COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Sahyoun v. British Columbia (Employment and Assistance Appeal Tribunal),* 2014 BCCA 86

Date: 20140306
Dockets: CA040293
CA040294

Between:

Dr. Nabil Riad Sahyoun

Appellant
(Petitioner)

And

Employment and Assistance Appeal Tribunal of British Columbia, and Minister of Social Development, and Attorney General of BC

Respondents
(Respondents)

Before: The Honourable Mr. Justice Low
The Honourable Madam Justice Neilson
The Honourable Mr. Justice Groberman

On judicial review from: An order of the Supreme Court of British Columbia, dated September 5, 2012 (*Sahyoun v. British Columbia (Employment and Assistance Appeal Tribunal)*, 2012 BCSC 1306, Vancouver Dockets S110473 and S121839).

The Appellant:	Appeared on his own behalf and assisted by his wife
Counsel for the Respondent, Employment and Assistance Appeal Tribunal of British Columbia:	A. Westmacott, Q.C.
Counsel for the Respondents, Minister of Social Development and Attorney General of B.C.:	B. Mackey
Place and Date of Hearing:	Vancouver, British Columbia October 2 and 3, 2013
Place and Date of Judgment:	Vancouver, British Columbia March 6, 2014

Written Reasons by:
The Honourable Mr. Justice Low

Concurred in by:
The Honourable Madam Justice Neilson
The Honourable Mr. Justice Groberman

Summary:

The appellant brought two judicial review applications with respect to decisions of the Employment and Assistance Appeal Tribunal of British Columbia. He brought an appeal of each order dismissing the review applications. The appellant claimed that he was, or should have been, given a status by the Ministry of Social Development that would have provided him with income assistance at a higher rate and would have given him health supplements after he reached age 65, when federal income made him no longer eligible for provincial income assistance. The chambers judge did not err in finding that neither decision of the tribunal was patently unreasonable. Both appeals are dismissed.

Reasons for Judgment of the Honourable Mr. Justice Low:

[1] In appeals heard together, the appellant challenges orders dismissing two petitions he brought for judicial review of two decisions made by the Employment and Assistance Appeal Tribunal ("the tribunal") upholding reconsideration decisions made within the Ministry of Housing and Social Development ("the ministry") These decisions denied the appellant certain income assistance benefits under the *Employment and Assistance Act*, S.B.C. 2002, c. 40 ["*EA Act*"] from April 2007 until his 65th birthday in September 2010 (the first tribunal decision) and certain medical benefits after age 65 (the second tribunal decision).

[2] The written and oral submissions of the appellant to this court are unfocussed and difficult to discern in either a factual or a legal context. The respondents have put the appellant's arguments in legal form, which I adopt as the issues we must consider:

(1) Did the chambers judge apply the proper standard of review?

(2) Did the chambers judge err in applying the standard of review?

[3] The respondent ministry also argues that both appeals are moot and the remedies sought are futile. Because the appeals lack merit on the substantive issues, I consider it unnecessary to discuss this issue.

[4] The appellant presented argument as though he were making the applications for benefits anew before this court, rather than identifying arguable errors of law made by the chambers judge, Stromberg-Stein J. (as she then was).

[5] The appellant, in effect, wants the court to rewrite his ministry file so that he can be backdated with a certain designation in order to qualify for additional income benefits retroactively from April 2007 to September 2010 and for certain medical benefits after age 65, which also require the designation the appellant seeks. In the alternative, he wants the court to set aside both tribunal decisions and send the matter back to the tribunal with directions to reconsider his application for the designation and the benefits he says would flow from the designation.

[6] This court cannot reconstruct the appellant's ministry file. Nor can we find that the designation the appellant seeks was implicitly made within the ministry in the past. We can only determine whether the chambers judge erred in not finding the two decisions of the tribunal declining the designation and refusing

the benefits to have been the result of reviewable error.

Standard of Review

[7] Section 58 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 states the standard of judicial review of a decision of a tribunal when the enabling statute governing the tribunal contains a privative clause. Section 58 reads:

> 58 (1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
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> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
>
> > (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
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> > (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
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> > (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.
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> (3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion
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> > (a) is exercised arbitrarily or in bad faith,
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> > (b) is exercised for an improper purpose,
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> > (c) is based entirely or predominantly on irrelevant factors, or
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> > (d) fails to take statutory requirements into account.

[8] Section 24(6) and (7) of the *EA Act* is a privative clause and s. 19.1 of the *EA Act* provides that s. 58 of the *Administrative Tribunals Act* applies to the tribunal.

[9] The effect of these sections, as observed by the chambers judge, is that review of the tribunal's findings of fact and application of the governing statutes and regulations is on the test of patent unreasonableness. Matters of procedure are reviewable on the test of fairness.

[10] I do not understand the appellant to be arguing that any other test is to be applied in this case. I am unable to discern in his argument any viable suggestion of procedural unfairness. Therefore, the broad issue before the chambers judge was whether either of the tribunal decisions was patently unreasonable.

Application of the Standard

[11] It is necessary to give a history of the appellant's receipt of income assistance and the legislation applicable from time to time.

[12] The appellant began receiving income assistance in 1986 under the *Guaranteed Available Income for Need Act*, R.S.B.C. 1979, c. 158 ["*GAIN Act*"], a predecessor to the *EA Act*. He and his wife were in receipt

of this assistance continuously until 10 November 2010, shortly after the appellant reached his 65th birthday. They became no longer eligible for provincial assistance because they then began to receive federal income assistance at $950.70 per month each.

[13] On 30 April 1992, a tribunal decision confirmed that the appellant was eligible for “handicapped person” benefits under the *GAIN Act*. He suffers from advanced degenerative changes of his dorsal spine with related problems and myofascial pain disorder affecting his temporamandibular joints and nearby muscles.

[14] The appellant has asserted throughout these proceedings that in 1990 the ministry designated him as “unemployable” and in 1992 as “permanently unemployable”. However, there is no ministry documentation of these designations.

[15] In October 1996, the *GAIN Act* was repealed and replaced by the *BC Benefits (Income Assistance) Act*, R.S.B.C. 1996, c. 27 and the *Disability Benefits Program Act*, R.S.B.C. 1996, c. 97. The appellant’s handicapped benefits continued under the new legislation and its regulations.

[16] In 2002, the above two statutes were repealed and replaced by the *EA Act* and the *Employment and Assistance for Persons with Disabilities Act*, S.B.C. 2002, c. 41 [“*EAPD Act”*]. The appellant was deemed to be a “person with disabilities” (“PWD”) under s. 31 and 32 of the *EAPD Act*. This was a transition of his status under the previous legislation. It came with the caveat that to continue receiving disability assistance or supplements, the appellant had to “satisfy the initial and continuing conditions of eligibility established under [the *EAPD Act*] that apply in respect of the disability assistance or supplement”: see s. 31(1)(b) of that statute.

[17] In September 2002, the ministry sought a review of the appellant’s PWD designation to confirm continuation of that status under *EAPD Act*. Because the appellant did not respond, the ministry rescinded the status, eventually confirmed by a tribunal after an internal appeal.

[18] As I understand it, this meant that the appellant received income assistance at a lower rate under the *EA Act* than he would have received with a PWD designation.

[19] The appellant relies extensively on s. 2 of the *Employment and Assistance Regulation*, B.C. Reg. 263/2002 [“*EA Regulation*”] which creates a designation of “a person who has persistent multiple barriers to employment” (“PPMB”). A person might be designated with this status if they have received income assistance for a certain time period, are unable to achieve financial independence and have long-term barriers to employment.

[20] On 26 October 2004, the ministry discontinued the appellant’s income assistance because he had failed to comply with the terms of an employment plan as required by s. 9 of the *EA Act*. On 8 December 2004, Mr. Butcher, a ministry reconsideration adjudicator, temporarily exempted the appellant and his wife from this requirement until the appellant could provide updated medical information. He reinstated the appellant’s income assistance.

[21] It should be noted that, notwithstanding the appellant's repeated submissions to the contrary, this decision by the adjudicator was not a determination that the appellant had PPMB status.

[22] Section 26(3) of the *EA* Regulation increases the monthly level of income assistance for PPMB status. In addition, s. 67(1)(a) provides for health supplements for persons with PPMB status. When the regulation came into being in 2002, there was a requirement that each family member be so designated to qualify for the health supplements. In April 2007, the section was amended to provide eligibility for the supplements if only one member of the family unit was designated PPMB.

[23] The appellant claims not to have been aware of this amendment until 2010. The chambers judge described what then ensued:

> [16] On September 7, 2010, the petitioner requested that the Ministry recognize his PPMB status without completing the application process on the basis that his status flowed from what he described as his permanently unemployable status under the *GAIN Act,* which he argued automatically transitioned to PPMB status under the *EA Act*.
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> [17] On September 13, 2010, the Ministry denied the petitioner's request for PPMB status because he refused to complete the PPMB application process and submit current medical information confirming his condition had lasted at least a year and was expected to last at least another two years. Further, the Ministry found the petitioner was no longer eligible for income assistance as his income was then in excess of ministry income assistance rates for his family unit.
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> [18] The petitioner filed a request for reconsideration on September 21, 2010. On October 26, 2010, the reconsideration officer confirmed the September 13, 2010 decision that the petitioner had not met the conditions for PPMB status.
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> [19] On October 29, 2010, the petitioner appealed the reconsideration decision to the Employment and Assistance Appeal Tribunal. The Tribunal heard the appeal and issued a decision on December 3, 2010, confirming the reconsideration decision.
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> [20] The petitioner challenged the Tribunal's decision under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241. Before the judicial review was set for hearing, it was discovered the record of proceedings was missing some documents the petitioner had tendered. As a result, with the consent of all parties, a rehearing of the appeal was conducted before a new panel on April 28, 2011. On May 10, 2011, [this] panel confirmed the reconsideration decision in the Tribunal Decisions.

[24] The ministry's internal reconsideration decision of 26 October 2010 neatly summarized the difficulties with the appellant's claim for PPMB status and benefits. After pointing out to the appellant that he was never designated with PPMB status, whether by transition or by Mr. Butcher, the reconsideration adjudicator wrote this:

> ... You have requested the ministry confirm that you had PPMB and were eligible for general health supplements from April 2007 to September 2010. After full review the ministry does not confirm that you had PPMB from April 2007 to September 2010, nor were you eligible for general health supplements during that time. September 2010 you requested your assistance be backdated to PPMB rates to April 2007. The ministry is unable to approve this request as you had not been assessed nor approved for PPMB status prior to, nor during that period, nor does the legislation allow for backdating of PPMB beyond 12 months.
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> … As per section 10 of the Act for the purposes of determining or auditing eligibility for assistance the minister may direct a person, an applicant or a recipient to supply the minister with information within the time and in the manner specified by the minister. If an applicant or a recipient fails to comply with

> a direction under this section, the minister may declare the family unit ineligible for income assistance, hardship assistance or a supplement for the prescribed period. As per section 32 of the Regulations for the purposes of section 10 of the Act, the period for which the minister may declare the family unit ineligible for assistance lasts until the applicant or recipient complies with the direction. It remains the ministry position that you remain ineligible for PPMB until you comply with the direction and your eligibility can be properly determined. ...
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> ... The ministry cannot approve PPMB based on an assumption, as confirmation by a medical practitioner is legislated as per section 2(4)(a). Furthermore, as per section 26(3) of the Regulations, PPMB becomes effective the month following the ministry decision. Therefore, if you had met the PPMB criteria, eligibility would begin effective November 2010. Review of your file confirms that you are now 65 and both you and your wife's pensions begin October 2010 with each of you receiving $950.70 per month ... in excess of ministry rates for your family unit making your family ineligible for income assistance from November on. I am unable to consider you for PPMB, even if I had received confirmation from a medical practitioner, because your family is no longer eligible for assistance therefore no ability to approve, and would have no effect on your assistance from the ministry because of the effective date of eligibility.
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> In summary, you are ineligible for PPMB due to failing to submit the PPMB medical information in the manner specified by the minister, failing to have a medical professional confirm your condition has lasted at least a year and is expected to last at least another two years, and because you are ineligible for income assistance for November therefore no ability to consider you for PPMB because the PPMB effective date would not even start until November.

[25] The first tribunal decision (dated 10 May 2011) is lengthy and comprehensive. After setting out the facts and the applicable legislation, the three-member panel stated the issues as follows:

> (1) Whether the ministry reasonably concluded that the appellant did not automatically transition to PPMB status?
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> (2) Whether the ministry reasonably concluded that the appellant is not eligible to qualify for PPMB designation because a medical practitioner has not confirmed that the appellant's condition has continued for at least 1 year and is likely to continue for at least 2 more years and he did not supply medical information in the manner specified?
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> (3) Whether the ministry reasonably concluded that the appellant is no longer eligible for income assistance as his income is in excess of ministry income assistance rates for his family unit?

[26] The reasons of the tribunal contain detailed analysis of each issue. The test for the panel was whether the ministry decision denying the appellant PPMB status was reasonable. The tribunal found that "it was reasonable for the ministry to conclude that the appellant's status under predecessor legislation did not automatically transition to PPMB under the [*EA Regulation*]." It found that "even if the appellant had made an application for PPMB status in September 2010, and was found eligible for it, the ministry could not have backdated the payments to April 1, 2007 by virtue of s. 26(4)(b) of the [*EA Regulation*] which limits back payments to a maximum of 12 calendar months." Finally, the tribunal found that "the ministry reasonably concluded that the appellant is no longer eligible for income assistance as his income is in excess of ministry income assistance rates for his family unit."

[27] The submissions of the appellant relate to the first of these conclusions, namely, that the ministry decision was reasonable. His submissions do not appear to address the question of backdating of payments being limited to one year. I presume that he does not dispute the third conclusion.

[28] On 7 January 2011, a few months after his 65th birthday, the appellant requested medical services only ("MSO") benefits from the ministry. Under the applicable section of the *EA Regulation*, these benefits were available only if a member of the family unit was designated with PPMB status. The ministry denied the request and a ministry adjudicator confirmed the denial on 21 November 2011.

[29] The second tribunal decision upheld the reconsideration decision. It found the decision to be "a reasonable application of the applicable enactment in the circumstances of the appellant".

[30] On the judicial review of the second tribunal decision, it was clear that the appellant had to again show that the finding with respect to his own lack of PPMB status was patently unreasonable. Except for one issue the appellant raises, to succeed on the claim for MSO benefits he had to succeed on the PPMB issue.

[31] The exception is the assertion by the appellant that his disabled adult son was designated PPMB and was a member of the appellant's family unit so as to bring the appellant within the MSO requirements. It is not clear to me whether this was raised with the tribunal but, assuming it was, the argument fails because the adult son was a separate family unit. The son became 18 years of age in 2005 and was designated PWD under the *EAPD Act*. In earlier proceedings, the tribunal confirmed a ministry decision that the son was a separate family unit and the court, on 19 September 2005, upheld that ruling on a judicial review.

[32] The chambers judge stated her final conclusion dismissing both petitions as follows:

> [36] In the Tribunal Decisions, the Tribunal set out the relevant facts, the relevant legislation and the law. The Tribunal conducted fair and proper hearings. The Tribunal reviewed the reasonableness of the Ministry's reconsideration decisions which found that the petitioner did not have automatic PPMB status as a result of any prior status under the *GAIN Act,* the petitioner did not have PPMB status because he refused to apply for it and refused to provide current medical information, and he is not entitled to MSO because he did not have PPMB status. The Tribunal found these conclusions to be reasonable, and, considering s. 10 of the *EA Act* that states that the Ministry may direct a recipient or applicant to provide information for determining eligibility, and considering the *McIntyre* decision, I conclude that the Tribunal Decisions are neither patently unreasonable nor is there any jurisdictional error.

[33] The chambers judge relied upon the decision in *McIntyre v. British Columbia (Employment and Assistance Appeals Tribunal)*, 2005 BCSC 1179. In that case, the tribunal upheld a ministry decision to cancel benefits previously provided for physiotherapy treatments for the petitioner, who then brought an application for judicial review. The petitioner had been designated a "handicapped person" under the *GAIN Act* and had been found eligible to receive physiotherapy treatments "at least twice a week for as long as needed." However, a change in the governing legislation made her ineligible for the benefit after she reached 65 years of age and the ministry eventually cancelled them. The tribunal found that the decision of the ministry was a based on a reasonable interpretation of the legislation.

[34] In her reasons dismissing the judicial review application, Russell J. said the court had to determine whether the reasoning of the tribunal in applying the governing statutes and regulations was patently unreasonable. The ministry is subject to a privative clause in its enabling legislation and the court must afford deference to its findings of fact and its interpretation of the legislation applicable to the particular issues

before it. With reference to various authorities, at para. 18 Russell J. said that to find the decision under review to be patently unreasonable it must be "clearly irrational" (*Canada (A.G.) v. Public Service Alliance of Canada,* [1993] 1. S.C.R. 941); or "not in accordance with reason" (*Centre communautaire juridique de l'Estrie v. Sherbrooke (City)*, [1996] 3 S.C.R. 84); "so flawed that no amount of curial deference can justify letting it stand" (*Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247). I consider this analysis to be correct.

[35] There is no merit in either appeal. The appellant attempted to persuade the ministry to backdate a designation never previously given to him, even by inference. He failed in the past and currently to provide necessary medical information. He read into past rulings designations that simply were not made. He did not meet statutory and regulatory criteria. He made his applications very late in the day when he could no longer qualify even if he had provided the necessary supporting medical information. The ministry's determinations of the issues raised by the appellant were reasonable and it is not arguable that either tribunal decision was patently unreasonable. The chambers judge did not err.

Conclusion

[36] I would dismiss both appeals. In accordance with the position taken by the respondents, the dismissal should be without costs.

"The Honourable Mr. Justice Low"

I agree:

"The Honourable Madam Justice Neilson"

I agree:

"The Honourable Mr. Justice Groberman"