Federal Court of Australia

Singh v Minister for Government Services [2024] FCA 368

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| File number(s): |  |
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| Judgment of: | **NESKOVCIN J** |
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| Date of judgment: | 16 April 2024 |
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| Catchwords: | **ADMINISTRATIVE LAW** – application for judicial review of decision made under *Scheme for Compensation for Detriment caused by Defective Administration* – non-statutory scheme – substitution of proper respondent – whether non-statutorily based administrative actions are amenable to prerogative relief – whether the Court has jurisdiction to grant relief under s 39B of the *Judiciary Act 1903* (Cth) – jurisdictional error – failure to take into account relevant considerations – error of law – procedural fairness – reasonable apprehension of bias – improper exercise of power |
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| Legislation: | *Judiciary Act 1903* (Cth) ss 39B(1), 39B(1A) |
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| Cases cited: | *Barnett v Minister for Health and Aged Care* [2023] FCA 1139  *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560  *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10; (2023) 408 ALR 381  *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 288 FCR 23  *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337  *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123  *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323  *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1 |
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| Date of hearing: | 15 February 2024, 19 March 2024 |
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| Counsel for the Applicant: | The Applicant appeared in person |
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| Counsel for the Respondent: | Mr A Chan |
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| Solicitor for the Respondent: | Sparke Helmore Lawyers |

ORDERS

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|  | | SAD 142 of 2023 |
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| BETWEEN: | JASBIR KAUR BALBIR SINGH  Applicant | |
| AND: | MINISTER FOR GOVERNMENT SERVICES  Respondent | |

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| order made by: | NESKOVCIN J |
| DATE OF ORDER: | 16 APRIL 2024 |

THE COURT ORDERS THAT:

1. Pursuant to r 9.11 of the *Federal Court Rules 2011* (Cth)*,* the Minister for Government Services is substituted as the respondent.
2. The application is dismissed.
3. The applicant pay the respondent’s costs of the proceeding.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011* (Cth).

REASONS FOR JUDGMENT

NESKOVCIN J:

1. By origination application dated 7 October 2023, the **applicant**, Ms Balbir Singh, seeks relief pursuant to s 39B(1) or (1A) of the ***Judiciary Act*** *1903* (Cth) in respect of a decision to decline her claim for compensation from Services Australia under the***Scheme*** *for Compensation for Detriment caused by Defective Administration.* She has been self-represented in this proceeding.
2. The Scheme is a non-statutory scheme that allows non-corporate Commonwealth entities to pay compensation in circumstances where a person has suffered detriment as a result of the entity’s defective administration when there is no legal requirement to make a payment. The Scheme is administered by Services Australia. In addition, Services Australia delivers government payments and services, including Centrelink payments. It is one of a number of statutory and non-statutory bodies and statutory office holders under the portfolio of the Department of Social Services.
3. Details and guidance for the Scheme’s operation are set out in the Department of Finance’s ‘Resource Management Guide No. 409’ (**RMG 409**).
4. RMG 409 states that the Scheme operates “… on the basis of authority provided to individual portfolio ministers under the executive power of sections 61 and 64 of the Constitution.”
5. The function of the Scheme is outlined in RMG 409 in the following terms:

17. The CDDA Scheme provides that if a minister or an official authorised by the minister forms an opinion that an official of the entity, acting, or purporting to act, in the course of duty, has directly caused a claimant to suffer detriment, or, conversely, prevented the claimant from avoiding detriment, due to:

* a specific and unreasonable lapse in complying with existing administrative procedures that would normally have applied to the claimant’s circumstances
* an unreasonable failure to institute appropriate administrative procedures to cover a claimant’s circumstances
* giving advice to (or for) a claimant that was, in all circumstances, incorrect or ambiguous
* an unreasonable failure to give to (or for) a claimant, the proper advice that was within the official’s power and knowledge to give (or was reasonably capable of being obtained by the official to give) the minister or the authorised official may authorise a payment to the claimant [sic].

18. The CDDA Scheme is permissive, in that it does not oblige the decision-maker to approve a payment in any particular case. However, the decision to approve or refuse a payment must be publicly defensible, having regard to all the circumstances of the matter.

1. It may be observed that paragraph 17 of RMG 409 is not in the clearest of terms, but it would seem that there are four types of circumstances in which the relevant minister or authorised official may authorise a payment to a claimant. However, as noted in paragraph 18 of RMG 409, the decision-maker is not obliged to approve a payment in any particular case.
2. RMG 409 provides the following guidance for ‘Determining defective administration’:

45. An unreasonable lapse or failure is one where the actions of the official(s) involved are considered to be contrary to the standards of diligence that the entity expects to be applied by reasonable officers acting in the same circumstances with the same powers and access to resources.

46. Cases may arise where individual instances of administrative omissions or errors may not be regarded as unreasonable when considered in isolation from each other, but may constitute defective administration when considered in totality and in the context of the combined impact of the omissions or errors on the claimant.

47. Where advice or information given to a claimant was incorrect or ambiguous, it is not necessary for an element of unreasonableness to be present for the action to fall within the definition of defective administration.

1. RMG 409 also sets out when a payment under the Scheme would be inappropriate, such as if other avenues exist to remedy the defective administration.
2. For the reasons that follow I have determined that the originating application should be dismissed.

# the applicant’s claim under the scheme

1. On 3 February 2023, the applicant submitted an electronic claim for compensation under the Scheme seeking $8,888,800 in compensation from Services Australia. In response to the question “*Why do you think you are entitled to compensation from Services Australia?*”, the applicant stated:
2. My COVID-19 Crisis payment has been rejected unreasonably due to negligence and maladministration
3. I am also being informed that funds that were meant for me as a victim of harm, and for injuries I have suffered, has been given to someone else. I am the one who has been harmed, who does not own my own home, has debts, my medical career is destroyed and whose life is destroyed, but it appears someone else has been given my compensation, by a government agency.
4. Crisis payments due to a national health emergency are payable under the ***Social Security Act*** *1991* (Cth) to persons who qualify for a social security pension or benefit and have made a claim for a crisis payment, subject to the claimant satisfying the requirements determined by the Minister for Social Services by legislative instrument: see s 1061JIA of the *Social Security Act*.
5. From 25 March 2020 to October 2022, a $500 COVID-19 Crisis Payment was available to persons who were in financial hardship and who, because of COVID-19, were required to quarantine or self-isolate, or care for another person who was required to quarantine or self-isolate. In addition, the Social Security Guide (published by the Department of Social Services) provided that to qualify for the COVID 19 Crisis Payment, a person was required to make a claim within 14 days after the commencement of the quarantine or isolation period. The 14 day claim period could be met by contacting Services Australia about a claim in that period and making a claim within 14 days after the contact day: Social Security Guide, 3.7.4.45 Qualification for CrP – national health emergency (NHE).
6. The applicant, who at all relevant times was on a disability support pension, says she was in compulsory quarantine under the relevant Western Australian legislation from 14 December 2021 to 28 December 2021. On 18 February 2022, the applicant made a claim for a COVID-19 Crisis Payment. Services Australia rejected the claim because it was not lodged within the required timeframe.
7. In the compensation application form, the applicant also sought compensation from Services Australia for defective administration relating to her claim for compensation against entities in New Zealand for injuries and harm she had suffered whilst working as a medical practitioner in New Zealand. Although the applicant has on occasion described this claim as relating to “lost” compensation, at the final hearing the applicant clarified that this aspect of her claim for compensation from Services Australia for defective administration was put on the basis that Services Australia should have done more to assist her with her claim against New Zealand entities for compensation for the injuries and harm she suffered whilst working as a medical practitioner in New Zealand.
8. The applicant’s claim for compensation under the Scheme was subsequently expanded to cover a third claim relating to Services Australia’s handling of a claim for a Crisis Payment – Extreme Circumstances.
9. Under s 1061JH (*Qualification – extreme circumstances forcing departure from home*) of the *Social Security Act*, a person who qualifies for a social security pension or benefit who has left their home because of an extreme circumstance may qualify for a crisis payment if the person makes a claim for a crisis payment within 7 days after the extreme circumstance occurred and the person is in severe financial hardship on the day on which the claim is made.
10. On 7 February 2023, the applicant lodged a claim for a Crisis Payment – Extreme Circumstances Forcing Departure from Home under s 1061JH of the *Social Security Act* in relation to her front door which the police had damaged when they forcibly entered her home in early January 2023. Services Australia rejected this claim on the basis that it was not lodged within the required timeframe.
11. At the final hearing the applicant asserted that her claim for compensation under the Scheme and the relief she sought in the proceeding also covered various privacy breaches by Services Australia. This claim is not referred to in the compensation application form. Nor is a claim for compensation for privacy breaches referred to in the decision statement in which the applicant’s claim under the Scheme was declined, to which I will come shortly. There was no evidence that the applicant’s claim under the Scheme was expanded to include the claim in relation to the privacy breaches, although the applicant made a submission to this effect. In light of these matters, I do not regard the applicant’s claim or the relief sought in this proceeding as extending to any claim in respect of privacy breaches.

# the Decision to decline the applicant’s claim under the scheme

1. On 1 August 2023 an **Authorised Officer** of Services Australia found that compensation under the Scheme was not payable to the applicant and advised her that she could request a reconsideration of her claim (**Compensation Decision**).
2. On or around 20 August 2023 the applicant requested a review of the Compensation Decision. Services Australia treated this as a request for reconsideration.
3. On 5 September 2023 a **Director** of Services Australia decided the additional information provided by the applicant did not support her request for reconsideration and advised the applicant that her claim under the Scheme had been finalised (**Reconsideration Decision**).
4. Although in the originating application the applicant asks the Court to overturn the Compensation Decision and the subsequent Reconsideration Decision, the grounds of review, to which I will come, refers to specific parts of the Compensation Decision and seek to challenge the decision that the applicant was not entitled to compensation under the Scheme. In these circumstances I proceed on the basis that it is the Compensation Decision to which the grounds of review are directed.
5. The Compensation Decision is set out in a decision statement. The decision statement began by identifying the materials considered. It then identified the criteria for assessing a claim under the Scheme for compensation for detriment caused by defective administration. The decision statement identified six issues to be decided.
6. Before considering those issues, the decision statement set out the reasons the applicant believed she should be paid compensation. In summary, the decision statement referred to the damage caused to the applicant’s front door by the police, that she was in mandatory quarantine in Western Australia in late December 2021, that she says she was told not to lodge claims on her computer due to her physical injury, that when her Disability Support Pension was granted she was informed she had also been granted the COVID-19 emergency payment and, finally, that she had not received a compensation payment from the New Zealand government.
7. The decision statement then set out key background facts, which included statements made by the applicant and other decided facts. In relation to the COVID-19 Crisis Payment, the decision statement noted that the claim was rejected because the applicant did not make a claim within 14 days after the start of the quarantine or isolation period. In relation to the Crisis Payment –Extreme Circumstances, the decision statement noted that the claim was rejected as the claim had not been lodged within 7 days of an extreme circumstance. In relation to the compensation from New Zealand, the decision statement noted that Services Australia does not have any legal capacity or ability to assist the applicant in relation to such a claim.
8. The decision statement then addressed two of the six issues to be decided, namely, whether compensation under the Scheme was excluded and whether there had been defective administration. The Authorised Officer was satisfied there were no circumstances that would preclude the assessment of the applicant’s claim under the Scheme, however, that person concluded that no defective administration was evident. As a result, the determination was that compensation was not payable in the applicant’s case and her claim was declined.

# THE PARTIES’ MATERIAL

1. The applicant relied on 15 affidavits and six sets of written submissions as follows:
2. an affidavit dated 28 September 2023 filed on 25 October 2023 entitled “Social Services Decisions”;
3. four affidavits dated 28 September 2023 filed on 30 October 2023 entitled:
   1. “Statement”;
   2. “Appendix 1”;
   3. “Appendix 2”;
   4. “Appendix 3”; and
4. two affidavits dated 6 May 2023 filed on 14 November 2023 entitled:
   1. “Losses SA”; and
   2. “Qualifications SA”;
5. an affidavit dated 28 September 2023 filed on 15 January 2024 entitled “Appendix 2”;
6. a submission filed on 15 January 2024 entitled “Compensation Application (SS509) dated 17/01/2023”;
7. a submission filed on 16 February 2024 entitled “Submission 15/02/24”;
8. a submission filed on 19 February 2024 entitled “Submission 15/02/24” (which is almost identical to the submission filed on 16 February 2024);
9. a submission filed on 15 March 2024 entitled “Why the minister is not the only person responsible”;
10. an affidavit dated 28 September 2023 filed on 15 March 2024 entitled “Appendix 5”;
11. two affidavits dated 28 September 2023 filed on 18 March 2024 entitled:
    1. “Appendix 4”; and
    2. “Appendix 2”;
12. a submission filed on 19 March 2024 entitled “Appendix 4”;
13. three affidavits dated 28 September 2023 filed on 19 March 2024 (two of which, (i) and (iii), appear to be identical to affidavits previously filed) entitled:
    1. “Appendix 2”;
    2. “Appendix 2A”; and
    3. “Social Services Decisions”.
14. The respondent relied on two affidavits and two sets of written submissions:
15. an affidavit of Cindy Huang, solicitor for the respondent, affirmed and filed on 12 February 2024 with six annexures entitled “CH-1” through to “CH-6”;
16. an affidavit of Ms Huang affirmed on 28 February 2024 filed on 5 March 2024 with one annexure entitled “CH-7”; and
17. submissions filed on 12 February 2024 and 5 March 2024.
18. The above affidavits were admitted without objection, and there was no cross-examination of the deponents to them.
19. After the final hearing, the applicant sought to file further materials, comprising:
20. “Correspondence” dated 23 March 2024 filed on 28 March 2024; and
21. an affidavit dated 28 September 2023 filed on 28 March 2024 entitled “Appendix 3A”.
22. The respondent objected to the affidavit entitled “Appendix 3A” on the grounds that the applicant did not have leave to file the affidavit and it appeared to include evidence that was not before the original decision-makers. Although it was not altogether clear, the affidavit seemed to relate to the privacy breaches and matters which were the subject of other affidavits filed by the applicant. For these reasons I refused the applicant leave to file the “Appendix 3A” affidavit.

# the proper respondent

1. When the applicant commenced this proceeding, Services Australia was named as the respondent.
2. The **Secretary** of the Department of Social Services subsequently applied and was substituted as the respondent.
3. The Secretary submitted, and I accept, that insofar as the Scheme confers powers on the Minister in connection with the Scheme the Minister can authorise an official to exercise such powers on the Minister’s behalf, consistently with the principles articulated in *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 at 563.
4. On 21 June 2022, the **Minister for Government Services** signed Instrument Number A-2022-6 and made an authorisation for the purposes of the Scheme. The effect of this was to authorise certain employees of Services Australia to approve or reject payments and claims under the Scheme.
5. Accordingly, as the Minister for Government Services has ultimate responsibility for approving or rejecting payments and claims under the Scheme, I am satisfied that it is appropriate that he be substituted as the respondent in the proceeding.

# the amenability of scheme decisions TO JUDICIAL REVIEW

1. Despite a formal submission that Scheme decisions are not amenable to prerogative relief, the respondent ultimately accepted that having regard to cases including ***Davis*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10; (2023) 408 ALR 381, this Court should proceed on the basis that Scheme decisions are amenable to judicial review.
2. In *Davis* two appeals were brought from a decision of the Full Court of this Court. Each appeal concerned a decision of a departmental officer not to refer to the Minister a request to exercise the power conferred on the Minister by s 351(1) of the ***Migration Act*** *1958* (Cth). Section 351(1) of the *Migration Act* gives the Minister power to substitute in the public interest a more favourable decision for that made by the Administrative Appeals Tribunal. Each departmental decision not to refer a request to the Minister was made in purported compliance with instructions issued in 2016 by the then Minister for Immigration and Border Protection. By the 2016 ministerial instructions departmental officers were instructed not to refer to the Minister a request to exercise the power conferred by s 351 of the *Migration Act* which departmental officers assessed not to “have unique or exceptional circumstances.” The 2016 ministerial instructions allowed departmental officers to decide whether or not a request met certain evaluative “public interest” criteria and, without referral to the Minister, to finalise the request. Under s 351(1) of the *Migration Act* the Minister is not obliged to consider whether to exercise the personal override power conferred by that section*.* In neither case on appeal did the Minister do so because departmental officers, exercising a discretion under the 2016 ministerial instructions, chose not to refer the requests to the Minister for consideration.
3. In *Davis* the High Court granted leave to amend the grounds of appeal to raise a point that was not raised before the Full Court, namely, whether the 2016 ministerial directions (and the departmental decisions made in purported compliance with them) exceeded the executive power of the Commonwealth. The High Court determined the appeals by reference to that ground. The High Court found that the 2016 ministerial instructions were ultra vires because they required departmental officers to encroach on the exercise of non-delegable statutory power. The High Court did not consider whether non-statutory executive action is amenable to judicial review.
4. The Full Court had dismissed the appeals on a different basis, having found that the impugned departmental decisions were not unreasonable. Relevantly for present purposes, the Full Court found that non-statutorily based administrative actions are amenable to judicial review for legal unreasonableness: ***Davis v Minister for Immigration****, Citizenship, Migrant Services and Multicultural Affairs* (2021) 288 FCR 23 at 27 [3] (Kenny J), 37 [49]–[50], 38 [54]–[55] (Besanko J), 50–51 [96]–[97], 53 [112]–[113] (Griffiths J), 54 [116]–[118] (Mortimer J, as her Honour then was), 89 [302], 95 [327], 103 [363] (Charlesworth J).
5. In ***Barnett*** *v Minister for Health and Aged Care* [2023] FCA 1139 at [28] – [29], after referring to the Full Court’s decision in *Davis v Minister for Immigration,* Snaden J proceeded on the basis that the Court had jurisdiction to grant relief under s 39B of the *Judiciary Act* in an application for judicial review of a Scheme decision.
6. I respectfully agree with the approach Snaden J adopted in *Barnett*. I infer that the respondent’s position is, and I accept, that in light of the Full Court’s decision in *Davis v Minister for Immigration*, I should proceed on the basis that the Court has jurisdiction to grant relief under s 39B of the *Judiciary Act* werethe grounds for such relief to be established.

# GROUNDS of REVIEW

1. In the originating application, the applicant seeks relief pursuant to s 39B(1) or (1A) of the *Judiciary Act* to “overturn” the decisions to reject her compensation claim and claims for COVID-19 and “Extenuating Circumstances” Crisis Payments. In effect the applicant seeks an order in the nature of certiorari setting aside the Compensation Decision and an order in the nature of mandamus requiring the Compensation Decision to be made again in accordance with law. I proceed on this basis.
2. Accompanying the originating application is a letter dated 5 September 2023 from the applicant. The applicant accepted at the hearing that this letter sets out the grounds of review which she propounds.
3. Bearing in mind that the applicant is not legally represented it may be accepted that some aspects of her application and grounds of review are expressed in lay-person’s terms. Nevertheless I have construed the grounds of review and the relief sought by the applicant as generously as would seem to be open.
4. That said, the grounds of review identified in the applicant’s letter may fairly be summarised as follows:
5. The Authorised Officer erred in finding that the applicant had not provided any evidence of her trip to South Australia in circumstances where she says that she travelled to South Australia for a medical assessment before returning to Western Australia at which point she was required to quarantine from 14 to 28 December 2021.
6. The Authorised Officer failed to take into account relevant considerations by not considering evidence between 14 December 2021 and 18 February 2022 of multiple telephone calls with Centrelink managers during which the applicant informed them that she was in quarantine at the time and there were ongoing discussions about her health and the ongoing disability support pension assessment process, which were occurring at the same time.
7. The Authorised Officer failed to take into account relevant considerations by not considering evidence that the applicant made contact with Centrelink within 14 days and informed Centrelink that she was in quarantine and the applicant was told that telephone contact was adequate for claim lodgement and that she did not have to lodge an online claim with Centrelink.
8. The Authorised Officer failed to take into account relevant considerations by not considering evidence about the applicant’s physical and mental injuries that affected her ability to lodge claims online in a timely manner.
9. The Authorised Officer erred in not having regard to the lack of assistance from Australian agencies in relation to the applicant’s claim for compensation for injuries and harm sustained in New Zealand.
10. The Authorised Officer made an error of law in deciding that there was a legislative remedy available to the applicant.
11. The Authorised Officer failed to take into account relevant considerations by not considering evidence that had been submitted and accepted by Centrelink that compulsory quarantine was required.
12. The applicant was denied procedural fairness due to a reasonable apprehension of bias against her.
13. The Compensation Decisionwas an improper exercise of power, abuse of process or was induced or affected by fraud.
14. In order to obtain the relief sought in the originating application, the applicant must establish that the Compensation Decision was affected by jurisdictional error. In *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 351 [82], McHugh, Gummow and Hayne JJ said:

It is necessary, however, to understand what is meant by "jurisdictional error" under the general law and the consequences that follow from a decision-maker making such an error. As was said in *Craig v South Australia*, if an administrative tribunal (like the Tribunal)

"falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it."

"Jurisdictional error" can thus be seen to embrace a number of different kinds of error, the list of which, in the passage cited from Craig, is not exhaustive. Those different kinds of error may well overlap. The circumstances of a particular case may permit more than one characterisation of the error identified, for example, as the decision-maker both asking the wrong question and ignoring relevant material. What is important, however, is that identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is to make an error of law. Further, doing so results in the decision-maker exceeding the authority or powers given by the relevant statute. In other words, if an error of those types is made, the decision-maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it. Nothing in the Act suggests that the Tribunal is given authority to authoritatively determine questions of law or to make a decision otherwise than in accordance with the law.

1. As I explain below, I have determined that the Compensation Decision was not affected by any jurisdictional error.

## Ground (1)

1. By this ground, the applicant alleges that the Authorised Officer erred in finding that she had not provided any evidence of her trip to South Australia. This ground for review relates to the decision to reject the applicant’s claim for compensation relating to the COVID-19 Crisis Payment.
2. The decision statement noted that the applicant stated she was in in compulsory quarantine under Western Australian state laws from 14 December 2021 to 28 December 2021. Further, it noted that the applicant stated that she had made a trip to South Australia for medical treatment and returned to Western Australia on 13 December 2021.
3. The decision statement noted that the applicant lodged a claim for a COVID-19 Crisis Payment on 18 February 2022, which was rejected, and that the applicant requested a review of that decision. The decision statement noted that on 28 June 2022 an Authorised Review Officer (**ARO**) of Services Australia advised the applicant that the rejection was a correct decision and the decision statement extracted the following reasons given by the ARO:

…you applied for Crisis Payment for a National Health Emergency after you tested negative for COVID-19 on 18 February 2022.

To be eligible for Crisis Payment – National Health Emergency, the person must:

* meet the common criteria for Crisis Payment, including severe financial hardship
* contact Services Australia for the purposes of claiming a payment or concession card within 14 days of entering quarantine or self-isolation
* lodge a claim for Crisis Payment – National Health Emergency within 14 days of the contact date
* provide evidence of a COVID-19 test notification or result with the date of the test being the event date

You advised in your claim that you tested negative to COVID-19 on 14 December 2021 and 25 December 2021. For a Crisis Payment, you must claim within 14 days after the start of the quarantine or isolation period.

This means you cannot be paid Crisis Payment because you did not claim within the required timeframe.

1. It appears that the applicant has raised this ground of review because the decision statement also noted that “[the applicant] has not provided any evidence of her visit to SA”.
2. By this ground, the applicant alleges that the Authorised Officer made a factual error in that a finding they made was wrong or incorrect. The applicant referred to and relied upon a letter dated 6 December 2021 from Dr Roberto D’Onise based in South Australia. She submitted that this letter, which was provided to Services Australia, was evidence of her trip to South Australia.
3. However, the letter from Dr D’Onise, which was provided to Services Australia, is heavily redacted and the non-redacted parts do not refer to the date or dates on which the applicant may have attended Dr D’Onise for an assessment or consultation. Accordingly, I am not satisfied that the Authorised Officer made the asserted factual error in light of the evidence that was before the officer. In any event, mere factual errors do not constitute jurisdictional error unless the error relates to a jurisdictional fact or is a manifestation of some error of law: *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1 at 16 [53] (Black CJ, French and Selway JJ). Furthermore, the asserted factual error was not an error that might have been material, in the sense that there was no realistic possibility of a different outcome if the error had not been made, given that the COVID-19 Crisis Payment claim was rejected on the basis that it was not made within the required timeframe: ***Hossain*** *v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 134 – 135 [30] – [31] (Kiefel CJ, Gageler and Keane JJ).
4. Therefore, ground (1) has not been established.

## Ground (2)

1. By this ground the applicant alleges that the Authorised Officer failed to take into account relevant considerations by not considering evidence between 14 December 2021 and 18 February 2022 of multiple telephone calls with Centrelink managers. The applicant says that during those telephone calls the applicant informed Centrelink that she was in quarantine at the time and that there were ongoing discussions about her health and the ongoing disability support pension assessment and process which was occurring at the same time. I will proceed on the basis that this ground of review could relate to the COVID-19 and Extreme Circumstances Crisis Payment claims.
2. The decision statement noted that on 14 December 2021, the applicant contacted Centrelink by telephone and indicated she was in quarantine. It noted further that the applicant also contacted Centrelink by telephone on 6 January 2022, 7 January 2022 and 10 January 2022.
3. The decision statement noted that the materials considered by the Authorised Officer included call recordings of the applicant’s telephone calls with Centrelink on 14 December 2021, 6 January 2022, 7 January 2022 and 10 January 2022 and that the Authorised Officer “had regard to … available call recordings”.
4. In oral submissions the applicant maintained that the relevance of her discussions with Centrelink was that Services Australia should have appreciated that she was unable to lodge online claims due to her physical and mental injuries.
5. In terms of the applicant’s claim for compensation for defective administration, the most that could be said was that the Authorised Officer did not take those discussions into account in considering whether there was defective administration in the sense of an unreasonable failure to institute appropriate procedures to cover the applicant’s circumstances: paragraph 17 of RMG 409. It may be accepted that during the telephone calls with Centrelink there were ongoing discussions about the applicant’s health and the ongoing disability support pension assessment and process. However, there is no evidence that the applicant raised her inability to lodge online claims due to her physical and mental injuries or that she asked Centrelink to modify its administrative procedures, which involved lodging claims online within specified timeframes, in light of her physical and mental injuries. In those circumstances, the applicant has not established an error in the Authorised Officer’s consideration of whether there was defective administration in relation to the handling of the applicant’s Crisis Payment claims.
6. Accordingly, ground (2) is not established.

## Ground (3)

1. By this ground, the applicant alleges that the Authorised Officer failed to take into account relevant considerations by not considering evidence that the applicant made contact with Centrelink within 14 days and informed Centrelink that she was in quarantine and the applicant was told telephone contact was adequate for claim lodgement and she did not have to lodge an online claim with Centrelink. This ground for review is relevant to the applicant’s COVID-19 Crisis Payment claim.
2. The decision statement noted that the applicant “states she was told not to lodge anything on her computer due to her physical injury as the manager would lodge the claim on her behalf.” However, there was no evidence that during the applicant’s discussions with Centrelink she was told telephone contact was adequate for claim lodgement and she did not have to lodge an online claim with Centrelink.
3. As has been mentioned, the decision statement noted that the materials considered by the Authorised Officer included call recordings of the applicant’s telephone calls with Centrelink on 14 December 2021, 6 January 2022, 7 January 2022 and 10 January 2022 and the Authorised Officer “had regard to … available call recordings.” The decision statement also contained summaries of the call recordings.
4. The decision statement does not refer to Centrelink informing the applicant that telephone contact was adequate for claim lodgement and she did not have to lodge an online claim with Centrelink. It was open to the applicant to request and review the call recordings, but she did not so. The applicant did not seek to lead any evidence in relation to the call recordings. In addition, prior to the Compensation Decision, the applicant was provided with a Preliminary Statement of Facts and Evidence and was given an opportunity to provide comments or additional evidence. The Preliminary Statement of Facts and Evidence referred to “available call recordings” and the summaries of the telephone calls made by the applicant on 14 December 2021, 6 January 2022, 7 January 2022 and 10 January 2022 were in similar terms to the decision statement. As a result, the applicant had the opportunity to take issue with the accuracy of those summaries.
5. In my view, the applicant, who bears the onus of proof, has not established that the Authorised Officer failed to take account of evidence before the Director that the applicant was told that telephone contact was adequate for claim lodgement and she did not have to lodge an online claim with Centrelink.
6. Therefore, ground (3) is not established.

## Ground (4)

1. By this ground the applicant alleges that the Authorised Officer failed to take into account relevant considerations by not considering evidence about the applicant’s physical and mental injuries that affected her ability to lodge claims online in a timely manner.
2. This ground overlaps with ground (2). For the reasons set out above under ground (2), this ground is not established.

## Ground (5)

1. By this ground the applicant alleges that the Authorised Officer erred in not having regard to the lack of assistance from Australian agencies in relation to the applicant’s claim for compensation for injuries and harm sustained in New Zealand.
2. The decision statement, which must be read as a whole to ascertain the reasons why the applicant’s claim for compensation was unsuccessful, records that in relation to the applicant’s claim for compensation for injuries and harm suffered in New Zealand, Services Australia does not have any legal capacity or ability to assist the applicant in relation to such a claim.
3. This is plainly correct. The applicant’s claim for compensation from New Zealand entities for the injury and harm she suffered whilst working as a medical practitioner in New Zealand is a matter for her to pursue, insofar as it can be pursued, in New Zealand. No error is apparent in this respect.
4. Therefore, ground (5) is not established.

## Ground (6)

1. By this ground the applicant alleges that the Authorised Officer made an error of law in deciding that there was no legislative remedy available to the applicant. This ground of review relates to all three parts of the applicant’s claim under the Scheme.
2. The premise of the Scheme is to provide compensation in circumstances where a person has suffered detriment as a result of defective administration where there is no legal requirement to make a payment. RMG 409 provides that if other avenues exist to remedy the defective administration (such as existing Commonwealth legislation or schemes), those options must be investigated before the matter is considered under the Scheme.
3. This was addressed in the following terms in the decision statement:

**Is compensation under the CDDA Scheme precluded?**

29. Compensation under the CDDA Scheme will be precluded if:

a) Services Australia is legally liable to pay compensation

b) there is a legislative remedy

c) the claim seeks to offset a recoverable debt

d) the claim arises from a flawed legislative provision or

e) the claim has previously been determined under act of grace.

30. I am satisfied there is nothing in the facts of the case that would give rise to a legal liability to pay compensation.

31. I have also considered if there is a legislative remedy. I am satisfied that this is not the case because the review process has determined that there is no legislative remedy.

32. For the above reasons, I am satisfied that there are no circumstances that would preclude the assessment of this claim under the CDA scheme.

1. The applicant appears to have misconstrued the decision statement on this issue. The decision that there “is no legislative remedy” assisted the applicant, in the sense of opening the gate for her claim for compensation to be considered under the Scheme. No error is apparent in this respect.
2. Therefore, ground (6) is not established.

## Ground (7)

1. By this ground the applicant alleges that the Authorised Officer failed to take into account relevant considerations by not considering evidence that had been submitted and accepted by Centrelink that compulsory quarantine was required. This ground for review is relevant to the applicant’s COVID-19 Crisis Payment claim.
2. The decision statement read as a whole indicates that the Authorised Officer proceeded on the basis that the applicant was in quarantine. As set out in relation to grounds (2) and (3) above, the decision statement records that on 14 December 2021 the applicant contacted Centrelink by telephone and the applicant indicated she was in quarantine. It also records that the applicant had advised she was in compulsory quarantine under Western Australian laws from 14 to 28 December 2021.
3. The applicant has not established that the Authorised Officer failed to take into account evidence that had been submitted and accepted by Centrelink that compulsory quarantine was required. In any event, as noted in relation to ground (2) above, the asserted error was not an error that might have been material, in the sense that there was no realistic possibility of a different outcome if the error had not been made, given the COVID-19 Crisis Payment claim was rejected on the basis that it was not made within the required timeframe: *Hossain* at 134 – 135 [30] – [31].
4. Therefore, ground (7) is not established.

## Ground (8)

1. By this ground the applicant alleges she was denied procedural fairness due to a reasonable apprehension of bias against her. This ground for review relates to all three parts of the applicant’s claim under the Scheme.
2. The relevant principles in relation to apprehended bias are well settled. In ***Ebner*** *v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344 – 345, [6] – [8], Gleeson CJ, McHugh, Gummow and Hayne JJ conveniently summarised the principles in the following terms:

Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge (or other judicial officer or juror), as here, the governing principle is that, subject to qualifications relating to waiver (which is not presently relevant) or necessity (which may be relevant to the second appeal), a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide. That principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the tribunal be independent and impartial. It is convenient to refer to it as the apprehension of bias principle.

The apprehension of bias principle may be thought to find its justification in the importance of the basic principle, that the tribunal be independent and impartial. So important is the principle that even the appearance of departure from it is prohibited lest the integrity of the judicial system be undermined. There are, however, some other aspects of the apprehension of bias principle which should be recognised. Deciding whether a judicial officer (or juror) *might* not bring an impartial mind to the resolution of a question that has not been determined requires no prediction about how the judge or juror will in fact approach the matter. The question is one of possibility (real and not remote), not probability. Similarly, if the matter has already been decided, the test is one which requires no conclusion about what factors actually influenced the outcome. No attempt need be made to inquire into the actual thought processes of the judge or juror.

The apprehension of bias principle admits of the possibility of human frailty. Its application is as diverse as human frailty. Its application requires two steps. First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an “interest” in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed. [Footnotes omitted]

1. The two-step test in *Ebner* requires the identification of what might affect the decision-maker’s impartiality and its logical connection with the possibility of departure from impartial decision-making in the case at hand. The basis on which the applicant alleged she was denied procedural fairness due to a reasonable apprehension of bias against her was, she said, due to the blatant racism to which she has been subjected and the spread of false information about her. However, the applicant did not identify anything the Authorised Officer did or failed to do in the process of considering the applicant’s claim under the Scheme that might give rise to a reasonable apprehension of bias against her, whether on racial grounds or otherwise. In these circumstances, the applicant has not established that a fair-minded observer would apprehend any bias in the manner in which the Compensation Decision was made, which was entirely orthodox.
2. Therefore, ground (8) is not established.

## Ground (9)

1. The applicant has not provided any explanation as to the basis on which it is alleged that the Compensation Decision was an improper exercise of power, an abuse of process or induced or affected by fraud.
2. The applicant has the onus of establishing jurisdictional error. In the absence of any detail as to how this ground is put, this ground must fail also.

# CONCLUSION

1. For these reasons, I have concluded that the application should be dismissed. There is no apparent reason why costs should not follow the event and the respondent has sought his costs. There will be an order that the applicant pay the respondent’s costs of the proceeding.

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| I certify that the preceding eighty-nine (89) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Neskovcin. |

Associate:

Dated: 16 April 2024