IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Garbutt v. British Columbia (Social Development),* 2012 BCSC 1276

Date: 20120829
Docket: S124183
Registry: Vancouver

Re: *Judicial Review Procedure Act*

Between:

Stanley Garbutt

Petitioner

And

Minister of Social Development

Respondent

Before: The Honourable Madam Justice Kloegman

On judicial review from: Employment and Assistance Appeal Tribunal, April 17, 2012 (appeal number 2012-00227)

Reasons for Judgment

Counsel for the Petitioner:	K.F. Milne
Counsel for the Respondent, Employment and Assistance Appeal Tribunal:	A.R. Westmacott
Counsel for the Respondent, Minister of Social Development:	G. Morley
Place and Date of Chambers Judicial Review:	Vancouver, B.C. August 20, 2012
Place and Date of Judgment:	Vancouver, B.C. August 29, 2012

[1] The petitioner applies for judicial review of the decision of the Employment and Assistance Appeal Tribunal (the “Tribunal”), upholding the decision of the Minister of Social Development (the “Minister”) that denied the petitioner designation as a person with disabilities (“PWD”).

[2] The 54-year-old petitioner suffers from a variety of medical problems, including:

> Hepatitis C, L5-S1 disc disease with space narrowing and arthropathy, chronic pain in his right shoulder with calcific tendonitis, chronic left knee pain, …
>
> (Tribunal Decision, pp. 65 and 66)

[3] The petitioner receives income assistance under the *Employment and Assistance Act*, S.B.C. 2002, c. 40. In December 2011 he sought designation as a PWD under the *Employment and Assistance for Persons with Disabilities Act*, S.B.C. 2002, c. 41 [*Act*], which would provide him with a higher level of income assistance and a reduced obligation to search for employment.

[4] On January 27, 2012, the adjudicator delegated by the Minister to consider the plaintiff's application for PWD status found that the plaintiff did not have a severe physical or mental impairment; his ability to perform daily living activities was not significantly restricted; and the petitioner did not require significant help or supervision of another person to perform daily living activities. All three of these findings were required to be positive before the petitioner could be designated PWD under s. 2(2) of the *Act*.

[5] On March 12, 2012, a delegated adjudicator reconsidered the decision of January 27, 2012, but denied the petitioner's application on the same three bases as the January 27, 2012 decision.

[6] On March 16, 2012, the petitioner appealed the reconsidered decision to the Tribunal. He was allowed to supplement the existing record with written argument by his advocate and a new letter from a second treating physician. An oral hearing was held on April 10, 2012, and the Tribunal confirmed the reconsideration decision on the basis that it was reasonably supported by the evidence.

1. Adequacy of Reasons of the Tribunal

[7] The primary ground of attack by the petitioner on the Tribunal's decision is that it failed to provide adequate reasons for its decision.

[8] The parties do not agree on the standard of review of the adequacy of the reasons of the Tribunal. The petitioner submits that s. 87 of the *Employment and Assistance Regulation*, B.C. Reg. 263/2002 (which is incorporated by reference in the *Act*), mandates that the written determination must summarize the issues and relevant facts considered in the appeal and set out the reasons on which the Tribunal bases its determination, all of which the Tribunal has failed to do.

[9] The petitioner submits that whether the reasons fulfill the requirements of s. 87 is a question of law, and therefore, the standard of review is one of correctness. The petitioner relies on the decisions of *Hudson v. British Columbia (Employment and Assistance Appeal Tribunal)*, 2009 BCSC 1461, and *Harley v. British Columbia (Employment and Assistance Appeal Tribunal)*, 2006 BCSC 1420, as support for this proposition.

[10] Counsel for the Minister and counsel for the Tribunal both submit that the decision of the Supreme Court of Canada in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, is overriding authority for the proposition that the review of the adequacy of reasons must be part of the substantive judicial review with the appropriate degree of curial deference as set out by

statute or common law. According to this later decision of a higher court, the appropriate standard of review will be in the varying ranges of reasonableness.

[11] In any event, regardless of whether I apply the standard of correctness or the standard of patently unreasonable, in my opinion the reasons cannot be viewed as inadequate. If the test is whether the reasons allow the reader to understand why the Tribunal made its decision, and permit the Court to determine whether the conclusion is within the range of acceptable outcomes, (*Newfoundland and Labrador Nurses' Union*, para. 16), then I find the reasons of the Tribunal do so.

[12] The analysis of the Tribunal is neatly summarized in the written submissions of the Minister at para. 65:

a. [The tribunal] accepted the diagnoses of physical impairments by Dr. Haegert;

b. Not enough information was provided from Dr. Haegert on severity of back pain or the present impact of the Hepatitis C diagnosis on daily functioning and fatigue;

c. A chronic diagnosis is not necessarily "severe" within the meaning of the *Act* and it is reasonable for the Minister to have regard for numeric functional skills indicators;

d. The Minister need not accept Dr. Haegert's assertion that the impairment is "severe" although it must consider it;

e. The assertions of the Hepatitis C specialist regarding Mr. Garbutt's present mobility, physical stamina and ability to care for self and perform daily maintenance activities in the letter provided to the Tribunal were not consistent with the evidence in the reports or Mr. Garbutt's own evidence;

f. The negative prognosis of the specialist is not relevant to whether Mr. Garbutt is eligible for PWD status at the time of application;

g. An analysis of the functional skills indicators supports the Minister's conclusion the physical impairment was not "severe" at the time of application;

h. The mental health diagnoses of Dr. Haegert were accepted regarding chronic depression and impaired recent memory;

i. The conclusion that these limitations are more in keeping with a moderate degree of impairment was reasonable;

j. Mr. Garbutt showed continuous restriction of basic housekeeping as a result of his inability to lift and of one out of five tasks of shopping;

k. It was reasonable of the Minister to conclude that this was not a direct and significant restriction on two or more daily living activities, but rather that Mr. Garbutt performs a majority of his daily living activities independently.

[13] The specific complaint of the petitioner with respect to the adequacy of the Tribunal's reasons concerns the Tribunal's application of the term "severe," as it is used in s. 2(2) of the *Act*:

> **2** (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, …

[14] The term “severe” is not defined in the *Act*. I do not find it incumbent on the Tribunal in their reasons to state what they consider would constitute severe; it is enough that they have stated what is not severe. They concluded that even though the petitioner’s condition was chronic and impaired him to some degree, the fact that he was able to perform the majority of his daily living activities independently meant that his limitations were more in keeping with a moderate, not severe, degree of impairment. I agree with the submissions of counsel for the Minister that under the *Act* the word “severe” creates a standard, and applying that standard to a particular set of facts is a matter of judgment, the exercise of which is within the purview of the Tribunal.

2. Finding of No Severe Physical Impairment

[15] A secondary ground of attack by the petitioner is that the findings of no severe impairment and no significant restriction of daily living activities, resulting in a need for significant help, are patently unreasonable.

[16] The parties agree that the standard of review for the substance of the decision is one of patent unreasonableness as prescribed by s. 58 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45.

[17] The petitioner further submits that the finding of the Minister that the petitioner did not have a severe physical impairment under s. 2(2) of the *Act*, which finding was confirmed on reconsideration and by the Tribunal, was patently unreasonable. Apart from the alleged inadequacy of the reasons of the Tribunal, the petitioner states that the evidence, as accepted by and summarized by the Tribunal in its reasons, cannot logically support a finding of no severe impairment.

[18] I disagree. It may be that a lay person, a judge, or even a doctor would consider the evidence of the petitioner’s impairment to be “severe” in the ordinary meaning of the word. However, it is the Tribunal that is tasked with creating designations of impairments that entitle impaired persons to assistance under the *Act*. Deference must be had to the Tribunal’s opinion (*Arbic v. British Columbia (Ministry of Housing and Social Development)*, 2011 BCSC 410 at para. 23).

[19] The evidence that the petitioner:

a) had not been prescribed medication that may interfere with his ability to perform daily living activities;

b) did not need aides;

c) could walk short distances unaided;

d) could climb stairs;

e) could lift up to five pounds;

f) could sit for about an hour; and

g) knew his limit and worked around it,

apparently supported a finding of something less than severe impairment in relation to the Minister's categorization of impairment. The adjudicator, the reconsideration officer and the Tribunal all have the authority and expertise to weigh this kind of evidence against the claim of the petitioner and his doctors that he is severely impaired.

[20] I note that s. 2(2)(a) of the *Act* calls for an opinion of a medical practitioner, but only in regard to whether the applicant's condition is likely to continue for two years or more. The *Act* does not require the practitioner's opinion as to degree of severity of impairment. Similarly, s. 2(b) does not require the opinion of a prescribed professional as to severity of impairment, only whether a person's impairment directly and significantly restricts the person's ability to perform daily living activities and as a result requires help to perform those activities.

[21] In other words, it is the Minister who must be satisfied as to the severity of the impairment, not the medical practitioners or prescribed professionals.

3. Finding of No Significant Restriction of Daily Living Activities

[22] The petitioner makes the similar submission that the Minister's finding that the petitioner's daily living activities were not significantly restricted was patently unreasonable and should not have been confirmed by the Tribunal. Daily living activities are defined in s. 2(1)(a) of the *Act's Regulation* (B.C. Reg. 265/2002) as:

> (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, and …

[23] The decision of *Hudson* established that there must be evidence from a prescribed professional indicating a direct and significant restriction on at least two of these daily living activities in order to find that a person's ability to perform daily living activities is significantly restricted.

[24] In the case at bar, the petitioner's physician checked off boxes confirming that the petitioner had continuing restriction (i.e. needed significant help) in housework and daily shopping. The prescribed professional, Nurse Showler, checked boxes confirming that the petitioner needed continuous assistance (i.e. significant help) with laundry, basic housekeeping and one out of five shopping tasks (carrying purchases home). *Prima facie*, it appears from this evidence that there are two daily living activities of the petitioner that are continuously restricted, yet the Tribunal concluded that the evidence did not demonstrate a direct and significant restriction on two or more daily living activities.

[25] However, on a closer reading of the analysis of the Tribunal, it is evident that it was considering the major headings of Personal Care, Basic Housekeeping, Shopping, Meals, Pay Rent and Bills, Medication and Transportation as each representing a daily activity, and not the individual tasks itemized under each of these headings. The petitioner was able to do the majority of these daily living activities without assistance. In that regard, it was not patently unreasonable for the Tribunal to state that because only Basic Housekeeping and one out of five tasks involved in Shopping were problematic for the petitioner, and all other daily living activities were independently managed by him, he did not meet the criteria set out in s. 2(b) of the *Act*.

[26] The petitioner concedes, through counsel, that it was necessary for him to satisfy the Minister under the whole of s. 2(2) of the *Act* as the provisions are conjunctive. The adjudicator, reconsideration officer and the Tribunal all found that the petitioner failed to do so. The decision of the Minister fell within the range of reasonable outcomes and I cannot find that either the reconsideration panel or the Tribunal were patently unreasonable in confirming his decision.

[27] Accordingly, the petition is dismissed.

"Kloegman J."