissions in that regard, in considerable measure, traversed the submissions on the substantive issues. However, she pointed to advice she received from the Inland Revenue Department referring to the possibility of going to the High Court as opposed to the Taxation Review Authority. Although that advice was in fact to pursue the disputes procedure before the High Court rather than the Taxation Review Authority, it may be that there was a degree of misunderstanding. Against that, however, is the fact that the substance of the argument came up against a substantial body of law contrary to the claim, for reasons I have already traversed. The other main point made by Mrs Goh

is that she is a beneficiary. She has a total net income, she says, of approximately $366 per week, being accident compensation and some supplementary benefits.

[39] In the light of the advice from Mrs Goh about her income, Mrs Roff very reasonably indicated that it might be in order to make a nominal award only. When pressed by me Mrs Roff suggested that Mrs Goh pay the filing fees paid by the defendant. That would in fact be a very modest award of costs against an unsuccessful litigant. But in view of the fact that that very reduced sum has been sought I will make an order for costs in an amount representing the filing fee, or fees, paid by the defendant in this proceeding.

[40] It is relevant in the light of the background to this proceeding, with clear indication that others are encouraging people such as Mrs Goh to bring these proceedings, to record that costs awards in the case of unsuccessful claims would in the normal course be very much higher than the award in this case.

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Peter Woodhouse J