COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Sahyoun v. British Columbia (Employment and Assistance Appeal Tribunal),* 2016 BCCA 312

Date: 20160715
Docket: CA42733

Between:

Dr. Nabil Riad Sahyoun

Appellant
(Petitioner)

And

Employment and Assistance Appeal Tribunal of British Columbia, Minister of Social Development and Social Innovation of British Columbia, and the Attorney General of British Columbia

Respondents
(Respondents)

Before: The Honourable Mr. Justice Frankel
The Honourable Mr. Justice Harris
The Honourable Mr. Justice Goepel

On appeal from: An order of the Supreme Court of British Columbia, dated March 25, 2015 (*Sahyoun v. British Columbia (Employment and Assistance Appeal Tribunal*), 2015 BCSC 456, Vancouver Registry Docket S146526).

The Appellant appearing in person:	Dr. Nabil Riad Sahyoun
Counsel for the Respondent, Employment and Assistance Appeal Tribunal of British Columbia:	N. Iyer
Counsel for the Respondents, Minister of Social Development and Social Innovation of British Columbia, and the Attorney General of British Columbia:	K. Evans
Place and Date of Hearing:	Vancouver, British Columbia April 21, 2016
Place and Date of Judgment:	Vancouver, British Columbia July 15, 2016

Written Reasons by:
The Honourable Mr. Justice Goepel

Concurred in by:
The Honourable Mr. Justice Frankel
The Honourable Mr. Justice Harris

Summary:

After being denied certain benefits under the Employment and Assistance Act, the appellant unsuccessfully appealed to the Employment and Assistance Appeal Tribunal and had his judicial review of that appeal dismissed. The respondent Ministry refused to re-open its decision, and the Tribunal found that the Act does not provide the appellant with a right to appeal that refusal. The Chambers judge upheld the decision of the Tribunal. Held: appeal dismissed. The right to reconsideration under the Act applies only to certain classes of decisions – not to a refusal to reopen. The Tribunal's failure to provide the appellant with notice and an opportunity to make submissions regarding jurisdiction did not, in all the circumstances, lead to an unfair result.

Reasons for Judgment of the Honourable Mr. Justice Goepel:

INTRODUCTION

[1] This appeal is the latest chapter in the appellant's long-running attempt to obtain certain benefits under the *Employment and Assistance Act,* S.B.C. 2002, c. 40 (the "*EA Act*") and the *Employment and Assistance Regulation*, B.C. Reg. 263/2002 ("*EA Regulation*").

[2] The appellant first applied for benefits in September 2010 and January 2011. When the application was denied by the Ministry of Social Development and Social Innovation (the "Ministry"), the appellant appealed unsuccessfully to the Employment and Assistance Appeal Tribunal (the "Tribunal"). He then brought judicial review proceedings challenging the Tribunal's decision. Those proceedings were dismissed in the Supreme Court (*Sahyoun v. British Columbia (Employment and Assistance Appeal Tribunal),* 2012 BCSC 1306) (*Sahyoun #1*)) and in this Court (*Sahyoun v. British Columbia (Employment and Assistance Appeal Tribunal)*, 2014 BCCA 86) (*Sahyoun Appeal*).

[3] Following the release of the reasons in *Sahyoun Appeal*, the appellant sought to re-open the Ministry decisions. When the Ministry refused to do so, the appellant appealed to the Tribunal. The Chair of the Tribunal refused to entertain the appeal holding that the proposed appeal did not fall within the classes of

decision subject to appeal under the *EA Act*. Madam Justice Holmes dismissed an application for judicial review. Her reasons are indexed at 2015 BCSC 456.

[4] The appellant now appeals the dismissal of his judicial review application. The main issue on the appeal is the scope of the appellant's rights of appeal to the Tribunal. The appeal also raises an issue of procedural fairness.

[5] For the reasons that follow I would dismiss the appeal.

BACKGROUND

[6] The background to this dispute has been well set out in the reasons of the chambers judge, of Stromberg-Stein J. (as she then was) in *Sahyoun #1* and of Low J.A. in *Sahyoun Appeal*. I will not repeat them other than is necessary to provide context for this appeal.

[7] The appellant and his wife were in receipt of social assistance under various provincial statutory regimes from 1986 until November 10, 2010, by which time he had turned 65 years of age. At that time, they began to receive federal income assistance.

[8] Commencing in September 2010, the appellant sought to have the Ministry designate him with the status of "a person who has persistent multiple barriers to employment" ("PPMB") under s. 2 of the *EA Regulation*, and to provide him with "medical services only" ("MSO") benefits under ss. 66.1 and 67 of the *EA Regulation*. After the Ministry denied these applications, the appellant sought reconsideration of them, and subsequently exercised his rights of appeal to the Tribunal.

[9] The Tribunal dismissed the appellant's appeal of the Ministry's denial of his application for PPMB status on May 10, 2011, and dismissed his appeal of the Ministry's denial of his application for MSO benefits on January 12, 2012 (collectively, the "Initial Decisions"). The appellant sought judicial review of the Initial Decisions and the petitions were heard together.

[10] In support of his petitions for judicial review, the appellant sought to introduce evidence (the "New Evidence") that had not been before the Tribunal when it made the Initial Decisions. The appellant deposed that he had discovered the New Evidence in his home in March 2012 and May 2012, after the Tribunal had made the Initial Decisions.

[11] In *Sahyoun #1* Madam Justice Stromberg-Stein declined to consider the New Evidence and dismissed the appellant's petitions.

[12] On March 6, 2014, this Court in the *Sahyoun Appeal* dismissed the appellant's appeal. In dismissing the appeal Low J.A. said:

> [35] There is no merit in either appeal. The appellant attempted to persuade the ministry to backdate a designation never previously given to him, even by inference. He failed in the past and currently to provide necessary medical information. He read into past rulings designations that simply were not made. He did not meet statutory and regulatory criteria. He made his applications very late in the day when he could no longer qualify even if he had provided the necessary supporting medical information. The ministry's determinations of the issues raised by the appellant were reasonable and it is not arguable that either tribunal decision was patently unreasonable. The chambers judge did not err.

[13] The day after this Court dismissed his appeal, the appellant wrote to the Ministry and requested re-opening of the Initial Decisions. In his letter requesting that the Initial Decisions be re-opened, the appellant referenced the New Evidence he had discovered in his home in March 2012 and May 2012. In the letter the appellant says that this material was not before the Tribunal when it made the Initial Decisions but that he did put the material before the Supreme Court and the Court of Appeal court on the judicial reviews of the Initial Decisions.

[14] By letter dated March 26, 2014, in response to the appellant's request to re-open, a representative of the Ministry advised that the Ministry would not re-open the Initial Decisions.

[15] On May 29, 2014, the appellant requested reconsideration of this denial. The request for reconsideration was denied on June 11, 2014 on the basis that, under s. 17 of the *EA Act*, the Ministry can only reconsider decisions that result in a

refusal, discontinuance or reduction of income assistance. As the refusal to re-open the Initial Decisions did not result in a refusal, discontinuance, or reduction of income assistance, it was not open to the Ministry to reconsider that refusal.

[16] On June 19, 2014, the appellant appealed to the Tribunal.

[17] On June 25, 2014, the Chair of the Tribunal wrote to the appellant and advised that the Tribunal did not have jurisdiction to proceed with the appeal. In her letter she said:

> The Ministry decision to refuse to reopen and complete a new reconsideration did not result in a refusal, discontinuance or a reduction of assistance or a supplement as set out in 17(1)(a) to (d). As a result, the Tribunal does not have the jurisdiction to proceed with the appeal and your file is now closed.

[18] Before making her decision, the Chair, contrary to Tribunal's *Practices and Procedures*, did not notify the parties in writing that the matter appeared to be outside the jurisdiction of the Tribunal. She did not invite the parties to make submissions on whether the matter was within the Tribunal's jurisdiction.

STATUTORY FRAMEWORK

[19] The statutory provisions relevant to his appeal are found in ss. 17, 18, 19, 19.1 and s. 20(2) of the *EA Act*, s. 58 of the *Administrative Tribunals Act*, S.B.C. 2004 c. 45 and s. 3.2 (d) of the Tribunal's *Practices and Procedures*.

[20] The Tribunal is established under s. 19 of the *EA Act* to hear appeals from reconsideration decisions of the Ministry. Sections 17 and 18 of the *EA Act* set out the circumstances in which an appeal can be brought. Those sections read:

> **Reconsideration and appeal rights**
>
> **17** (1) Subject to section 18, a person may request the minister to reconsider any of the following decisions made under this Act:
>
> (a) a decision that results in a refusal to provide income assistance, hardship assistance or a supplement to or for someone in the person's family unit;
>
> (b) a decision that results in a discontinuance of income assistance or a supplement provided to or for someone in the person's family unit;

(c) a decision that results in a reduction of income assistance or a supplement provided to or for someone in the person's family unit;

(d) a decision in respect of the amount of a supplement provided to or for someone in the person's family unit if that amount is less than the lesser of

(i) the maximum amount of the supplement under the regulations, and

(ii) the cost of the least expensive and appropriate manner of providing the supplement;

(e) a decision respecting the conditions of an employment plan under section 9 [*employment plan*].

(2) A request under subsection (1) must be made, and the decision reconsidered, within the time limits and in accordance with any rules specified by regulation.

(3) Subject to a regulation under subsection (5) and to sections 9 (7) [*employment plan*], 18 and 27 (2) [*overpayments*], a person who is dissatisfied with the outcome of a request for a reconsideration under subsection (1) (a) to (d) may appeal the decision that is the outcome of the request to the tribunal.

(4) A right of appeal given under subsection (3) is subject to the time limits and other requirements set out in this Act and the regulations.

(5) The Lieutenant Governor in Council may designate by regulation

(a) categories of supplements that are not appealable to the tribunal, and

(b) circumstances in which a decision to refuse to provide income assistance, hardship assistance or a supplement is not appealable to the tribunal.

No appeal from decision based on same circumstances

18 If a person reapplies for income assistance, hardship assistance or a supplement after

(a) the eligibility of the person's family unit for the income assistance, hardship assistance or supplement has been determined under this Act,

(b) a right of appeal under section 17 (3) has been exercised in respect of the determination referred to in paragraph (a), and

(c) the decision of the tribunal in respect of the appeal referred to in paragraph (b) has been implemented,

no right of reconsideration or appeal exists in respect of the second or a subsequent application unless there has been a change in circumstances relevant to the determination referred to in paragraph (a).

[21] The *EA Act* contains a strong privative clause at ss. 24(6) and (7). Pursuant to s. 19.1 of the *EA Act,* s. 58 of the *Administrative Tribunals Act*, S.B.C. 2004 c. 45 applies to the Tribunal. That section reads:

> **Standard of review with privative clause**
>
> **58** (1) If the Act under which the application arises contains or incorporates 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 Tribunal's *Practices and Procedures* are established by the Chair under s. 20(2) of the *EA Act*. The *Practices and Procedures* are to be followed during the appeal process subject to any circumstances that justify a departure from their requirements. Section 3.2 provides a mechanism to screen an appeal to determine whether it complies with the specified form, has been submitted within the specified time limit and whether the tribunal has jurisdiction over the appeal. Section 3.2 (d) concerns appeals that relate to matters outside the Tribunal's jurisdiction. In relation to such appeals, the *Practices and Procedures* state:

(i) if the appeal relates to a matter that appears to be outside the jurisdiction of the Tribunal, the Tribunal will notify the parties in writing.

(ii) the Tribunal may invite the parties to make submissions on the Tribunal's jurisdiction. The Tribunal Chair will then determine, based on any submissions received, if the Tribunal has jurisdiction over the appeal and will notify the parties in writing of the decision.

THE JUDICIAL REVIEW DECISION

[23] In her reasons the chambers judge first determined that the Chair's decision was based on her interpretation of provisions of the Tribunal's enabling statute. Therefore, the applicable standard of review under ss. 58(1) and (2) of the *Administrative Tribunals Act* was patent unreasonableness.

[24] The chambers judge then considered the New Evidence. She held that New Evidence could not assist Dr. Sahyoun in overcoming the Tribunal's conclusion in the Initial Decisions.

[25] After addressing the New Evidence, the chambers judge turned to whether or not the Chair's decision declining to hear the appeal was patently unreasonable. That issue involved interpretation of s. 17 of the *EA Act* which sets out the Tribunal's jurisdiction to hear appeals. The chambers judge concluded that the Chair's decision was not patently unreasonable, explaining at paragraphs 14 and 15 of her reasons:

> [14] The Chair's decision amounted, rather, to a conclusion, based on her interpretation of the enabling statute, that Dr. Sahyoun's claims had been conclusively determined in the proceedings that began with the original decisions and continued to *Sahyoun* (BCCA), and that the avenues for reconsideration or appeal under ss. 17 and 18 of the *Act* were not available to Dr. Sahyoun. The right under s. 17 of the *Act* applies only to the listed classes of decisions, and the Chair clearly viewed the refusal to reopen the original decisions as not within the listed classes. The refusal to reopen was not a decision that resulted in a refusal of status or assistance, but, rather, was a refusal to revisit the refusals made and upheld years earlier.
>
> [15] In her interpretation of the *Act*, the Chair was entitled to deference. Her decision was not patently unreasonable.

[26] The chambers judge then considered and rejected the appellant's argument that s. 18 of the *EA Act* allowed for his application for reconsideration, and

therefore his appeal, because the New Evidence gave rise to a change in circumstances. She held that there was no change in circumstances as the New Evidence put forward by the appellant merely fortified positions which had already been rejected in the Initial Decisions and upheld in the prior judicial review proceedings.

[27] The Chambers judge then considered the implication of the Chair's failure to follow the Tribunal's *Practices and Procedures* and give notice and invite submissions on the jurisdiction issue. She concluded that in the circumstances of this case nothing would be gained by remitting the matter to the Chair for notice to the parties to be given. In that regard she held that the Chair was under no obligation to invite the parties to make submissions concerning the Tribunal's jurisdiction to hear the appeal. Further and in any event, even if the Tribunal heard the appeal, it was bound to fail because the New Evidence could not assist the appellant for the reasons she had discussed.

ISSUES ON APPEAL

[28] There are two issues on the appeal. The first concerns the decision of the Chair that the Tribunal did not have jurisdiction to hear the appeal. The second concerns whether the failure of the Chair to follow the Tribunal's *Practices and Procedures* rendered the decision unfair.

DISCUSSION

[29] The standard of review is set out in s. 58 of the *Administrative Tribunals Act.* Accordingly any finding of fact or law or an exercise of discretion by the Tribunal must not be interfered with unless it is patently unreasonable. 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.

[30] The avenues for reconsideration or appeal are found in ss. 17 or 18 of the *EA Act*. The Chair found, based on her interpretation of the enabling statute that

the appellant's claim had been conclusively determined in the proceedings that began with the Initial Decisions and culminated in the unsuccessful judicial reviews of those decisions. Accordingly the avenues for reconsideration or appeal under section 17 or 18 of the *EA Act* were not available to the appellant.

[31] To succeed on this appeal, the appellant must establish that the decision of the Chair was patently unreasonable. The Chair's interpretation of her home statue is entitled to deference. I can find no error in the chambers judge's analysis. I agree with her finding that the Chair's decision was not patently unreasonable. I would not accede to this ground of appeal.

[32] In regard to the question of procedural fairness, it is clear that the Chair failed to follow the Tribunal's *Practices and Procedures*. The *Practices and Procedures* required the Tribunal to notify the parties in writing if the matter appeared to be outside the jurisdiction of the Tribunal and in those circumstances, the Tribunal could invite the parties to make submissions on the Tribunal's jurisdiction. In this case, no notification was given in advance of the decision.

[33] That however is not the end of the matter. Questions of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the Tribunal acted fairly. Accepting, without deciding, that the failure to give notice and invite submissions was a breach of natural justice, I find in the circumstances of this case that it would not be appropriate to return the matter to the Tribunal. In my view the Chair's decision that the Tribunal lacked jurisdiction to hear the appeals was not only not patently unreasonable, it was correct. The right to reconsideration under s. 17 applies only to the listed classes of decisions – not to the refusal to reopen. In these circumstances, I agree with the chambers judge that nothing would be gained by remitting the matter to the Chair to invite the parties to make submissions concerning the Tribunal's jurisdiction. The Chair's actions did not lead to an unfair result.

[34] I would not accede to this ground of appeal.

[35] For completeness I should note that the appellant spent some time in his submissions trying to convince us that the Initial Decisions were wrongly decided and he was entitled to the benefits he has been seeking from the time of his initial application in September 2010. The correctness of the Initial Decisions is not a matter before us on this appeal and it would not be appropriate for us to opine on that issue.

[36] In the result, I would dismiss the appeal.

"The Honourable Mr. Justice Goepel"

I agree:

"The Honourable Mr. Justice Frankel"

I agree:

"The Honourable Mr. Justice Harris"