IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Hudson v. British Columbia (Employment and Assistance Appeal Tribunal),* 2009 BCSC 1461

Date: 20091028
Docket: S092170
Registry: Vancouver

Between:

Susan Hudson

Petitioner

And:

Employment and Assistance Appeal Tribunal and Ministry of Housing and Social Development

Respondents

Before: The Honourable Madam Justice Koenigsberg

Judicial Review from: Employment Assistance Appeal Tribunal, January 22, 2009 (2008-00707).

Reasons for Judgment

Counsel for Petitioner:	K. Milne
Counsel for Respondent, Employment and Assistance Appeal Tribunal:	No appearance
Counsel for Respondent, Ministry of Housing and Social Development:	J. Penner
Place and Date of Hearing:	Vancouver, B.C. August 17, 2009
Place and Date of Judgment:	Vancouver, B.C. October 28, 2009

Introduction

[1] This is a petition pursuant to the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, for an order that the Decision (the "Decision") of the Employment and Assistance Appeal Tribunal (the "Tribunal") dated January 22, 2009, in appeal number 2008-00707 be set aside and the matter remitted back to the Tribunal with directions. The Tribunal upheld a decision of the Ministry of Housing and Social Development (the "Ministry") that the petitioner was not eligible for a "Person with Disabilities" ("PWD") designation within the

meaning of s. 2 of the *Employment and Assistance for Persons with Disabilities Act*, S.B.C. 2002, c. 41 ("*EAPDA*"), and was therefore not eligible for disability assistance payments under that legislation.

Facts

[2] The petitioner Susan Hudson is 47 years old and lives with her 11 year old son. The petitioner suffers from degenerative disc disease, a fractured foot, arthritis, and epilepsy. On October 29, 2008, she applied for disability benefits under the *EAPDA*. To be eligible for disability benefits, one must be designated a PWD, which requires completing a Persons with Disabilities Designation Application ("Application").

[3] The Application is to be completed by three persons: the applicant, a physician, and an assessor to be chosen from a list of prescribed professionals, in this case a nurse. The Application was completed as required. On page eight of the Application, in the section titled "Diagnoses", the physician identified the following diagnoses related to the petitioner's impairment using the diagnostic codes on the Application:

- Diseases of the musculoskeletal system and connective tissue
    - 13.6 – Degenerative Disc Disease
    - 13.0 – Musculoskeletal system – Other
    - 13.3 – Arthritis
- Diseases of the nervous system & sense organs – Neurological
    - 6.1 – Epilepsy

[4] On page nine of the Application, in the section titled "Health History", in relation to the severity of the medical conditions relevant to the petitioners impairment, the physician wrote:

> Ongoing pain + radicular [illegible] related to degen. disc disease C – spine – unable to do any work involving even moderately heavy lifting.
>
> Ongoing pain in feet related to arthritis/fracture. Awaiting further surgery
>
> Prev. history of seizures – recent recurrence. Now on anti-epileptic medication.

[5] On page 11 of the Application, in the section titled "Daily Living Activities", the physician specified that the petitioner was restricted in performing the following "Daily Living Activities": meal preparation, basic housework, daily shopping, and mobility outside the home. All of these restrictions were identified as "periodic", and were accompanied by the following notes:

> constant foot/ankle pain - wears a hiking boot 24/7. [Increased] pain and [decreased] mobility without hiking boot.

[6] On page 12 of the Application, when providing additional information considered relevant to an understanding of the petitioner's medical condition, the physician wrote:

> She has multiple medical barriers preventing her from working at present.
>
> I feel that she will benefit from custom made orthotics.
>
> Her neck problems are chronic and expected to flare up intermittently. She is not able to do any work

involving heavy lifting.

She is unable to drive until she has been seizure free for 1 years.

[7] Finally, on page 21 of the Application, the nurse assessor provided additional information relevant to understanding the nature and extent of the petitioner's impairment and its effect on her daily living activities:

> 1. Client limited to distance walking [due to] pain + weakness. Weakness from degenerative disc disease.
>
> 2. Pain in [right] foot from previous surgery and damage. Requires orthotics to assist [and] correct foot placement.
>
> 3. Has tingling numbness in hands + feet. This affects her ability to accomplish fine motor movements, lift pots/pans while cooking.
>
> 4. This city has limited access to disabled transportation. Nothing available after 3 p.m.

[8] The Application also contains space for applicants to describe their disability and the impact it has on their life. While it is not necessary to complete this part, the Application states that if the section is left blank, the Application will be considered "based on information provided in the Physician and Assessor Sections of this Application".

[9] The petitioner indicates in the Application that her disabilities have affected her life so much that she can no longer work. She says she is in constant pain which affects her daily living activities. She cannot even walk a block. Her feet have been in such extreme pain that she has sat on the floor at home and slid across the room on her bottom because her feet were too painful to stand on.

[10] Concerning her ability to prepare meals, shop for personal needs, and travel outside her home, the petitioner states:

> Because of being only able to stand for 10 minutes it is extremely difficult for me to stand at the kitchen counter to try and prepare and cook our meals. My hands go numb within minutes of chopping, peeling, mixing or stirring food. I can't open cans or jars nor can I open or reseal bags because I have no feeling in my fingers. I also cannot move food from shelves to counters to stove and oven for the same reason. I can't feel with my hands and will drop everything I hold for too long.
>
> ...
>
> My brother or mother or father does my shopping for me. I cannot walk around the store; the cement floors are extremely hard on my feet. I can't reach to take items off the shelves and load them into the basket or cart because of my back and hands. I cannot stand in line to pay for the groceries nor can I carry them.
>
> ...
>
> I always have appointment[s] to go to and my parents or friends always take me because I can no longer drive because of my seizures. My seizures can come at any time.

[11] The Ministry denied the petitioner's application on November 26, 2008, and the petitioner submitted a request for reconsideration of this decision on December 4, 2008. The Ministry denied the request for PWD designation in the reconsideration decision on December 10, 2008. On December 23, 2008, the Tribunal received the petitioner's notice of appeal of the reconsideration decision. The Tribunal held a hearing by

teleconference on January 15, 2009. While the Tribunal did not issue its Decision until January 22, 2009, the reasons were signed on January 15, 2009.

[12] The petitioner filed for judicial review of the Tribunal's Decision.

Relevant Statutory Provisions

[13] Section 2 of the *EAPDA* reads:

> **Persons with disabilities**
>
> **2** (1) In this section:
>
> **"assistive device"** means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;
>
> **"daily living activity"** has the prescribed meaning;
>
> **"prescribed professional"** has the prescribed meaning.
>
> (2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that
>
> (a) in the opinion of a medical practitioner is likely to continue for at least 2 years, and
>
> (b) in the opinion of a prescribed professional
>
> (i) directly and significantly restricts the person's ability to perform daily living activities either
>
> (A) continuously, or
>
> (B) periodically for extended periods, and
>
> (ii) as a result of those restrictions, the person requires help to perform those activities.
>
> (3) For the purposes of subsection (2),
>
> (a) a person who has a severe mental impairment includes a person with a mental disorder, and
>
> (b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires
>
> (i) an assistive device,
>
> (ii) the significant help or supervision of another person, or
>
> (iii) the services of an assistance animal.
>
> (4) The minister may rescind a designation under subsection (2).

[14] The terms "daily living activity" and "prescribed professional" are defined in the *Employment and Assistance for Persons with Disabilities Regulation*, B.C. Reg. 265/2002 [*EAPDR*]:

> **2** (1) For the purposes of the Act and this regulation, **"daily living activities"**,
>
> (a) in relation to a person who has a severe physical impairment or a mental impairment, means the following activities:
>
> (i) prepare own meals;

(ii) manage personal finances;

(iii) shop for personal needs;

(iv) use public or personal transportation facilities;

(v) perform housework to maintain the person's place of in acceptable sanitary condition;

(vi) move about indoors and outdoors;

(vii) perform personal hygiene and self care;

(viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

(i) make decisions about personal activities, care or finances;

(ii) relate to, communicate or interact with others effectively.

(2) For the purposes of the Act, **"prescribed professional"** means a person who is authorized under an enactment to practice the profession of

(a) medical practitioner,

(b) registered psychologist,

(c) registered nurse or registered psychiatric nurse,

(d) occupational therapist,

(e) physical therapist,

(f) social worker,

(g) chiropractor, or

(h) nurse practitioner.

[15] The Tribunal's jurisdiction is set out in the *Employment and Assistance Act*, S.B.C. 2002, c. 40 [*EAA*]:

19 (1) The Employment and Assistance Appeal Tribunal is established to determine appeals of decisions that are appealable under

...

(b) section 16 (3) [*reconsideration and appeal rights*] of the *Employment and Assistance for Persons with Disabilities Act*, and

...

[16] Under s. 24 of the *EAA*, the Tribunal must determine whether the decision being appealed is:

(a) reasonably supported by the evidence, or

(b) a reasonable application of the applicable enactment in the circumstances of the person appealing the decision.

[17] Section 24(3) of the *EAA* obliges the Tribunal to provide written reasons for its decision. Section 24 also contains these privative clauses:

(6) The tribunal has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in an appeal under section 19 and to make any order permitted to be made.

(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] As stated by Bauman J. (as he then was) in *Harley v. British Columbia (Employment and Assistance Appeal Tribunal)*, 2006 BCSC 1420 at para. 16, 54 Admin. L.R. (4th) 309 [*Harley*], the presence of these privative clauses engages s. 58 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*]:

Standard of review if tribunal's enabling Act has privative clause

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.

(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.

[19] The statutory requirements for reasons that apply to the Tribunal are found in the *Employment and Assistance Regulation*, B.C. Reg. 263/2002 [*EAR*]:

Notice of determinations and reasons

87 (1) The written determination of a panel under section 24 of the Act must be in the form specified by the minister and must

(a) specify the decision under appeal,

(b) summarize the issues and relevant facts considered in the appeal,

(c) set out the reasons on which the panel based its determination, and

(d) specify the outcome of the appeal.

Decisions Below

[20] The Tribunal's reasons are reproduced for convenience:

The panel must decide whether the ministry's decision to deny PWD status to the appellant was reasonably supported by the evidence.

The EAPWDA, section 2, sets out 5 criteria to be designated as a PWD:

1. The appellant must have reached the age of 18;

2. The minister must be satisfied that the person has a severe mental or physical impairment;

3. In the opinion of a medical practitioner, the impairment will continue for at least 2 years.

4. In the opinion of a prescribed professional, the impairment must directly and significantly restrict the person's ability to perform daily living activities, either continuously or periodically for extended periods; and

5. As a result of the restriction in activities, the person requires help to perform those activities.

There is no dispute that the appellant meets criteria 1 and 3; she is over the age of 18 and her medical practitioner has confirmed that her condition will continue for at least 2 years.

The ministry's position is that the appellant has not met criteria 2, 4, and 5 based on the information that was submitted by her physician and the assessor.

The appellant's position is that she is eligible for PWD status due to her medical conditions and medication.

The panel accepts that the appellant suffers from significant pain and as a result of this pain her lifestyle and activities are affected. However, while the panel appreciates and accepts this information, it has not been confirmed by the appellant's physician or assessor as required by legislation and as such the panel is not able to place significant weight on this evidence.

The evidence of the physician indicates that the appellant suffers from constant pain in her foot and ankle and intermittent pain in her neck as well as epileptic seizures. The appellant's description of her pain was consistent with that of the physician and she further advised that she takes non-prescription medication for her pain and has suffered 2 seizures in the past 7 months. Based on the evidence, the panel finds that the appellant does not have a severe physical impairment as required by the legislation.

While the evidence of the physician indicates that the appellant suffers from physical impairments that affect her mobility and daily living activities, the physician has not provided sufficient evidence to establish that, in her opinion, the impairment directly and significantly restricts the appellant's ability to perform daily living activities, either continuously or periodically for extended periods. The assessor's report identifies few limitations in the appellant's daily living activities. Both the assessor and the physician note that the appellant's restrictions are periodic but they do not address whether these restrictions are for extended periods.

The panel must rely on the reports as provided in reaching a decision as to whether the reconsideration decision was reasonable. On the evidence that has been provided by the assessor and the physician regarding the appellant's limitations, the panel finds that the appellant does not have an impairment that directly and significantly restricts her ability to perform daily living activities, either continuously or periodically for extended periods.

As the physician and assessor have not provided evidence sufficient to establish that the appellant's daily living activities are directly and significantly restricted, the panel cannot find that the appellant requires significant help to perform those activities.

Based on the information provided by the physician, it was reasonable for the minister to conclude that the appellant has not met criteria 2, 4 and 5.

The panel therefore determines that the ministry's decision is reasonably supported by the evidence and that decision is confirmed.

Issues

[21] The issues raised in this judicial review are as follows:

1. What are the applicable standards of review?

2. Did the Tribunal violate the statutory duty to provide reasons?

3. Did the Tribunal err in finding that the Ministry's decision was reasonably supported by the evidence?

Analysis

A. Standards of Review

[22] As stated earlier, the Tribunal's enabling act contains a privative clause. Accordingly, s. 58 of the *ATA* must be applied. There is no doubt that the Tribunal must be considered an expert tribunal in relation to all matters over which it has exclusive jurisdiction. The Tribunal must be accorded appropriate deference on findings of fact or law or an exercise of discretion in respect of matters over which it has exclusive jurisdiction, unless they are found to be patently unreasonable. Questions about the application of common law rules of natural justice and procedural fairness are to be decided on the basis of whether the Tribunal acted fairly. All other matters are to be reviewed on a standard of correctness.

[23] By virtue of s. 87 of the *EAR*, the Tribunal is under a statutory duty to provide reasons. As such, with respect to reasons, it is not necessary to resort to the common law rules of natural justice as described in s. 58(2)(b) of the *ATA*. Thus, the question of the standard of review with respect to reasons turns on whether the statutory duty in s. 87 of the *EAR* can be considered a matter within the Tribunal's exclusive jurisdiction, in which case the standard of patent unreasonableness described in s. 58(2)(a) of the *ATA* would apply; or whether it falls into the category of "all matters other than those identified in [ss. 58(2)(a) & (b)]", in which case the standard of correctness described in s. 58(2)(c) of the *ATA* would apply. It is also worth noting that in *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 59, [2008] 1 S.C.R. 190 [*Dunsmuir*], the Supreme Court of Canada makes it clear that the existence of a privative clause does not insulate the administrative decision maker from correctness review on jurisdictional questions.

[24] In *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 [*CUPE*], Dickson J. warned against hastily branding questions as jurisdictional merely to attract a less deferential standard of review. Doing so "has the capacity to unravel the essence of the decision and undermine the very characteristic of the Agency which entitles it to the highest level of deference from a court – its specialized expertise" (*Council of Canadians with Disabilities v. VIA Rail Canada Inc.,* 2007 SCC 15 at para. 88, [2007] S.C.R. 650). When engaging in judicial review, courts should refrain from overlooking a tribunal's expertise in interpreting its own legislation and defining the scope of its statutory authority. This concern is echoed in *Dunsmuir* at para. 27, where, while reflecting on the nature of judicial review, the Court noted that "[c]ourts, while exercising their constitutional functions of judicial review, must be sensitive ... to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures".

[25] Administrative powers, however, have limits. It is the role of the court to ensure that administrative agencies do not overstep their powers, or, as a corollary, that they do not fail to meet them. This latter case refers to those situations where the legislature prescribes specific matters that an administrative decision maker must attend to in the exercise of its powers. Generally, the legal consequence of a failure to comply with statutory directions depends on whether a requirement is mandatory or merely directory (see David Phillip Jones & Anne S. de Villars, *Principles of Administrative Law*, 5th ed. (Toronto: Carswell, 2009) at 162). Failure to comply with an imperative statutory direction will render an administrative action voidable. However, where a failure to comply with a statutory direction is minor or trivial and has no impact on the outcome of the case, a court may decline to set aside an administrative decision: *Uniboard Surfaces Inc. v. Kronotex Fussboden GmbH and Co*., 2006 FCA 398 at para. 24, 61 Admin L.R. (4th) 47. Crucial to the court's discretion in this area is interpretation of the provision in question: given the scheme and object of the Act, is it reasonable to conclude that the legislature intended to confer jurisdiction on an administrative decision maker that does not comply with statutory requirements?

[26] The *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 29 [*Interpretation Act*], provides that "'must' is to be construed as imperative". In this case, the *EAR*, s. 87(1)(c) mandates that a Tribunal's reasons "must ... set out the reasons on which the panel based its determination". The language is imperative. Unless the failure to comply with this direction is trivial, administrative action which does not follow this direction should not be granted a deferential standard of review.

[27] A failure to provide reasons is not trivial. As discussed by the Federal Court of Appeal in *VIA Rail Canada Inc. v. National Transportation Agency*, [2001] 2 F.C. 25, 193 D.L.R. (4th) 357 (F.C.A.) [*VIA Rail*]:

> [17] The duty to provide reasons is a salutary one. Reasons serve a number of beneficial purposes including that of focussing the decision maker on the relevant factors and evidence. In the words of the Supreme Court of Canada:
>
> > Reasons, it has been argued, foster better decision making by ensuring that issues and reasoning are well articulated, and, therefore, more carefully thought out. The process of writing reasons for decision by itself may be a guarantee of a better decision.
>
> [18] Reasons also provide the parties with the assurance that their representations have been considered. [Footnotes omitted.]

A similar articulation highlighting the importance of reasons has been developed in the common law jurisprudence on procedural fairness: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 38-43.

[28] In *Harley*, Bauman J. (as he then was) considered a challenge to a decision of the Tribunal on the grounds that the Tribunal did not provide adequate reasons. After considering the existence of the statutory duty to provide reasons in s. 87(1) of the *EAR* and the content of the statutory duty to give reasons discussed in *VIA Rail*, he stated that a failure to articulate reasons to the standard mandated in *VIA Rail* amounts to non-compliance with a statutory direction and must be reviewed on a standard of correctness, as called for by s. 58(2)(c) of the *ATA*. In this regard, I also adopt with approval the statement in Jones & de Villars, *supra* at 375 that "where the delegate is statutorily required to provide reasons, failure to do so will

certainly violate the duty to be fair and, moreover, will amount to a jurisdictional error by the statutory delegate".

[29] From this, it can be concluded that the legislature did not intend to confer on the Tribunal the jurisdiction to make the Decision without regard to the statutory direction to set out its reasons. Accordingly, this is not a matter within the exclusive jurisdiction of the Tribunal, and the standard of review with respect to reasons is correctness.

[30] Before leaving this issue, it is necessary to briefly return to the *ATA*, where we find additional evidence that the legislature did not intend to confer jurisdiction on a tribunal that does not comply with statutory direction. Section 58(3)(d) states that a discretionary decision made by a Tribunal is patently unreasonable if it fails to take statutory requirements into account. Although the decision to provide reasons is a mandatory and not a discretionary one, the legislature's explicit refusal to confer jurisdiction on a Tribunal that does not comply with statutory requirements in the realm of discretionary decisions assists in the conclusion that the legislature did not intend to confer jurisdiction on a Tribunal that does not comply with imperative statutory requirements.

[31] With respect to the third issue of whether the Tribunal erred in finding that the Ministry's decision was reasonably supported by the evidence, both the petitioner and the respondent agree that the appropriate standard of review is patent unreasonableness. Leaving the jurisdictional matter of the adequacy of reasons aside, this is a matter of fact or law within the exclusive jurisdiction of the Tribunal, and pursuant to s. 58(2)(a) of the *ATA* should be reviewed on a standard of patent unreasonableness.

B. Reasons

[32] At the outset of its reasons, the Tribunal indicates that it must decide whether the Ministry's decision to deny PWD status to the appellant was reasonably supported by the evidence. This is consistent with s. 24(1)(a) of the *EAA*. The Tribunal has gone further than this. It has made several conclusions in which it appears to be engaged in a direct assessment of the applicant's condition. I assume from this that the Tribunal was exercising its jurisdiction under s. 24(1)(b) of the *EAA* to decide whether the Ministry's decision was a reasonable application of the *EAPDA* in the petitioner's circumstances.

[33] *VIA Rail* contains a simple direction for reasons against which courts can test the adequacy of a tribunal's reasons. Both Bauman J. in *Harley* and Chief Justice McMurtry of the Ontario Court of Appeal in *Gray v. Director of the Ontario Disability Support Program* (2002), 59 O.R. (3d) 364 [*Gray*], in reviewing similar reasons for decision where a person was denied PWD status, have cited *VIA* with approval in this context. The relevant parts of *VIA* are as follows:

> [21]The duty to give reasons is only fulfilled if the reasons provided are adequate. What constitutes adequate reasons is a matter to be determined in light of the particular circumstances of each case. However, as a general rule, adequate reasons are those that serve the functions for which the duty to provide them was imposed. In the words of my learned colleague Evans J.A., "[a]ny attempt to formulate a standard of adequacy that must be met before a tribunal can be said to have discharged its duty to give reasons must ultimately reflect the purposes served by a duty to give reasons."

> [22]The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. Rather, the decision maker must set out its findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision maker must be set out and must reflect consideration of the main relevant factors [Footnotes omitted].

[34] In reviewing an administrative decision of this nature, applicants are entitled to know that the hearing has given them a meaningful opportunity to influence the decision maker. If a decision involves, as it does here, an exercise of discretion, the reasons should demonstrate that the Tribunal recognized it had the power to make a choice regarding the Ministry's decision and the factors that it relied on in making that decision.

[35] Furthermore, in reviewing this decision, it is important to keep in mind the *Interpretation Act*, s.8, which reads "[e]very enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects." In dealing with similar legislation to the *EAPDA*, the Ontario Court of Appeal in *Gray* provided valuable instruction for interpreting the type of social welfare legislation at issue:

> [10] It is my view that as social welfare legislation, any ambiguity in the interpretation of the *ODSPA* should be resolved in the claimant's favour. In *Wedekind v. Ontario (Ministry of Community and Social Services)* (1994), 21 O.R. (3d) 289 (C.A.) at 296-297, this court stated:
>
> > [T]he principle of construction … applicable to social welfare legislation … is, where there is ambiguity in the meaning of a statute, the ambiguity should be resolved in favour of the applicant seeking benefits under the legislation.
>
> [11] Likewise, in *Abrahams v. Canada (Attorney General)*, [1983] 1 S.C.R. 2 at 10, Wilson J. wrote with respect to the *Unemployment Insurance Act*:
>
> > Since the overall purpose of the Act is to make benefits available to the unemployed, I would favour a liberal interpretation. … I think any doubt arising from the difficulties of the language should be resolved in favour of the claimant.
>
> [12] The rationale for such an approach was set out by the Federal Court of Appeal in *Villani v. Canada (Attorney General)* 2001 FCA 248, 205 D.L.R. (4th) 58 (F.C.A.) at 70 as follows:
>
> > The liberal approach to remedial legislation flows from the notion that such legislation has a benevolent purpose which courts should be careful to respect.

[36] Finally, in reviewing the adequacy of the Tribunal's reasons on the standard of correctness, I am assisted by the Supreme Court of Canada's articulation of the standard in *Dunsmuir* at para. 50:

> When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer.

[37] It is keeping this instruction in mind that we turn to an analysis of the Tribunal's reasons.

[38] The petitioner submits that the Tribunal failed to meet the standard required in *VIA Rail* by failing to explain the following conclusions:

1. the petitioner's evidence of her significant pain and its effect on her lifestyle and activities was

not confirmed by her physician or assessor;

2. the petitioner does not have a severe physical impairment; and

3. the petitioner does not have an impairment that directly and significantly restricts her ability to perform daily living activities, either continuously or for extended periods.

Further, the petitioner submits that the Tribunal's reasons are contradictory on the "key issue" of whether the petitioner's evidence relating to her pain and limitations are confirmed by her physician or assessor.

[39] The respondent denies each of these submissions, and, in short, submits that the petitioner failed to meet the statutory criteria for PWD status and that the Ministry's decision is entitled to deference and should not be interfered with because it is reasonable. More specifically, the respondent submits that "[w]hen the Tribunal's Reasons are read as a whole ... it is clear that while the Tribunal accepted that the Petitioner feels that her lifestyle and activities are affected by a severe physical impairment, her opinion was not confirmed by a prescribed professional as required by the legislation" [Emphasis added]. With respect, I disagree. Nowhere in the Tribunal's decision is there a finding that petitioner "felt" her activities were limited by her physical impairment. In its Decision, fully reproduced above, the Tribunal stated that it "accepts that the appellant suffers from significant pain and as a result of this pain her lifestyle and activities are affected." In the Tribunal's opinion, the petitioner's "description of her pain was consistent with that of the physician". Despite this, the Tribunal stated the petitioner's pain and its effect on her lifestyle and activities have not been confirmed by the petitioner's physician or assessor, and as such, it "is not able to place significant weight on this evidence".

[40] Concerning the petitioner's first submission on whether the petitioner's significant pain and its effect on her lifestyle and activities was confirmed by her physician or assessor, s. 2(1) of the *EAPDR* defines daily living activities, in relation to a person who has a severe physical impairment, as follows:

(i) prepare own meals;

(ii) manage personal finances;

(iii) shop for personal needs;

(iv) use public or personal transportation facilities;

(v) perform housework to maintain the person's place of residence in acceptable sanitary condition;

(vi) move about indoors and outdoors;

(vii) perform personal hygiene and self care;

(viii) manage personal medication,

...

[41] These daily living activities are reproduced on page 11 of the Application. In this section, the physician is asked: "Does the impairment directly restrict the person's ability to perform Daily Living Activities?" [Emphasis added]. This question is left unanswered in the petitioner's Application. However, immediately following this question, there is a table listing all of the daily living activities in s. 2 of the *EAPDR* with a subsequent question asking "Is the Activity Restricted?", with a space to answer "Yes", "No", or "Unknown".

While the physician did not directly answer the question of whether the impairment directly restricts the petitioner's ability to perform daily living activities, the physician is asked to complete this table if the physician is of the opinion that the impairment directly restricts the applicant's ability to perform daily living activities. In this case, the physician completed this table, indicating "Yes" to a restriction on meal preparation, basic housework, daily shopping, and mobility outside the home.

[42] These daily living activities are again reproduced on page 17 of the Application, in the section to be completed by the assessor. The assessor is asked to indicate the assistance required related to impairments that directly restrict the applicant's ability to manage daily living activities. The assessor indicated that the applicant requires significant help most or all of the time in going to and from stores for shopping and in carrying purchases home. The assessor indicated that the applicant requires significant help some of the time to prepare and cook meals.

[43] Section 2(2) of the *EAPDA* requires evidence from a "prescribed professional" that a severe physical impairment "directly and significantly restricts the person's ability to perform daily living activities." There is no indication that every one of the daily living activities listed must be affected. The ordinary meaning of the plural "activities" in this section dictates that there must be evidence from a prescribed professional indicating a direct and significant restriction on at least two daily living activities.

[44] The definition of "prescribed professional" includes a medical practitioner and a nurse practitioner. There is nothing indicating whether the medical reports need to be read discretely, or even whether more than one opinion is required. Both the physician and the assessor in this case fall within the definition of prescribed professional in the *EAPDR*.

[45] There is evidence in the affidavit submitted to this Court that the medical practitioner found a direct restriction on at least four of the petitioner's daily living activities. There is evidence that the nurse assessor found a significant, direct restriction on the petitioner's ability to go to and from stores and on her ability to carry purchases home. At the very least, this speaks both to the petitioner's ability to shop for personal needs and the petitioner's ability to move about outdoors. Additionally, there is evidence from both the medical practitioner and the nurse assessor that the petitioner can only walk for limited distances due to the pain in her right foot and her weakness from the degenerative spine disease.

[46] Faced with this evidence, the Tribunal has failed to explain the evidentiary basis for its conclusion that the petitioner's physician or assessor has not confirmed that the petitioner has a severe physical impairment that directly and significantly restricts her ability to perform daily living activities. The Tribunal merely summarizes the facts and states this conclusion. There is no indication of which facts the Tribunal accepted or rejected. Did it consider the either the physician's, the assessor's, or both reports unreliable? The reader is left with no articulation of the Tribunal's reasoning in this respect, and as such, the Tribunal's assessment of this evidence does not meet the standard of adequacy for reasons articulated in *VIA Rail*.

[47] Concerning the second submission on whether the petitioner has a severe physical impairment, it is to be noted that the term "severe physical impairment" is not defined in the *EAPDA*. As the respondent rightly

points out, the determination of whether or not a person meets that definition is a question of fact or of mixed fact and law, to which the Tribunal is entitled to deference (provided that determination is not patently unreasonable). Where, however, the statutory pre-condition of providing reasons for decision is unfulfilled, as it is in this case, no deference is warranted.

[48] In its reasons, the Tribunal does not indicate which evidence it relies on to conclude that the appellant does not have a severe physical impairment. To the contrary, the Tribunal only lists evidence which would appear to support the opposite conclusion. Indeed, the Tribunal's reasoning here appears to be contradictory. The Tribunal accepts, on one hand, that the petitioner's description of her pain was consistent with that of the physician. The petitioner's description of her pain was that "I am in constant pain which totally affects my daily living activities". Yet, on the other hand, with only this evidence and evidence of the prescribed professionals in the Application, the Tribunal baldly states that, "[b]ased on the evidence", the petitioner does not have a severe physical impairment.

[49] Were the Tribunal to explain its reasoning and the finding of facts upon which it is based, the Tribunal would be entitled to deference in its assessment. However, when the Tribunal concludes that the petitioner does not have a severe physical impairment without disclosing which evidence it relies upon in reaching this conclusion, it has not adhered to the statutory requirement to provide reasons and is, therefore, incorrect.

[50] Concerning the third submission on whether the petitioner has an impairment that directly and significantly restricts her ability to perform daily living activities, either continuously or for extended periods, we must again turn to the medical reports in the Application. Again, s. 2(2) of the *EAPDA* requires evidence from a "prescribed professional" that a severe physical impairment directly and significantly restricts the person's ability to perform daily living activities either continuously, or periodically for extended periods, and that as a result of the restriction in activities, the person requires help to perform those activities.

[51] On page 11 of the Application, where the physician indicated the degree of restriction on the petitioner's daily living activities, the physician responded that the petitioner has periodic restrictions on meal preparation, basic housework, daily shopping, and mobility outside the home. While the physician does not directly indicate whether these periodic restrictions are for extended periods, she does indicate that the petitioner has "ongoing pain" related to degenerative disc disease, making her unable to do any work involving even moderate heavy lifting, and that she has "ongoing pain" in her feet related to arthritis and a fracture. On page 10 of the application, the physician indicates that the impairment is likely to continue for two years or more from the date of assessment.

[52] Concerning the petitioner's mobility outside the home, the physician noted on page 12 of the Application that the petitioner is unable to drive until she has been seizure free for one year. On page 9 of the Application the physician noted that the petitioner has had a recent recurrence of seizures due to her epilepsy. This is consistent with the petitioner's evidence that she can no longer drive because of her seizures. This is in addition to the physician's evidence that the petitioner is unable to walk more than 1 block on a flat surface without the assistance of another person, assistive device, or assistance animal. Also of note in this regard is the Assessor's comment on page 21 of the Application that the city has limited

access to disabled transportation and that nothing is available after 3 p.m.

[53] On page 17 of the Application, the assessor indicated that the petitioner requires "[c]ontinuous assistance from another person" in going to and from stores for shopping and in carrying purchases home. This speaks both to the petitioner's ability to shop for personal needs and her ability to move about outdoors on her own. Additionally, the assessor indicated that the petitioner requires "periodic assistance" in food preparation and in cooking, which speaks to the petitioner's ability to prepare her own meals.

[54] The Tribunal wrote that "[b]oth the assessor and the physician note that the appellant's restrictions are periodic but they do not address whether these restrictions are for extended periods." Unless the Tribunal had valid grounds for rejecting the prescribed professionals' evidence, this is incorrect. The physician's evidence on the duration of the periodic limitations aside (leaving aside also the inquiry into whether a broad reading of the Act mandates reading the physician's evidence of periodic limitations together with the physician's evidence that the petitioner's impairment is "ongoing" and likely to last for more than two years), the assessor clearly stated that the petitioner requires continuous assistance from another person to go to and from stores and to carry purchases home. In other words, contrary to the Tribunal's decision, the assessor confirms that the petitioner has continuous restrictions in at least two daily living activities and that she requires help to perform those activities.

[55] Given these findings, it is not clear which evidence the Tribunal accepted and which evidence it rejected, and why. Even more disturbing is that it is unclear whether the Tribunal rejected any of the evidence at all, as opposed to the possibility of simply misreading it. Because of this unknown, it is very difficult to effectively scrutinize this decision – one of the hallmarks of inadequate reasons.

C. Did the Tribunal err?

[56] The status of the patently unreasonable standard of review in this province under the *ATA* was recently considered in *Manz v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2009 BCCA 92, 91 B.C.L.R. (4th) 219, 82 Admin. L.R. (4th) 185. After satisfying itself of the constitutional validity of s. 58(2)(a) of the *ATA* in a post-*Dunsmuir* environment, the Court stated:

> 39 ...When applied to findings of fact or law the Administrative Tribunals Act does not define [patently unreasonable]. (Section 58(2)(a) refers to a finding of fact or law or an exercise of discretion, but s. 58(3) is said to apply only to discretionary decisions). Accordingly, the well understood meaning of that phrase in relation to factual matters applies, is as described in *Speckling*:
>
> > [37] As the chambers judge noted, a decision is not patently unreasonable because the evidence is insufficient. It is not for the court on judicial review, or for this Court on appeal, to second guess the conclusions drawn from the evidence considered by the Appeal Division and substitute different findings of fact or inferences drawn from those facts. A court on review or appeal cannot reweigh the evidence. Only if there is no evidence to support the findings, or the decision is "openly, clearly, evidently unreasonable", can it be said to be patently unreasonable.

[57] This application is allowed on the basis that the Tribunal's reasons for decision are inadequate. As a

result of that inadequacy, this Court is in no position to decide whether the Tribunal's Decision is patently unreasonable. The Tribunal could reconvene and come to a reasoned conclusion that, having weighed the evidence and applied it to the statutory criteria, the petitioner remains ineligible for a PWD designation. Provided that the problem with the reasons is remedied and there were no other jurisdictional errors, the reconvened Tribunal would only be open to review on a patently unreasonable standard.

[58] However, because several of the Tribunal's findings as currently articulated have no clear and reasonable evidentiary basis, they could be characterized as patently unreasonable. I should stress that this is not a matter of this Court reweighing the evidence. Rather, it is a matter of there being clearly articulated evidence to support the Tribunal's findings.

[59] When applied to the statutory framework, the following aspects of the Tribunal's decision could be considered patently unreasonable:

- the Tribunal's finding that the petitioner's physician or assessor has not confirmed that the petitioner has a severe physical impairment that directly and significantly restricts her ability to perform daily living activities;
- the contradictions on the face of the reasons with respect to whether the physician or assessor confirmed the petitioner's evidence relating to her pain and limitations, and the possibility that the Tribunal misread the medical reports;
- the Tribunal's finding that it could not give significant weight to the petitioner's evidence since it was not confirmed by the physician or assessor;
- the Tribunal's finding that neither the assessor nor the physician confirmed that the impairment directly and significantly restricts the petitioner's ability to perform daily living activities either continuously or periodically for extended periods; and
- the finding that the petitioner does not have a severe physical impairment.

[60] Concerning the last point, it is useful to briefly return to s. 2(2) of the *EAPDA*:

> (2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that
>
> (a) in the opinion of a medical practitioner is likely to continue for at least 2 years, and
>
> (b) in the opinion of a prescribed professional
>
> (i) directly and significantly restricts the person's ability to perform daily living activities either
>
> (A) continuously, or
>
> (B) periodically for extended periods, and
>
> (ii) as a result of those restrictions, the person requires help to perform those activities.

[61] As indicated by the Tribunal and agreed to by the petitioner and the respondent, s. 2(2) of the *EAPDA* sets out 5 criteria that must be met for a person to be designated as a PWD:

1. the applicant must have reached the age of 18 (s. 2(2));

2. the Minister must be satisfied that the person has a severe mental or physical impairment (s. 2(2));

3. in the opinion of a medical practitioner, the severe physical impairment will continue for at least two years (s. 2(2)(a));

4. in the opinion of a prescribed professional, the impairment must directly and significantly restrict the person's ability to perform daily living activities (s. 2(2)(b)(i)), either continuously (s. 2(2)(b)(i)(A)) or periodically for extended periods (s. 2(2)(b)(i)(B)); and

5. in the opinion of a prescribed professional, as a result of the restriction in activities, the person requires help to perform those activities (s. 2(2)(b)(ii)).

[62] It is possible that the Tribunal interpreted s. 2(2) in such a manner that if all the criteria were not met, the applicant could not be considered to have a severe physical impairment. If this was so, was the petitioner's failure to meet, in the Tribunal's opinion, criteria 4 and 5 determinative of the petitioner's failure to meet criterion 2? Put another way, even if the Tribunal's current reasoning on criteria 4 and 5 is considered patently unreasonable, then could the Tribunal still correctly come to the conclusion that criterion 2 has not been met? Without proper explanation from the Tribunal, whether or not such a conclusion is supportable is mere speculation. However, such an interpretation would need to be made in light of the broad interpretation applicable to social welfare legislation canvassed in the authorities above at para. [35]. The Tribunal should interpret the *EAPDA* with a benevolent purpose in mind.

[63] I pause now to consider another difficulty in the Tribunal's Decision. The Decision indicates that "[t]here is no dispute that the appellant meets criteria 1 and 3". The first criterion is uncontroversial. It is with the conclusion on criterion 3 that I have some difficulty. Read carefully, section 2(2) reads that the Minister may make a PWD designation "if the minister is satisfied that the person has a severe mental or physical impairment that ... in the opinion of a medical practitioner is likely to continue for at least 2 years". Thus, it would appear that meeting criterion 2 is a condition precedent to meeting criterion 3. How can the Ministry be satisfied that the applicant has a severe physical impairment that will continue for at least 2 years if the Ministry is not satisfied that the applicant has a severe physical impairment in the first place? If there is any ambiguity in the interpretation of s. 2(2)(a), which I doubt there is, it must be resolved in favour of the applicant: *Gray* at paras. 9-12.

[64] Concerning the weight to be given to the petitioner's evidence, while s. 2(2) of the *EAPDA* makes it clear that certain eligibility criteria for PWD status need to be confirmed by the applicant's physician or assessor, nothing in the *EAPDA* prevents the Ministry or the Tribunal from placing considerable weight on the Petitioner's evidence, provided the statutory eligibility criteria are met. Indeed, it would be illogical for the

Application to demand of the petitioner to describe her disabling condition if the situation were otherwise.

[65] I should note that to the extent that the Tribunal did not choose to place significant weight on the petitioner's evidence because of a legitimate reason going to credibility, conflict with the medical practitioner's reports, or otherwise, the Tribunal cannot be said to have committed a patently unreasonable error. The Tribunal is entitled to make a decision that, despite the opinion of the medical professionals, the petitioner did not meet the eligibility criteria for PWD designation. The problem is, of course, that the Tribunal has not revealed its rationale.

Conclusion

[66] The relief sought by the petitioner is therefore allowed and the Decision is set aside. Because the Tribunal violated its statutory duty to provide reasons, the matter is sent back to a differently constituted Tribunal for consideration of the petitioner's appeal.

"Dickson J."

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for The Honourable Madam Justice Koenigsberg