IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lee v. Employment and Assistance Tribunal and Minister of Social Development,* 2013 BCSC 513

Date: 20130325
Docket: 117064
Registry: Vancouver

Between:

Susanna Lee

Petitioner

And

Employment and Assistance Tribunal and Minister of Social Development

Respondents

Before: The Honourable Madam Justice Fisher

On judicial review from the decision of the Employment and Assistance Tribunal dated August 17, 2011, Appeal Number 2011-00376

Reasons for Judgment

Counsel for the Petitioner:	D.W. Mossop, QC
Counsel for the Respondent Employment and Assistance Tribunal:	A.R. Westmacott
Counsel for the Minister of Social Development and the Attorney General	J. Walters
Place and Date of Hearing:	Vancouver, B.C. February 12, 13, 2013
Place and Date of Judgment:	Vancouver, B.C. March 25, 2013

[1] This is a judicial review of a decision of the Employment and Assistance Appeal Tribunal. The main issue involves the authority of the Minister or the Tribunal to make orders back-dating the eligibility date for disability benefits. The petitioner also challenges the validity of the regulation that prescribes eligibility dates.

The facts

[2] On August 13, 2010, the petitioner applied for designation as a person with disabilities (PWD) and for disability benefits under the *Employment and Assistance for Persons with Disabilities Act* (the *EAPWD Act)*. Her application was denied. On November 30, 2010, she made a request to the Minister of Social Development for a reconsideration of the decision. On January 21, 2011,[1] the Minister's delegate decided in the petitioner's favour and she was designated PWD and awarded disability assistance benefits commencing February 1, 2011.

[3] Section 72 of the *Employment and Assistance for Persons with Disabilities Regulation* (the *EAPWD Regulation*) requires the Minister to complete a reconsideration decision within 10 business days from the date of the request. In this case, the Minister did not comply with this time requirement. The petitioner's eligibility date was determined under s. 23(1) of the *EAPWD Regulation*, which provides that a person is not eligible for disability assistance until the first day of the month after the month in which the Minister designates the person as a PWD. As a result of the Minister's failure to comply with the 10 day time requirement, her eligibility for disability assistance commenced one month later than it would have if the decision had been made within the time limit.

[4] The petitioner then requested a reconsideration of the eligibility date. She asked the Minister to backdate her disability assistance payments for one month on the basis that the reconsideration decision should have been made by December 14, 2010. The Minister's delegate refused to do so on the basis that the legislation does not authorize eligibility to be backdated. The petitioner appealed this decision to the Employment and Assistance Appeal Tribunal. The Tribunal dismissed the appeal. She now seeks judicial review of the Tribunal's decision. She also seeks, in the alternative, a declaration that s. 23 of the *EAPWD Regulation* is *ultra vires*.

The legislative scheme

[5] The Tribunal is established under s. 19 of the *Employment and Assistance Act* (the *EA Act*) and it hears appeals of decisions made under that Act as well as the *EAPWD Act*. The *EA Act*, the *EAPWD Act* and their regulations create a comprehensive legislative scheme governing the administration of income and disability assistance.

[6] Under the *EAPWD Act*, the Minister may provide disability assistance to a person designated under s. 2 as a PWD. To be designated as a PWD, the Minister must be satisfied, based on expert opinion, that the person has a severe mental or physical impairment that is likely to continue for at least two years, which restricts the person's ability to independently perform daily living activities. A family unit is eligible for disability assistance provided it includes a person designated as a PWD.

[7] The process for applying for PWD designation is separate from the process for applying for disability assistance. Sections 4.1 and 4.2 of the *EAPWD Regulation* set out a two-stage process for assessing the eligibility of a family unit for disability assistance and s. 23 prescribes the effective date of eligibility. The pertinent parts of s. 23 provide:

(1) Subject to subsection (1.1), the family unit of an applicant for designation as a person with disabilities or for both that designation and disability assistance

(a) is not eligible for disability assistance until the first day of the month after the month in which the minister designates the applicant as a person with disabilities

...

(4) If a family unit that includes an applicant who has been designated as a person with disabilities does not receive disability assistance from the date the family unit became eligible for it, the minister may backdate payment but only to whichever of the following results in the shorter payment period:

(a) the date the family unit became eligible for disability assistance;

(b) 12 calendar months before the date of payment.

[8] The decisions are made by Ministry employees exercising delegated powers. The *EAPWD Act* provides for reconsideration and appeal rights. Under s. 16(1)(a), a person may request the Minister to reconsider "a decision that results in a refusal to provide disability assistance". Under s. 16(2), the request must be made, and the decision reconsidered, within time limits specified by regulation. Section 72 of the *EAPWD Regulation* specifies the 10 day time limit for the Minister to reconsider a decision:

The minister must reconsider a decision referred to in section 16 (1) of the Act, and mail a written determination on the reconsideration to the person who delivered the request under section 71 (1) *[how a request to reconsider a decision is made]*,

(a) within 10 business days after receiving the request, or

(b) if the minister considers it necessary in the circumstances and the person consents, within 20 business days after receiving the request.

[9] There is a further right of appeal to the Tribunal under s. 16(3) of the *EAPWD Act*. Under s. 22 of the *EA Act,* an appeal is heard by a panel of up to three members of the Tribunal. The hearings are oral or, where the parties consent, in writing. The appeal is based on the record and "oral or written testimony in support of the information and records" that were before the Minister.

[10] Section 19.1 of the *EA Act* provides that certain sections of the *Administrative Tribunals Act,* SBC 2004, c 45 (*ATA*) apply to the Tribunal; one of those is s. 44, which specifies that the Tribunal has no authority to consider constitutional questions. A panel's decision-making authority on an appeal is set out in s. 24 of the *EA Act*:

(1) After holding the hearing required under section 22 (3) *[panels of the tribunal to conduct appeals]*, the panel must determine whether the decision being appealed is, as applicable,

(a) reasonably supported by the evidence, or

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

(2) For a decision referred to in subsection (1), the panel must

(a) confirm the decision if the panel finds that the decision being appealed is reasonably supported by the evidence or is a reasonable application of the applicable enactment in the circumstances of the person appealing the decision, and

(b) otherwise, rescind the decision, and if the decision of the tribunal cannot be implemented without a further decision as to amount, refer the further decision back to the minister.

[11] The Tribunal is protected by a privative clause in ss. 24(6) and (7):

> (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.

The Tribunal's decision

[12] The Tribunal confirmed the Minister's decision that there was no authority to backdate the petitioner's eligibility date for disability benefits.

[13] The petitioner's position before the Tribunal was that s. 23(4) of the *EAPWD Regulation* permitted the Minister to backdate payments for up to a year, and because this is benefits-conferring legislation, the regulation should be given a large and liberal construction. She argued that the Ministry's position resulted in absurd consequences, as it would not be able to rectify its own breach of the legislation.

[14] The Ministry's position was that the time limits in s. 72 of the *EAPWD Regulation* are directory, not prescriptive, and as there are no consequences for non-compliance, there is no authority to change the effective date of a PWD designation that is made out of time.

[15] The Tribunal concluded that s. 23(4) is clear in its language and applies when an applicant does not receive disability assistance from the date the family unit became eligible to receive it. It allows the Minister to backdate payment only to the date the family unit became eligible or 12 months before, whichever results in the shorter payment period. The Tribunal also concluded that s. 23(1) clearly states that that a family unit is not eligible for disability assistance until the first of the month following the month the applicant is designated a PWD. It found that the designation in this case was made on January 21, 2011, the date of the Minister's reconsideration decision. The essence of its decision is as follows:

> The panel finds that the wording of the legislation provides a defined time of "eligibility" for disability assistance and that it is not open to the ministry to "deem" eligibility at any other time. Since the appellant received disability assistance from the date the family unit became "eligible" for it, on February 1, 2011, the provisions of 23(4) do not apply to the appellant's circumstances. Even if Section 23(4) were applied to the appellant's circumstances, the result would be no different for the appellant as the shorter payment period would be the date the family unit became "eligible" for disability assistance which, pursuant to Section 23(1), is February 1, 2011. Therefore, the panel finds that the ministry's determination that it had no authority to backdate the appellant's disability assistance payments was a reasonable application of the applicable enactment, being Section 23(1) of the [*EAPWD Regulation*], in the circumstances of the appellant and confirms the ministry's decision.

The standing of the Tribunal

[16] The Tribunal made submissions on the nature of the legislative scheme, the record of the proceeding, whether the petitioner should be permitted to raise a new issue in the judicial review, and the standard of

review. Ms. Westmacott also sought leave to make submissions on the application of the doctrine of necessary implication in the event the Court considered the new issue. No objection was taken to leave being granted. She made no submissions on the substance of the Tribunal's decision or the validity of the *Regulation* in issue.

[17] I found all of the Tribunal's submissions helpful and granted leave as requested. Ms. Westmacott took care to respect the limits of the Tribunal's role in judicial review as set out in numerous authorities on this issue, such as *Northwestern Utilities Ltd. v Edmonton (City)*, [1979] 1 SCR 684; *Canadian Assn. of Industrial, Mechanical and Allied Workers, Local 14 v Paccar of Canada Ltd.*, [1989] 2 SCR 983; *Timberwolf Log Trading Ltd. v Commissioner (Pursuant to s. 142.11 of the Forest Act)*, 2011 BCCA 70; *Henthorne v British Columbia Ferry Services Inc.,* 2011 BCCA 476.

The issues

[18] As in most judicial reviews, the first issue is what standard of review applies to the decision of the Tribunal. Closely related to this is the issue of what is properly before the Court in this proceeding.

[19] The petitioner's position is that the Tribunal erred in jurisdiction by failing to consider whether it had the implied power to make remedial orders that would allow it to backdate the effective date of eligibility to "correct the Ministry's error". This position is founded on the proposition that a statutory tribunal has implied ancillary powers in addition to explicit powers. Mr. Mossop raised three points of law in respect of this: (1) administrative appeals are substantive rights, (2) the doctrine of necessary implication permits or requires that an appeal tribunal should have the power to make remedial orders, and (3) ambiguities in benefits-conferring legislation should be interpreted in favour of the applicant. He also submitted that the standard of review for such a decision is correctness, as the Tribunal's expertise does not extend to determining its own jurisdiction.

[20] The petitioner raises a second, alternative position: if the Tribunal correctly interpreted ss. 23(1), (3.2) and (4) of the *EAPWD Regulation*, the *Regulation* is in whole or in part *ultra vires* the *EAPWD Act*.

[21] The position of both respondents is that the petitioner has reformulated the substantive issue and is putting before this Court a new position and new arguments that were not considered by the Tribunal. This new position centers on the question of the doctrine of necessary implication in respect of the Tribunal's powers. They submit that this Court should not consider an argument that could have been but was not put before the Tribunal. They also submit that the standard of review of the Tribunal's decision is patent unreasonableness under s. 58(2)(a) of the *ATA*.

[22] The respondents do not dispute the petitioner's right to challenge the *vires* of the *Regulation* for the first time, as the Tribunal does not have jurisdiction to consider this, but this is a matter separate from the judicial review.

[23] For the following reasons, I have concluded that it is not appropriate to consider the new issue in the judicial review. However, I have considered it in general terms so far as it is relevant to my assessment of the

Tribunal's decision and I have also considered it in relation to the petitioner's alternative challenge to the validity of the *EAPWD Regulation*. Addressing the issue in this way does not offend the principles on which courts exercise supervisory jurisdiction over administrative tribunals.

New issues on judicial review

[24] The petitioner's entire argument on judicial review is premised on a position that was neither taken before nor considered by the Tribunal. The issue before the Tribunal was whether the Minister has the authority to backdate eligibility under s. 23(1) or (4) of the *EAPWD Regulation*. The issue before this Court is whether the Tribunal failed to consider whether the Tribunal itself has an implied remedial power to backdate.

[25] The Court on a judicial review should be very reluctant to consider a new issue that was not raised before the tribunal, absent exceptional circumstances. In *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, Rothstein J. for the majority held that a litigant does not have the right to require a reviewing court to consider a new issue and the court has the discretion not to do so where inappropriate. He cautioned that generally, a court's discretion to consider an issue for the first time on judicial review should not be exercised where the issue could have been but was not raised before the tribunal. He explained the rationales for this at paras. 24-25:

> [24] There are a number of rationales justifying the general rule. One fundamental concern is that the legislature has entrusted the determination of the issue to the administrative tribunal. As this Court explained in *Dunsmuir*, "[c]ourts . . . 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" (para. 27). Accordingly, courts should respect the legislative choice of the tribunal as the first instance decision maker by giving the tribunal the opportunity to deal with the issue first and to make its views known.
>
> [25] This is particularly true where the issue raised for the first time on judicial review relates to the tribunal's specialized functions or expertise. When it does, the Court should be especially careful not to overlook the loss of the benefit of the tribunal's views inherent in allowing the issue to be raised.
>
> [citations omitted]

[26] Rothstein J. also pointed out that raising an issue for the first time on judicial review may unfairly prejudice the opposing party and may deny the court the adequate evidentiary record required to consider the issue.

[27] In *Alberta Teachers*, the new issue involved compliance with statutory timelines and whether the Information and Privacy Commissioner lost jurisdiction for his failure to extend a 90 day period for completion of an inquiry. This was an issue that the Commissioner had decided in other cases. The reviewing judge's decision to consider the issue was upheld on appeal on the basis that it was implicitly decided by the Commissioner, there was no evidentiary inadequacy, and there was no prejudice to the parties.

[28] The respondents submitted that here, the Tribunal has not had occasion to express its views on the doctrine of necessary implication in respect of its powers and the petitioner should not be able to undermine the deference owed to it by failing to raise the issue in her appeal.

[29] The petitioner submitted that the Court should exercise its discretion to consider this issue because no additional evidence is required, there is no prejudice to the respondents, and her argument is consistent with the argument made to the Tribunal which sought a remedy for the Ministry's failure to adhere to the time limit for reconsideration. In addition, she submitted that because she is also seeking a declaration that the *Regulation* is *ultra vires*, the Court should be able to consider the issue of implied remedial powers in the judicial review. Mr. Mossop says that all of this constitutes exceptional circumstances, similar to those found to apply in *Vandale v British Columbia (Workers' Compensation Appeal Tribunal)*, 2012 BCSC 831. He also referred to *Grace v British Columbia (Lieutenant Governor in Council)*, 2000 BCSC 923, where the court considered an *ultra vires* argument.

[30] I have considerable difficulty with the petitioner's submissions on this point. I do not find the circumstances comparable to those in *Vandale* or *Grace*. In *Vandale*, the new argument was raised by the court. It related to whether the tribunal's finding that the petitioner's injury was reversible was inconsistent with a prior appeal decision. The judge considered the issue to be consistent with the constant theme of the petitioner's complaint that his work-related injury entitled him to a pension and the only issue was the size of that pension. In *Grace*, the court did not decide whether the impugned regulations were invalid in the context of a judicial review.

[31] The issue now raised here is fundamentally different from that raised before the Tribunal, as it deals not with the Minister's statutory authority to backdate eligibility but with the Tribunal's own statutory authority to grant a remedy to do the same thing. It is an issue that the Tribunal has not considered before and because of that, there is no basis on which this Court can determine an implicit decision. It is also an issue that relates to the Tribunal's interpretation of regulations under its home statute, which may require deference on review.

[32] In cases where new issues have been considered, the court was able to determine an implicit decision based either on prior decisions (as in *Alberta Teachers*) or the nature of the inquiry itself (as in *Vandale*, where the issue turned on the tribunal's interpretation of prior findings of fact). This is important in my opinion, because without at least an implicit decision, there nothing to review and no decision on which to apply any standard of review.

[33] This in itself creates ambiguity as to the status of the Tribunal's decision and the nature of any decision this Court would make. In this regard, see *Actton Transport Ltd. v British Columbia (Employment Standards)*, 2010 BCCA 272, where the court was critical of the reviewing judge hearing new evidence that was not before the tribunal and in effect conducting a *de novo* analysis of the issue. At paras. 22 and 23, Donald J.A. stated:

> [22] If the reviewing judge effectively turned the petition into a declaratory action and conducted a trial, what is the status of the Tribunal's decision? Is the judge's determination an original decision or an affirmation of what the Tribunal decided? How does this Court approach the appellate function?
>
> [23] While the Tribunal had to be correct in deciding the division of powers question, normally its decision would be reviewed on the record before it. The reviewing court usurps the role of the tribunal when it embarks upon a *de novo* hearing. The procedure adopted here was wrong and should not be repeated.

[34] While this case does not involve new evidence, it does involve an issue that should properly be considered by the Tribunal before this Court reviews it on judicial review.

[35] Clearly, this issue could and should have been raised before the Tribunal. To consider it now in a judicial review would effectively and inappropriately change the nature of this proceeding. Accordingly, I am not satisfied that this is an appropriate case in which to exercise my discretion in favour of the petitioner.

[36] All that said, the petitioner does raise the same issue in relation to her alternative submission that s. 23 of the *EAPWD Regulation* is *ultra vires* the *EAPWD Act*. This submission is based on two grounds: (a) the *Regulation* is not authorized by the enabling legislation, or (b) it is discriminatory or otherwise unreasonable. In relation to the first ground, the petitioner argues that the *EAPWD Act* does not take away the Tribunal's implied power to grant a remedial remedy to backdate eligibility dates and the *Regulation* cannot take away this implied power. In addition, as I explain below, the nature of the Tribunal's power on appeal is relevant to an assessment of its decision in the judicial review.

[37] Therefore, I will address much of this argument in the context of these issues only.

Issues to be determined

[38] The Minister submitted that the issue properly before this Court in the judicial review is whether the Tribunal's decision, that the Ministry's determination that it had no authority to backdate the petitioner's disability assistance payments was a reasonable application of s. 23 of the *EAPWD Regulation*, was itself patently unreasonable.

[39] In my view, subject to determining the correct standard of review, this is an accurate statement of the issue that should be before me in this judicial review.

[40] First, the Tribunal's decision-making authority on the appeal is limited in s. 24(1)(b) of the *EA Act* to determining whether the Minister's decision was a reasonable application of the *Regulation* in the circumstances of the petitioner. Second, this was the main focus of the grounds on which the petition was brought (as set out in the petition):

> a. The Tribunal erred in jurisdiction or made a patently unreasonable decision in deciding that s. 23(4) of the [*EAPWD Regulation*] did not give discretion to the Minister to backdate PWD status.
>
> b. The Tribunal erred in jurisdiction or made a patently unreasonable decision in deciding the Minister on reconsideration, or the Tribunal, could not backdate PWD status.
>
> [Emphasis added]

[41] However, at the hearing, the petitioner abandoned the grounds pertaining to the Minister's authority and made submissions only on the issue of the Tribunal's power to backdate. Given this, and without the benefit of any argument from the petitioner on the proper issue, the Court is in a difficult position. Because her alternative position is predicated upon the Tribunal having correctly or reasonably interpreted s. 23 of the *Regulation,* it is necessary for me to decide that issue in the context of the judicial review. I have done my best to interpret the petitioner's submissions as they apply to the issues as I have framed them.

[42] I have determined the issues to be as follows:

1. What standard of review applies to decisions of the Tribunal regarding the Minister's authority to backdate eligibility for disability assistance?

2. Is the Tribunal's decision that the Ministry's reconsideration decision was a reasonable application of s. 23(1) and (4) of the *EAPWD Regulation* either incorrect or patently unreasonable?

3. If the Tribunal's decision stands, is s. 23 of the *EAPWD Regulation ultra vires* the *EAPWD Act* on the basis that it is (a) not authorized by the enabling legislation, or (b) discriminatory or otherwise unreasonable?

[43] This latter issue was not addressed by the Tribunal as it has no authority to do so, and it will be addressed here as a matter of first instance.

1. What is the applicable standard of review?

[44] The standard of review for decisions of the Tribunal is, by s. 19.1 of the *EA Act*, governed by s. 58 of the *ATA*, which applies where a Tribunal's enabling Act contains a privative clause. The pertinent parts of s. 58 of the *ATA* provide:

> (1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
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> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
>
> > (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
> >
> > (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.

[45] This provision makes it clear that the patently unreasonable standard applies to questions of law. It is only where the question of law is a matter of "true jurisdiction" that the correctness standard would apply.

[46] In my opinion, the issue before the Tribunal was not a true question of jurisdiction requiring a correctness standard of review. "True" questions of jurisdiction are the exception and not the norm, particularly where a tribunal is interpreting its home statute. On this issue, the jurisprudence on common law standards of review is relevant.

[47] In *Dunsmuir v New Brunswick*, 2008 SCC 9, the court took "a robust view of jurisdiction", stating that it did not intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence for many years. It defined jurisdiction "in the narrow sense of whether or not the tribunal had the authority to make the inquiry" (at para. 59). Decisions after *Dunsmuir* have emphasized that a reasonableness standard

applies where a tribunal is interpreting its own statute and does not involve issues of general legal importance: *Smith v Alliance Pipeline Ltd.*, 2011 SCC 7; *Canada (Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53; *Alberta Teachers*.

[48] In *Alberta Teachers*, Rothstein J., for the majority, took this issue further. He held that the category of true questions of jurisdiction should be interpreted narrowly, particularly when a tribunal is interpreting its home statute. It was his view that unless the situation is exceptional, "the interpretation by the tribunal of 'its own statute or statutes closely connected to its function, with which it will have particular familiarity' should be presumed to be a question of statutory interpretation subject to deference on judicial review" (at para. 34). He proposed "a natural extension of the approach to simplification set out in *Dunsmuir*" (at para. 39):

> When considering a decision of an administrative tribunal interpreting or applying its home statute, it should be presumed that the appropriate standard of review is reasonableness. As long as the true question of jurisdiction category remains, the party seeking to invoke it must be required to demonstrate why the court should not review a tribunal's interpretation of its home statute on the deferential standard of reasonableness.

[49] He did not rule out the existence of a true question of jurisdiction and stated (at para. 43) that a correctness review of decisions of tribunals interpreting their home statute would still be undertaken "where the issue is a constitutional question, a question of law that is of central importance to the legal system as a whole and that is outside the adjudicator's expertise, or a question regarding the jurisdictional lines between competing specialized tribunals."

[50] This decision was considered in *MacNeil v British Columbia (Superintendent of Motor Vehicles)*, 2012 BCCA 360, where the Court concluded that the question of whether the Superintendent of Motor Vehicles had the authority to extend time to apply for a review was a matter to be reviewed on a standard of reasonableness (at para. 32):

> The adjudicator, as delegate of the Superintendent, was reviewing the home statute. The Superintendent is responsible for the administration of a complex and specialized administrative scheme designed to protect the public interest. The determination of whether there can be an extension was made with knowledge of the manner in which the broader specialized scheme operates. The issue involves a discrete question involving a single procedural step within that specific scheme and is not one of central importance to the legal system as a whole.

[51] In this case, the issue before the Tribunal was whether the legislation authorized the Minister to change the eligibility date for disability assistance to a date before the PWD designation was made in circumstances where the Ministry did not comply with the established time limits. In my view, this issue clearly involved the Tribunal's interpretation of regulations enacted under its home statute, it applied its expertise, and did not involve a question of law of central importance to the legal system. Accordingly, the standard of review, as governed by s. 58(2)(a) of the *ATA*, is patent unreasonableness.

[52] Patent unreasonableness is the most deferential standard of review. It was defined by common law before *Dunsmuir*, and *Dunsmuir* did not change its meaning: *Manz v Sundher*, 2009 BCCA 92 at para. 36. An inquiry under the patent unreasonableness standard will consider a number of factors, such as whether the decision has rational support or falls within a range of outcomes defensible in respect of the facts and the

law, but will demand less of the tribunal's reasons than under the reasonableness standard: *Viking Logistics Ltd. v British Columbia (Workers' Compensation Board)*, 2010 BCSC 1340 at paras. 60-61. I agree with the respondent Tribunal's submission that a reviewing court should not closely parse the decision-maker's "chain of analysis" or put undue emphasis on the precise articulation of the decision if the underlying logic is sound. If there is a rational basis for a decision it should not be disturbed because of defects in reasoning: *Petro-Canada v British Columbia (Workers' Compensation Board)*, 2009 BCCA 396 at paras. 51-56; *Kovach v. British Columbia (Workers' Compensation Board)*, 2000 SCC 3, affirming the dissenting reasons of Donald J.A. (1998), 52 BCLR (3d) 98 (CA) at para. 26.

[53] In *Viking Logistics Ltd.* the court described the patently unreasonable standard at para. 63:

> ... "patently unreasonable", in s. 58(2)(a) of the *ATA*, is not to be simply replaced by "reasonable", because such a substitution would disregard the legislator's clear intent that the decision under review receive great deference. Standing at the upper end of the "reasonableness" spectrum, the "patently unreasonable" standard in s. 58(2)(a) nonetheless requires that the decision under review be defensible in respect of the facts and the law. It is in the inquiry into whether the decision is so "defensible" that the decision will enjoy the high degree of deference the legislator intended.

[54] The standard has also been described as whether the decision is "clearly irrational", "not in accordance with reason", or "openly, evidently and clearly unreasonable": *Arbic v British Columbia (Ministry of Housing and Social Development)*, 2011 BCSC 410 at para. 23 and the cases cited therein; *Manz* at para. 39; *Sahyoun v British Columba (Employment and Assistance Appeal Tribunal)*, 2012 BCSC 1306 at para. 35.

2. Was the Tribunal's decision patently unreasonable?

[55] The Tribunal found that s. 23(1) of the *EAPWD Regulation* provided a defined time of "eligibility" for disability assistance and it was not open to the Ministry to "deem" eligibility at any other time. It also found that s. 24(4) did not apply in the petitioner's circumstances because she had received disability assistance from the date the family unit became "eligible" for it. On that basis, it concluded that the Ministry's determination that it had no authority to backdate the petitioner's disability assistance payments was a reasonable application of s. 23(1) in the circumstances of the petitioner and it confirmed the decision under s. 24(2)(a) of the *EA Act*.

[56] The Tribunal did not address the consequences, if any, of the Ministry's non-compliance with the time limits in s. 72 of the *EAPWD Regulation.* However, it outlined the Ministry's position that the time limits are directory, not prescriptive, and because there are no consequences for non-compliance there is no authority for it to change the effective date of PWD status. Implicit in its decision is an acceptance that non-compliance with the time limits did not change its view that the Minister did not have statutory authority to backdate eligibility to receive disability assistance.

The powers of the Tribunal

[57] It is important to assess whether or not the Tribunal's decision was patently unreasonable in the context of the powers of the Tribunal on an appeal. These are defined in s. 24 of the *EA Act.* Section 24(1)

provides that the panel must determine whether the decision being appealed is either

> (a) reasonably supported by the evidence, or
>
> (b) a reasonable application of the applicable enactment in the circumstances of the person appealing the decision.

[58] Section 24(2) provides that the panel must either confirm the decision if it finds either of the circumstances in subsection (1), or rescind the decision. If it rescinds the decision, it must refer it back to the Minister if the decision cannot be implemented without a further decision as to amount.

[59] The plain words of these provisions indicate that the Tribunal is not empowered to determine if the Minister's decision is right or wrong, but only whether it is reasonably supported by the evidence or is a reasonable application of the legislation in issue; nor is the Tribunal empowered to make a new decision but is limited to either confirming or rescinding the decision of the Minister. However, it is necessary to assess the legislative framework established in the *EA Act*, the *EAPWD Act* and their *Regulations* in order to properly determine what the Tribunal is empowered to do on an appeal.

[60] It is a well known principle that an administrative tribunal cannot exceed the powers granted to it by its enabling statute, either expressly or impliedly: *ATCO Gas and Pipelines Ltd. v Alberta (Energy and Utilities Board)*, 2006 SCC 4 at paras. 35-36; *Canada (Human Rights Commission)* at para. 33; *R v 974649 Ontario Inc.*, 2001 SCC 81 at para. 26. In *ATCO*, Bastarache J. for the majority described the nature of the powers of administrative tribunals at para. 38:

> ... in the area of administrative law, tribunals and boards obtain their jurisdiction over matters from two sources: (1) express grants of jurisdiction under various statutes (explicit powers); and (2) the common law, by application of the doctrine of jurisdiction by necessary implication (implicit powers) ...

[61] The petitioner submitted that both the *EA Act* and the *EAPWD Act* are benefits-conferring social welfare legislation and as such require a fair, large and liberal interpretation, and any ambiguity in the language should be resolved in favour of a claimant. Mr. Mossop argued that the *EA Act* is ambiguous in that it does not expressly preclude the Tribunal from exercising remedial powers. He pointed out that s. 24(2) directs the Tribunal, where it has rescinded a decision, to refer a decision back to the Minister in certain circumstances, and s. 24(6) allows the Tribunal to make any order permitted to be made. He submitted that this language suggests a broad power to make remedial orders.

[62] I agree that the legislative scheme is benefits-conferring legislation that should be considered remedial and should be given a fair, large and liberal interpretation. This principle is reflected in s. 8 of the *Interpretation Act*, RSBC 1996, c 238, and in authorities such as *Abrahams v Attorney General of Canada*, [1983] 1 SCR 2 (which involved unemployment insurance legislation), and *Hudson v British Columbia (Employment and Assistance Appeal Tribunal)*, 2009 BCSC 1461 (which involved this legislation). However, it is also important to conduct an analysis of the words and context of the legislation in order to give effect to its purpose; a fair, large and liberal interpretation cannot supplant such an analysis if to do so gives effect to a policy or purpose different from that made by the legislature: see *Canada (Human Rights Commission)* at para. 62. This approach allows judges to interpret words as required by the context but it does not generally

allow words to be read in or added to the statute: *R. v McIntosh*, [1995] 1 SCR 686 at para. 26.

[63] I do not agree, however, that a power exists in a statute simply because it is not expressly excluded: see, for example, *MacNeil* at para. 41. Nor do I agree that the powers granted to the Tribunal in the *EA Act* are ambiguous. As I read s. 24, it expressly limits the Tribunal's function on appeal to assessing the reasonableness of the Minister's reconsideration decisions and it limits its remedial authority to confirming or rescinding those decisions.[2] Section 24(6) does not confer any decision-making power; it simply describes the matters over which the Tribunal has exclusive jurisdiction and refers to orders that are permitted to be made. The orders that are permitted to be made are described in s. 24(2). On this point, I accept the submissions of the respondents.

[64] The petitioner also submitted that the Tribunal has, in addition to powers expressly conferred on it, powers that are implied as being necessary to accomplish its intended function. She relies on the principles enunciated in *R v 974649 Ontario Inc.,* particularly those outlined at paras. 70-71:

> [70] It is well established that a statutory body enjoys not only the powers expressly conferred upon it, but also by implication all powers that are reasonably necessary to accomplish its mandate. In other words, the powers of a statutory court or tribunal extend beyond the express language of its enabling legislation to the powers necessary to perform its intended functions.
>
> [71] Consequently, the function of a statutory body is of principal importance in assessing whether it is vested with an implied power to grant the remedy sought. Such implied powers are found only where they are required as a matter of practical necessity for the court or tribunal to accomplish its purpose. While these powers need not be absolutely necessary for the court or tribunal to realize the objects of its statute, they must be necessary to effectively and efficiently carry out its purpose.
>
> [citations omitted]

[65] In the petitioner's submission, the Tribunal's powers must include, in addition to those expressly provided in the *EA Act*, additional remedial powers to grant remedies to correct mistakes made by the Minister:

> The Tribunal constitutes a formal review process at which a reconsideration decision might be challenged. The Tribunal serves to resolve disputes between recipients of disability benefits ... and the Ministry in an efficient and cost-effective manner. We submit that the Tribunal must have power to remedy Ministry errors with appropriate orders if it is to be effective and efficient. Within the broader legal system, the Tribunal serves as the primary forum of appeal with regard to the [*EAPWD Act*] and the *Regulations*. It is essential that the Tribunal has the power to order remedies. Otherwise, disabled appellants would be required to appear before this court to remedy Ministry errors by way of the *Judicial Review Procedure Act*. The court has more complex procedures, and petitioners may face greater risk and expense, exacerbated by the barriers faced by many people with disabilities. Therefore the functional analysis militates for an implied power to remedy.

[66] In conjunction with this submission, the petitioner argued that an administrative appeal process is a substantive statutory right and the Tribunal must have the power to give effect to this right by having the power to make remedial orders.

[67] I cannot accept the petitioner's submission that the Tribunal has additional implied powers to make remedial orders to correct Ministry errors. While it is true that the appeal process in the legislative scheme

here is a statutory right, the nature of the appeal is that prescribed in the legislation. Section 16(3) of the *EAPWD Act* establishes the right of appeal to the Tribunal for applicants who are dissatisfied with the outcome of a reconsideration decision and s. 16(4) provides that this right is subject to the requirements in the *EA Act* and *Regulation*. The *EA Act* prescribes the nature of an appeal to the Tribunal and the powers granted to it to carry out its function. It does not grant a broadly based appeal process but rather a process limited to an assessment of the reasonableness of the Minister's decisions. More specifically, it does not grant the Tribunal the power to make its own decision on the issues before it or to otherwise correct errors.

[68] The nature of the implied powers sought by the petitioner is quite different from the kinds of powers administrative tribunals need to control their process, as was the case, for example, in *Pugliese v Clark*, 2008 BCCA 130. There it was determined that the Registrar of Mortgage Brokers had an implied power to stipulate a period of time before an unsuccessful applicant could re-apply for registration, as this was essential "to enable the Registrar to carry out his duties in an effective and efficient manner in accordance with his licensing role" (para. 36). Here, the petitioner seeks an implied power to grant a substantive remedy that is beyond the nature of the Tribunal's role on appeals.

[69] When this legislation was introduced in the Legislature in 2002, the Minister responsible described the appeal system as more streamlined with faster decisions than that which existed under the previous legislation (Hansard, 2002 Legislative Session: 3rd Session, 37th Parliament, Monday April 16, 2002, Vol. 6, No. 8). Under this scheme, both the *EA Act* and the *EAPWD Act* are administered by the Minister, who makes decisions relating to eligibility for benefits, with the first review to be a reconsideration decision by the Minister, and the second an appeal to the Tribunal that is limited in the manner I have described. It is apparent to me that the object of the appeal process in this legislation is to provide fairly quick reviews of the Minister's decisions, while at the same time preserving the Minister's authority to administer the legislation and make decisions. I do not see that further implied powers are necessary for the Tribunal to effectively and efficiently carry out its purpose.

[70] It is in this context that the Tribunal's decision is to be assessed under the standard of patent unreasonableness.

Assessment of the Tribunal's decision

[71] The petitioner submitted that the Tribunal failed to consider the proper question, which is whether the Ministry, when it does not comply with the 10 day time limit, has the authority to designate a person with PWD status on the day it should have done so. She says that the Tribunal failed to recognize the ambiguity in her circumstances and ought to have interpreted the date of PWD designation in s. 23 of the *EAPWD Regulation* in light of the Ministry's non-compliance with s. 72. Mr. Mossop argued that the Tribunal's decision was patently unreasonable because it gives rise to absurd results in the petitioner's circumstances, as backdating of eligibility is contemplated in s. 23(3.2) and (4) in the circumstances outlined in those subsections.

[72] I do share the concerns of the petitioner about the Minister's non-compliance with the time limits in s.

72 of the *EAPWD Regulation*. The failure to comply clearly has consequences for persons waiting for the Minister's decision whether or not to designate a person as a PWD, as this case shows. The Tribunal did not address this issue in its reasons but it outlined the Ministry's position, which was based on the assumption that s. 72 was directory only.

[73] The words used in s. 72 are not directory. Section 72 provides that the Minister must reconsider a decision and mail a written determination to the applicant within 10 days after receiving the request. Section 29 of the *Interpretation Act*, which defines expressions in enactments, provides that "must" is to be considered as imperative. Nevertheless, it is also the case that there are no consequences in the legislation for the Minister's failure to comply.

[74] As I stated above, implicit in the Tribunal's decision is an acceptance that non-compliance with s. 72 did not change its view that s. 23 did not authorize the Minister to backdate eligibility in circumstances where the time limit was not met.

[75] Despite my concerns about the Minister's non-compliance with s. 72, given the legislative scheme and the Tribunal's mandate to assess the reasonableness of the Minister's decisions, I cannot say that its decision was patently unreasonable.

[76] Nothing in the wording of either s. 23 or s. 72 of the *EAPWD Regulation* suggests an intention to grant to the Minister any discretion to change the date on which a person becomes eligible to receive disability assistance in the event the PWD designation is not made within the time limit. Section 23(1) establishes that a person is not eligible for disability assistance "until the first day of the month after the month" in which the Minister designates the applicant as a PWD. The only authority to backdate in relation to disability assistance is found in ss. 23 (3.2) and (4). Section 23(4) permits the Minister to backdate payments, but only to the date the person became eligible or 12 months before, whichever is the shorter payment period. Section 23(3.2) establishes eligibility on the date of the reconsideration decision where the Minister determined that the applicant did not qualify as a PWD and the Tribunal rescinds that decision. In my view, neither of these provisions suggests that there is authority to backdate a PWD designation or eligibility for benefits further than the date the reconsideration decision was actually made. Rather they suggest that all eligibility dates are predicated upon the Minister's determination of PWD status.

[77] It is clear that the intention of this legislative scheme is to provide a quick and efficient review and appeal system. The time limits established in s. 72 of the *Regulation* are part of that process. However, the legislation is silent on the consequences of non-compliance and no discretion is given to the Minister to deem eligibility for PWD status on a date other than the actual date the designation was made. I can certainly appreciate the frustration of applicants caught in the middle of what they reasonably perceive to be a bureaucratic gap. While it may be fair to draw a connection between the eligibility date in s. 23(1) and the time limit in s. 72, this is really a gap that should be remedied by the Lieutenant Governor in Council or the Legislature. I cannot find that the Ministry's interpretation of its authority was unreasonable, as the Tribunal determined.

[78] Accordingly, I have concluded that the Tribunal's decision to confirm the Ministry's determination that it had no authority to backdate the petitioner's eligibility for disability assistance was not patently unreasonable.

3. Is s. 23 of the *EAPWD Regulation ultra vires*?

[79] The petitioner also challenges the validity of the provisions in s. 23 of the *EAPWD Regulation* on the basis that (a) they are not authorized by the grant of authority in the *EAPWD Act*, or (b) they are discriminatory or otherwise unreasonable.

[80] It is well established that regulations must be authorized by statute and must also be consistent with the purpose of the enabling Act. This principle is reflected in s. 41(1)(a) of the *Interpretation Act*:

> (1) If an enactment provides that the Lieutenant Governor in Council or any other person may make regulations, the enactment must be construed as empowering the Lieutenant Governor in Council or that other person, for the purpose of carrying out the enactment according to its intent, to
>
> > (a) make regulations as are considered necessary and advisable, are ancillary to it, and are not inconsistent with it

[81] Additionally, regulations must not unreasonably discriminate on the basis of distinctions that are irrelevant or inconsistent with the purpose of the enabling statute. These principles stem from municipal law. In *Montréal (City) v Arcade Amusements Inc.*, [1985] 1 SCR 368 at 405-406, the court held that by-laws will be *ultra vires* where

> (1) they are partial and unequal in operation between different classes; (2) they are manifestly unjust; (3) they disclose bad faith; and (4) they involve such oppressive or gratuitous interference with the rights of those subject to them as can find no justification in the minds of reasonable men.

[82] It also confirmed the long standing principle that the power to make by-laws does not include that of enacting discriminatory provisions unless the enabling legislation provides the contrary.

[83] The same principles apply to regulations, although it has been held that the standard of review is less stringent in respect of regulations made by the Lieutenant Governor in Council due to the Crown's residual common law powers: see *Brown v British Columbia (Attorney General)* (1997), 41 BCLR (3d) 265 (SC).

[84] In *Federated Anti-Poverty Groups of British Columbia v British Columbia (Ministry of Social Services)* (1996), 41 Admin. L.R. (2d) 158 (BCSC), the court found invalid a regulation which imposed a residency requirement for eligibility to receive social assistance on the basis that such a requirement was contrary to the purposes of the enabling legislation (then the *GAIN Act*, RSBC 1979, c 158). Spencer J. found those purposes to be the relief of poverty, neglect and suffering within the financial parameters set by the Legislature. In *Grace*, the court struck down a regulation that disqualified otherwise eligible recipients from receiving income assistance where they were subject to unexecuted arrest warrants. Baker J. found that the enabling Acts did not authorize a regulation that disqualified a person on that basis. At para. 71 she explained:

> [71] Although s.24(4)(c) appears to give the Lieutenant Governor in Council broad discretion to make different regulations for different groups, the power is not unlimited. Distinctions cannot be

> drawn that discriminate unreasonably. A distinction will be unreasonable where it draws lines between groups or classes, or members of a class, arbitrarily, or for purposes unrelated to the objects and purposes of the *Act*.

[85] She agreed that the purposes of the enabling Acts were the same as the predecessor *GAIN Act*, as described in *Federated Anti-Poverty Groups*.

[86] The legislation considered in *Grace* was the predecessor legislation to the current regime under the *EA Act* and the *EAPWD Act*. I see no basis to depart from the conclusions expressed in both *Grace* and *Federated Anti-Poverty Groups* that the purpose of this legislative regime is the relief of poverty, neglect and suffering within the financial parameters set by the Legislature. The Ministry pointed out that the current legislation has a shift in focus towards a culture of responsibility, self-reliance and employment, which is similar to the emphasis on self-sufficiency in the prior legislation as described in *Grace*. I would characterize the purpose more specifically to the *EA Act* and the *EAPWD Act* as the provision of income and disability assistance and other benefits to persons in need, and good stewardship of the expenditure of public funds required for these programs.

(a) Is the *Regulation* authorized by its enabling *Act*?

[87] As I understand the petitioner's submission, it is predicated upon two premises: (1) that the Tribunal has an implied power to grant remedial orders that includes orders to backdate eligibility for disability assistance where necessary to correct the Ministry's "mistake" or "error", and (2) s. 23 of the *EAPWD Regulation* binds the Tribunal's power to grant such a remedy and as such falls outside the explicit grant of regulatory authority provided in s. 26 of the *EAPWD Act*. In essence, she says that the *Act* does not authorize regulations that infringe on the Tribunal's core purpose of correcting the Ministry's breaches of the *Act* or the *Regulation*.

[88] I have already determined that the Tribunal's authority on an appeal is limited to assessing the reasonableness of the Minister's decisions and it does not have an implied power to make remedial orders generally. It follows that it does not have the power to grant the specific kind of order to backdate suggested by the petitioner. I cannot accept her submission that the Tribunal must have the power to make orders to retroactively correct the Ministry's mistakes or errors given the legislative scheme and the Tribunal's role as I have described.

[89] In my view, there is no basis to conclude that s. 23 of the *EAPWD Regulation* is not authorized by its enabling statute. Section 26 of the *EAPWD Act* provides a long list of matters over which the Lieutenant Governor in Council may make regulations, including eligibility for disability assistance in s. 26(2)(f). Section 26(2)(i) specifically authorizes regulations to be made which regulate the time and manner of providing disability assistance. Section 23 of the *Regulation* establishes when a person is eligible for disability assistance, a matter clearly authorized by s. 26(2)(i) of the *Act*.

(b) Is the *Regulation* discriminatory or otherwise unreasonable?

[90] In the petitioner's submission, s. 23 of the *EAPWD Regulation* is discriminatory because, by tying the

date of eligibility to the date the Minister designates a person as a PWD, it creates impermissible distinctions between applicants who obtain PWD designations within the time limits established in s. 72 and those who obtain designations outside the time limits. More specifically, she says that s. 23(3.2) discriminates between applicants who have suffered substantive errors (those denied PWD status by the Minister) and applicants who have suffered procedural errors (those granted PWD status by the Minister after a delay); and s. 23(4) discriminates between applicants who suffered errors before the date of the reconsideration decision (where there is no power to backdate eligibility) and applicants who suffered errors after that date (where there is power to backdate payments).

[91] The respondent Ministry submitted that s. 23 does not create distinctions between classes of disability recipients:

> Each of the subsections of section 23 of the Regulation refers to a date of eligibility after the Minister's last decision on the matter. The Minister is the person who must be "satisfied" the conditions of s. 2 of the Act are met. The Minister may make that final determination either on the initial application or after reconsideration... It is only when the Minister is satisfied that statutory conditions for disability assistance are met that the effective date for eligibility may be set. The various subsections of s. 23 ... reflect that requirement under the Act; there are no distinctions as between classes of people as to the date of eligibility.
>
> [Emphasis in original]

[92] I agree with the Ministry. The *Regulation* does not create distinctions between classes of recipients. Eligibility for all recipients is based on when the Minister designates the applicant as a PWD; the earliest date occurs when the designation is made on the initial application and the latest date occurs when it is made on the reconsideration. Timing of eligibility necessarily depends on when eligibility is established.

[93] The petitioner's position assumes, improperly in my view, that applicants who are not found to be qualified for PWD status initially have "suffered substantive errors". As she acknowledges in her submissions, applicants for disability assistance face multiple barriers to completing their applications correctly and providing sufficient information. Reconsideration provides an opportunity to correct errors or omissions made by either the applicants or the Ministry. I also do not see that there is a proper distinction between those who do not receive payment after becoming eligible and those who become eligible after a delay that is outside the time limits. Everything is based on an eligibility date that is consistently tied to the time of PWD designation.

[94] None of the provisions in s. 23 are inconsistent with the purpose of both the *EA Act* and the *EAPWD Act* to provide income and disability assistance to persons in need and good stewardship of the expenditure of public funds required for these programs. Nor are the provisions inconsistent with the *Acts* themselves.

[95] I do not need to address the petitioner's final submission that s. 23 is also unreasonable because it is based on the premise that the Tribunal has implied powers to make remedial orders to correct Ministry errors, a matter I have already addressed.

[96] For these reasons, I have concluded that s. 23 of the *EAPWD Regulation* is consistent with the

purpose of and is authorized by its enabling Act, is not discriminatory or otherwise unreasonable, and is therefore valid.

Conclusion

[97] The petition is dismissed. Costs as between the petitioner and the respondent Ministry may be spoken to.

"Fisher, J."

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[1] There are references in the records to the reconsideration date being either January 20, 21 or 22, 2011.

[2] I do agree with the petitioner, however, that the power to rescind may be somewhat broader than simply setting aside the Minister's decision. It appears to me that a rescission in the context of s. 24(2) is in effect a reversal. Otherwise there would be no purpose in referring the matter back for a further decision as to amount. Moreover, s. 23(3.2) of the *EAPWD Regulation*, which establishes eligibility on the date of the reconsideration decision where the Tribunal rescinds the Minister's determination that the applicant did not qualify as a PWD, implies that the effect of a rescission is that the person did qualify. However, this power of rescission does not change my view of the nature of the Tribunal's authority in an appeal.