IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***McIntyre v. Employ. & Assist. Appeal Tribunal,***
2005 BCSC 1179

Date: 20050812
Docket: L042791
Registry: Vancouver

Re: ***Judicial Review Procedure Act***
Employment and Assistance Act and
Employment and Assistance For Persons With Disabilities Act

Between:

Margaret May McIntyre

Petitioner

And

Employment and Assistance Appeals Tribunal
Minister of Human Resources

Respondents

Before: The Honourable Madam Justice Russell

Reasons for Judgment

Counsel for the Petitioner: D. Mossop, Q.C.
Counsel for the Respondent: A.R. Westmacott

Employment and Assistance Appeal Tribunal
Counsel for the Respondent: B. Mackey

Minister of Human Resources
Date and Place of Hearing: June 17, 2005
Vancouver, B.C.

NATURE OF PROCEEDINGS

[1] This is an application pursuant to the ***Judicial Review Procedure Act***, R.S.B.C. 1996, c.241, seeking judicial review of a decision of the Employment and Assistance Appeal Tribunal (the "Tribunal"). The matter in front of the Tribunal concerned a decision of the Ministry of Human Resources to cancel coverage for physiotherapy treatment for the petitioner due to her ineligibility under the ***Employment and Assistance for Persons with Disabilities Act***, S.B.C. 2002, c.41 (the "***EAPD Act"***). The Tribunal upheld the decision of the Ministry of Human Resources, and the petitioner now seeks its review.

FACTUAL BACKGROUND

[2] The petitioner, Margaret May McIntyre, is a sixty-six year old woman who has been classified as disabled by

the Ministry of Human resources for many years. She was originally designated as a "handicapped person" pursuant to the ***Guaranteed Available Income for Need Act,*** R.S.B.C. 1979, c.158 (the "***GAIN Act***"). In light of this designation, the petitioner became eligible for government funded general health care services in accordance with the applicable regulations. In November 1991, a tribunal panel found her eligible to receive physiotherapy treatments as part of her general health care services and subsequently awarded the petitioner "physiotherapy treatments at least twice a week for as long as needed".

[3] The petitioner received government-funded physiotherapy from 1991 until 2003. In October 2003, an Employment Assistance Worker from the Ministry of Human Resources advised the petitioner that under the current legislative scheme, the Ministry no longer automatically paid for physiotherapy treatments after a recipient reached sixty-five years of age. In November, and again in December 2003, the petitioner filed a request for continuation of physiotherapy treatments. The treatments were reinstated, but were again cancelled in June 2004.

[4] In August 2004, the petitioner submitted a Request for Reconsideration to the Ministry of Human Resources. The Reconsideration was denied and the petitioner appealed this matter to the Tribunal. The Tribunal heard the matter in October 2004, and upheld the decision of the Ministry of Human Resources to cease funding of the physiotherapy treatments. The Tribunal stated as follows:

The panel confirms the Ministry's decision is a reasonable application of the legislation. The appellant was awarded a benefit under section 2(3) of Schedule C of the B.C. Benefits regulations. The Employment and Assistance for Persons with Disabilities Regulations states that these benefits were to be continued on the same terms and conditions until the appellant turned 65 and ceased to receive disability assistance. The appellant has turned 65 and has ceased to receive disability assistance and thus is no longer eligible to receive the treatment previously awarded to her in October 1991. It is unclear whether the appellant is eligible to receive a General Health Supplement under the current legislation.

[5] The petitioner consequently filed this application for judicial review in November 2004.

POSITION OF THE PETITIONER

[6] The petitioner submits that the appropriate standard of review for the case at bar is "patent unreasonableness" as dictated by the ***EAPD Act*** and the ***Administrative Tribunals Act,*** S.B.C. 2004, c.45. The petitioner further submits that the Tribunal's decision is patently unreasonable as it embarked upon an analysis of the wrong question. More specifically, the petitioner contends that the Tribunal focused its attention on irrelevant sections of the Employment and Assistance for Persons with Disabilities Regulations instead of dealing with the real issue, namely, whether the decision of the 1991 tribunal is still binding on the parties.

[7] The petitioner contends that the 1991 decision awarding physiotherapy treatments "for as long as needed" remains binding upon the parties. In making this submission the petitioner states that there are no specific transitional provisions in the modern governing legislation, being the ***EAPD Act***, which allow the Minister to override decisions rendered under the ***GAIN Act***. The petitioner further relies on s.35 of the ***Interpretation Act***, R.S.B.C. 1996, c.238, which states in part:

(1) If all or part of an enactment is repealed, the repeal does not …

(c) affect a right or obligation acquired, accrued, accruing or incurred under the enactment so repealed.

[8] In the alternative, the petitioner contends that the Tribunal relied on a patently unreasonable interpretation of the ***EAPD Act,*** and failed to consider the principle that ambiguity involving social welfare legislation should be resolved in favour of the applicant seeking benefits.

POSITION OF THE RESPONDENTS

[9] The respondents also propose that the applicable standard of review for the case at bar is "patent unreasonableness" as dictated by the ***EAPD Act*** and the ***Administrative Tribunals Act***. The respondents further

assert, however, that the decision of the Tribunal was reasonable in all of the circumstances and thus should not be disturbed by this court.

[10] The respondents draw the court's attention to s.24(1) of the ***Employment and Assistance Act,*** S.B.C. 2002, c.40, which states that the test to be applied by the Tribunal when conducting an appeal is to determine whether the decision being appealed is "reasonably supported by the evidence, or a reasonable application of the applicable enactment in the circumstances of the person appealing the decision". The respondents contend that the limited role of the Tribunal is important to note in light of the petitioner's submission that the Tribunal embarked upon the wrong question.

[11] In answer to the petitioner's submission that she acquired vested rights due to a lack of transitional provisions in the governing legislation, the respondents assert that the transition was effected through the use of a consistent definition of "handicapped person", as well as through the inclusion of "deeming" provisions in both the ***Disability Benefits Program Act,*** R.S.B.C. 1996, c.97, and the ***EAPD Act***.

[12] The respondents submit that each time the petitioner was statutorily deemed to be a recipient under the new legislation, she was made subject to the requirements of that legislation. Thus, in 2002, when the petitioner was "deemed to have applied for and be in receipt of benefits" and "deemed to have been designated" under ss.31 and 32 of the ***EAPD Act***, it is submitted that she was made subject to the requirements of that ***Act*** (which included the requirement to satisfy continuing conditions of eligibility). In this regard, the respondents also draw the courts attention to s.29 of the ***EAPD Act,*** which states that the rights under s.35 and 36(1) of the ***Interpretation Act*** are limited by ss.31 and 32 of the ***EAPD Act.***

[13] Lastly, the respondents assert that the court, on judicial review, should not engage in its own *de novo* interpretation of the legislation, which is what the petitioner's alternative argument asks it to do. The respondents contend that the proper question on a patent unreasonableness standard is to consider whether the Tribunal's reasoning is so contrary to reason, or inconsistent with the statutory scheme, that it cannot be permitted to stand.

ISSUES

[14] The arguments above raise the following issues for determination by the court:

(a) What is the applicable standard of review?

(b) Does the Tribunal's decision meet this standard?

APPLICABLE STANDARD OF REVIEW

[15] Determining the applicable standard of review has historically involved a complicated and labyrinthine analysis aimed at discovering the legislative intent of the statute creating the tribunal whose decision is being reviewed. Fortunately, in British Columbia, the ***Administrative Tribunals Act*** has removed the need for this analysis as it statutorily prescribes the appropriate standard of review for tribunals protected by privative clauses and those not so protected.

[16] Section 58 of the ***Administrative Tribunals Act*** dictates that the standard of review for tribunals that have a privative clause in their enabling legislation is patent unreasonableness. The section reads in part as follows:

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.**

(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,**

(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

(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.

[Emphasis Added]

[17] The enabling ***Act*** of the tribunal in question is the ***Employment and Assistance Act,*** and a review of that ***Act*** reveals a strongly worded privative clause at s.24(7) which reads as follows:

24(7) A decision or order of the tribunal under this Act on a matter in respect of which the tribunal has exclusive jurisdiction is final and conclusive and is not open to question or review in any court.

[18] Read together, these sections dictate that the appropriate standard of review for the matter at bar is whether the Tribunal's decision is patently unreasonable. Patently unreasonable decisions have variously been described by the Supreme Court of Canada as ones that are "clearly irrational", (***Canada (A.G.) v. Public Service Alliance of Canada***, [1993] 1 S.C.R. 941 at pp.963-947), "not in accordance with reason", (***Centre communautaire juridique de l'Estrie v. Sherbrooke (City)***, [1996] 3 S.C.R. 84 at paras. 9-12), "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, 2003 SCC. 20 at para. 21) and where "the result…almost border[s] on the absurd", (***Voice Construction Ltd. v. Construction & General Workers' Union, Local 92***, [2004] 1 S.C.R. 609, 2004 SCC 23 at para. 18).

[19] In ***Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.***, [1997] 1 S.C.R. 748, the Supreme Court of Canada described in detail how to recognize a patently unreasonable decision. The court stated at para. 57:

The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable. As Cory J. observed in *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at p.963, "[i]n the Shorter Oxford English Dictionary 'patently', an adverb, is defined as 'openly, evidently, clearly'". This is not to say, of course, that judges reviewing a decision on the standard of patent unreasonableness may not examine the record. If the decision under review is sufficiently difficult, then perhaps a great deal of reading and thinking will be required before the judge will be able to grasp the dimensions of the problem. See *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, at p. 1370, per Gonthier J.; see also *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 47, per Cory J. But once the lines of the problem have come into focus, if the decision is patently unreasonable, then the unreasonableness will be evident.

[20] The ***Administrative Tribunals Act*** also provides some guidance as to what will constitute a patently unreasonable decision at s.58(3) as follows:

(3) For the purposes of subsection (2)(a), a discretionary decision is patently unreasonable if the discretion

(a) is exercised arbitrarily or in bad faith,

(b) is exercised for an improper purpose,

(c) is based entirely or predominantly on irrelevant factors, or

(d) fails to take statutory requirements into account.

DOES THE TRIBUNAL'S DECISION MEET THIS STANDARD?

[21] An application of the holdings above to the decision at hand shows that the decision clearly fails to meet the standard of patent unreasonableness. A review of the reasons reveals a rational, well thought out decision that is based on a reasonable analysis of the relevant evidence and statutory requirements. In addition, the decision-making power of the Tribunal was not exercised arbitrarily, in bad faith, or for an improper purpose. Relying on the guidance of the Supreme Court of Canada in ***Southam***, this inability to find a defect on the face of the reasons is enough to determine that the Tribunal's decision falls short of the patently unreasonable standard. In addition, however, it is also clear that a more detailed analysis of the arguments of the parties in this matter further fails to uncover any reason to disturb the decision of the Tribunal.

[22] The petitioner's main argument proceeds from the premise that she acquired vested rights as a "handicapped person" under the ***GAIN Act,*** which survived the enactment of the ***Disability Benefits Program Act,*** and its subsequent replacement by the ***EAPD Act,*** because of an alleged lack of transitional provisions in the succeeding legislation. In addition, the petitioner asserts that her vested rights are affirmed by the ***Interpretation Act***. To make this argument, however, ignores the continuity of the language in the succeeding legislation, as well as the specific provisions of the current governing legislation, being the ***EAPD Act***, which deem the petitioner to be in receipt of benefits under the ***EAPD Act***. It also ignores s.29 of the ***EAPD Act*** which expressly provides that the rights under the ***Interpretation Act*** are subject to limitation.

[23] The petitioner's alternative argument must also fail on this application as it asks the court to engage in a *de novo* interpretation of the legislation, relief that is not only beyond the scope of this judicial review, but is also unnecessary in the circumstances. The Tribunal's reasons reveal that it properly considered the relevant sections of the ***EAPD Act*** and the ***Employment and Assistance Act,*** and came to a reasonable interpretation and conclusion based on the analysis of that legislation. It is also apparent that, in the totality of circumstances, the Tribunal's conclusion was itself reasonable in light of ss.31 and 32 of the ***EAPD Act,*** which appear to be drafted specifically to ensure that individuals do not carry forward vested rights from former legislative schemes.

CONCLUSION

[24] In light of the above findings, I must conclude that there are no grounds on which to disturb the Tribunals decision on judicial review. Accordingly, the petition is dismissed.

"L. Russell, J."
The Honourable Madam Justice L. Russell