IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Arbic v. British Columbia (Ministry of Housing and Social Development),* 2011 BCSC 410

Date: 20110401
Docket: S12235
Registry: Duncan

IN THE MATTER OF THE *JUDICIAL REVIEW PROCEDURE ACT*
R.S.B.C. 1996, C. 241
AND
IN THE MATTER OF
Tribunal Decision Appeal No. 2009 00061
Reconsideration Number R101046256

Between:

Dean Arbic

Petitioner

And:

Ministry of Housing and Social Development

Respondent

On judicial review from: Employment and Assistance Appeal Tribunal, February 17, 2009, (Tribunal Decision Appeal No. 2009 00061, Reconsideration Number R101046256)

Before: The Honourable Mr. Justice Bracken

Reasons for Judgment

Counsel for the Defendant Ministry of Housing and Social Development and Attorney General of British Columbia: R. Butler

Counsel for the Employment and Assistance Appeal Tribunal: A. R. Westmacott

Appearing in Person: D. Arbic

Place and Date of Trial/Hearing: Duncan, B.C. December 7, 2010

Place and Date of Judgment: Victoria, B.C. April 1, 2011

[1] The petitioner appeals from a decision of the Employment and Assistance Appeal Tribunal (the "tribunal") dated February 17, 2009. The tribunal upheld a reconsideration decision by the Ministry of Housing and Social Development (the "Ministry") that denied the petitioner income assistance because he

had failed to make reasonable efforts to comply with the mandatory requirements of his employment plan under s. 9 of the *Employment and Assistance Act*, S.B.C. 2002, c. 40. At issue in the proceeding is the request of the Ministry that Mr. Arbic repay the amount of $3,343.75 in assistance benefits.

Factual Background

[2] Mr. Arbic is married with four dependent children. In June 2007, he applied for income assistance and the Ministry required him to enter into an employment plan under s. 9(1) of the *Employment and Assistance Act* in order to receive income assistance. The Ministry contracted out the provision of employment assistance services to GT Hiring Solutions of Duncan, B.C. ("GT Hiring").

[3] GT Hiring set up an employment plan for Mr. Arbic and by its terms he was required to (a) make an appointment with GT Hiring for an intake assessment visit, (b) attend the intake assessment, (c) complete all tasks assigned by the B.C. Employment Program in accordance with the plan, (d) work with GT Hiring to address issues that may be impacting his ability to secure and sustain employment, (e) declare all income and report any changes to his Ministry caseworker, and (f) attend all review appointments as required.

[4] On July 10, 2007, GT Hiring returned the petitioner's file to the Ministry because he had failed to attend for his intake appointment. Mr. Arbic was redirected to the B.C. Employment Program in August of 2007 and two additional terms were added to his employment plan. The additional conditions required him to attend a scheduled intake appointment on September 4, 2007 and to bring with him a current resumé.

[5] In May of 2008, GT Hiring returned Mr. Arbic's file to the Ministry because he had secured casual on-call employment with the government liquor store in Lake Cowichan, B.C. However, as he wished to continue receiving assistance while he looked for full-time employment, the Ministry again referred Mr. Arbic back to GT Hiring. It appears that throughout the summer of 2008, he worked approximately 16 hours per week at the government liquor store.

[6] GT Hiring told Mr. Arbic he would have to make more effort to find full-time employment. Specifically, GT Hiring told Mr. Arbic that part-time or casual employment was not sufficient for him to keep receiving income assistance and he had to expand his job search. From that point, it appears there was an issue between GT Hiring's requirements under the employment plan and Mr. Arbic's preferred strategy of trying to build up hours of work at the government liquor store in Lake Cowichan and thus increase his seniority and potential for full-time employment.

[7] He advised GT Hiring in September 2008 that even though he was getting less work at the government liquor store, he believed he would continue to receive hours and could better his chances of full-time employment if he remained available for work at the liquor store. Subsequently, in November of 2008, Mr. Arbic withdrew from the B.C. Employment Program as he felt that GT Hiring was not accommodating his schedule and disagreed with his job search strategy of focussing all of his efforts on the potential for increased hours and seniority at the government liquor store.

[8] Subsequently, as Mr. Arbic still wished to obtain some income assistance, he was again advised by

the Ministry that he would have to return to GT Hiring for a new employment plan if he was to remain eligible for income assistance. Mr. Arbic agreed to a new employment plan with essentially the same conditions as his prior plan.

[9] The issue of his job search strategy continued to be a point of contention between GT Hiring and Mr. Arbic. GT Hiring wanted Mr. Arbic to apply for work at various building supply or automotive stores in the Lake Cowichan and Duncan areas in an effort to find full-time work. He did make an application at the Walmart store in Duncan but without success. Mr. Arbic continued to prefer to make himself fully available for work at the government liquor store at Lake Cowichan in the hope he could build his hours and seniority and eventually get a full-time job.

[10] In this strategy, Mr. Arbic was eventually successful. He did secure full-time employment at the government liquor store and no longer has any need of income assistance.

[11] However, before he obtained a full time job, GT Hiring insisted that Mr. Arbic attend at a meeting at its office in Duncan on December 4, 2008. Mr. Arbic did not want to give up any opportunity to obtain casual work from the liquor store and was reluctant to attend meetings that took him out of Lake Cowichan. GT Hiring had previously arranged an accommodation that allowed him to wait at home until 10:00 a.m. every day to see if there was work available to him. On December 4, 2008, he had waited until 10:00 a.m. without any opportunity for work and then attended the appointment in Duncan. Unfortunately, the call for work came after 10:00 a.m. and Mr. Arbic lost the opportunity to work one shift at the liquor store.

[12] The relationship between Mr. Arbic and GT Hiring was a difficult one over the time Mr. Arbic received income assistance. Clearly, Mr. Arbic wanted to focus on his job strategy of building hours with the government liquor store. GT Hiring and the Ministry wanted him to expand his efforts to find full-time employment beyond Lake Cowichan and in particular, beyond the government liquor store.

[13] Mr. Arbic's file was returned to the Ministry on December 15, 2008 because he had allegedly failed to comply with his employment plan. GT Hiring took the view that Mr. Arbic should not be referred back to the employment program as he was reluctant to participate in it except on his own terms. The Ministry then decided Mr. Arbic was no longer eligible for income assistance because he had not complied with his employment plan.

[14] Mr. Arbic sought reconsideration of that decision under s. 17 of the *Employment and Assistance Act*. However, on January 15, 2009, the Ministry adjudicator denied his request because he had failed to make reasonable efforts to comply with his employment plan.

[15] Mr. Arbic filed a notice of appeal with the Employment and Assistance Appeal Tribunal on January 27, 2009 and an oral hearing was held February 17, 2009. Written reasons were subsequently issued denying the appeal. The tribunal concluded:

> The appellant has refused to attend a job search related workshop and a one-on-one meeting with an employment counsellor. The contractor returned the appellant's file to the ministry for reasons of non-compliance and that the appellant did not wish to participate in the BCEP. The Panel finds that

> the appellant did enter into the Employment Plan and that he understood the terms and conditions of that plan and that he understood the consequences of failing to comply with the terms of the Employment Plan. On many occasions the contractor attempted to work with the appellant but the appellant wanted to set his own conditions of participation and felt that attending the required meetings at the contractor's office interfered with his part time employment. The appellant's job search efforts to find sustainable employment in his community have been poor.

Petitioner's Grounds of the Appeal

[16] Mr. Arbic asserts that he did not receive a fair hearing from the Employment and Assistance Appeal Tribunal. The grounds are well summarized in the written submission of the Ministry of Housing and Social Development and Attorney General of British Columbia and are stated as follows:

1. The tribunal did not appreciate the significance of a letter from GT Hiring Solutions or give it sufficient weight, specifically a letter congratulating Mr. Arbic on finding employment.

2. The tribunal did not give sufficient weight to proof that Mr. Arbic had attended all review appointments and in particular had attended the December 4, 2008 appointment.

3. The tribunal did not give sufficient weight to Mr. Arbic's written submissions.

4. The tribunal erred in finding that Mr. Arbic did not complete all tasks assigned under his employment plan.

5. The tribunal erred in finding Mr. Arbic did not submit applications for employment by ignoring the fact that he had applied to Walmart in Duncan.

6. The tribunal erred in how it understood and dealt with the December 4th meeting Mr. Arbic allegedly missed but the evidence indicates he attended.

7. The tribunal did not give sufficient weight to Mr. Arbic's evidence respecting his job search.

8. The tribunal erred in not overturning the Ministry's decision on the basis that Mr. Arbic had in fact participated in all assigned activities.

9. The tribunal erred in failing to appreciate that the employment plan itself forced Mr. Arbic to miss work in order to look for work.

10. The tribunal's reasons for decision demonstrate error.

11. The tribunal erred in denying Mr. Arbic's application for a legal aid lawyer to represent him.

[17] Mr. Arbic alleges he did not receive a fair hearing, thus raising the question of procedural fairness. I agree with the submissions of counsel for the Ministry and the Attorney General that the issue of procedural fairness only arises in the denial of Mr. Arbic's application for a legal aid lawyer. However, there is no absolute right to legal representation in administrative proceedings and the duty of fairness does not require

the provision of publicly funded counsel. See *Brown and Evans*, Judicial Review of Administrative Action in Canada (Canvassback Publishing, loose-leaf ed.), p. 10-26.

[18] Upon analysis, I conclude the grounds for review and the submissions of Mr. Arbic allege errors in findings of fact or the weight given when the facts were applied to the law. It is my view that his application for judicial review is not based on an issue of a loss of jurisdiction by the tribunal or a lack of procedural fairness. Instead, Mr. Arbic alleges the tribunal either made errors in the interpretation of the evidence or failed to give sufficient weight to evidence that had been placed before it.

Standard of Review

[19] In *Lavender Co-Operative Housing Association v. Ford*, 2011 BCCA 114, the court stated:

> Thus the process for determining the appropriate standard of review under the *ATA* [*Administrative Tribunals Act*] should be straightforward. The reviewing judge must:
>
> 1. determine which legislative provisions, if any, apply;
> 2. if s. 58 or 59 of the *ATA* apply, determine which type of question is at issue; and
> 3. apply the mandated standard of review.

[20] Section 58 of the *Administrative Tribunals Act* provides that the standard of review for tribunals with a privative clause is the patent unreasonable standard for findings of fact or law or an exercise of discretion in respect of a matter over which the tribunal has exclusive jurisdiction. The *Employment and Assistance Act* does contain a privative clause and expressly directs the application of s. 58 of the *Administrative Tribunals Act*. The provisions of the *Employment and Assistance Act* that are applicable are s. 19.1 and s. 24(6) and (7). Those provisions are:

> **19.1** Sections 1 to 6, 7(1) and (2), 8, 9, 30, 44, 46.3, 55, 56, 58 and 61 of the *Administrative Tribunals Act* apply to the tribunal.
>
> **24** (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.

[21] Section 58 of the *Administrative Tribunals Act* provides:

> **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.

[22] The combination of the provisions of the *Administrative Tribunals Act* and the *Employment and Assistance Act* lead me to conclude that the application of the patent unreasonable standard of review is the appropriate standard of review for the tribunal's findings of fact and law.

[23] The standard of patent unreasonableness imposes a limit on the court's ability to interfere with the decision of an administrative tribunal. In *Canada (AG) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 at paras. 44 - 46, the test was described as being "clearly irrational". It has also been described as "not in accordance with reason", *Centre communautaire juridique de l'Estrie v. Sherbroke (City)*, [1996] 3 S.C.R. 84, paras. 9 - 12; amounting to a "fraud on the law or a deliberate refusal to comply with it", *Syndicat des employès de production du Quèbec et de l'Acadie v. Canada Labour Relations Board*, [1984] 2 S.C.R. 412; and where "the result … almost borders on the absurd", *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, para. 18. Finally, in *Viking Logistics v. British Columbia (Workers' Compensation Board)*, [2010] B.C.J. No. 1874, the court held that the patent unreasonable standard requires the greatest deference to the decision under review.

[24] Counsel for the tribunal argues that the role of the reviewing court is to inquire into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and the outcomes. She argues that "Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process and whether the decision falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and the law."

[25] It is not open to the court on judicial review to reweigh any of the evidence presented to the tribunal or to make findings of fact in substitution for those of the tribunal.

[26] As was stated in *Manz v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2009 BCCA 92, citing *Speckling v. British Columbia (Workers' Compensation Board)*, 2005 BCCA 80, at para. 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.

[27] The record of the tribunal indicates that there were elements of conflicting evidence that had to be resolved. The tribunal did so. It is clear from the record that the tribunal found Mr. Arbic was required to engage in an employment plan and he failed to abide by all of the terms of it. The tribunal held some parts of the employment plan were complied with, but not all.

[28] I can find no basis upon which to interfere with the findings of fact of the tribunal. The tribunal provided a summary of the evidence that had been presented to the Ministry and the oral evidence that was heard by the tribunal. It clearly considered the letter from GT Hiring referred to in the petition and the fact that Mr. Arbic had made application for employment at Walmart. It is also clear that the tribunal was aware that Mr. Arbic had in fact attended the meeting at GT Hiring on December 4, 2008.

[29] I am satisfied that the reasons given by the tribunal are complete and meet the test in *Hudson v. British Columbia (Employment and Assistance Appeal Tribunal)*, 2009 BCSC 1461.

[30] I agree with submissions of counsel that the reasons given by the tribunal were "intelligible and transparent". All of the findings of fact made by the tribunal were made with at least some evidentiary basis. There is nothing in the record to indicate that any evidence was overlooked or ignored that could have changed the outcome of the tribunal's decision.

Conclusion

[31] I am therefore satisfied the conclusions reached by the tribunal were not patently unreasonable, nor is there any insufficiency in the reasons given by the tribunal for its decision. In the result, the petition is dismissed.

"J. K. Bracken, J."
The Honourable Mr. Justice Bracken