IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Harley v. Employment and Assistance Appeal Tribunal,*** 2006 BCSC 1420

Date: 20060920
Docket: S065346
Registry: Vancouver

Re: *Judicial Review Procedure Act*
Employment and Assistance Act
Employment and Assistance Regulations

Between:

Belinda Harley

Petitioner

And

Employment and Assistance Appeal Tribunal
Minister of Employment and Income Assistance

Respondents

Before: The Honourable Mr. Justice Bauman

Reasons for Judgment

Counsel for the Petitioner	J. K. Hadley and K. Love, Articled Student
Counsel for the Respondents	B. A. Mackey
Date and Place of Trial/Hearing:	24 August 2006 Vancouver, B.C.

[1] By her petition, Belinda Harley impugns a decision affecting her made by the Employment and Assistance Appeal Tribunal (the "Tribunal") on 5 July 2006.

[2] By that unanimous decision of a three member panel, the Tribunal confirmed a decision made by a Regional Reconsideration Adjudicator on 12 June 2006, which in turn confirmed a decision under the ***Employment and Assistance for Persons with Disabilities Act***, S.B.C. 2002, c. 41 (the "***Act*** "), which denied assistance to the petitioner for a period of four months.

[3] Ms Harley has been receiving income assistance since July 2000. In November 2001, she was granted "person with disability" status ("PWD") making her eligible for assistance under the ***Act***.

[4] On 6 April 2006, Ms Harley completed a routine eligibility review with a representative of the Ministry of Employment and Income Assistance. She advised the worker that she held guaranteed investment certificates ("GICs") totalling approximately $7,000.

[5] Ms Harley was asked to provide documentation from the bank in respect of the GICs.

[6] According to bank documents provided by Ms Harley, on 13 April 2006, she cashed in investments totalling $7,282.96 and she purchased a draft in that amount payable to her daughter, Aileen Harley.

[7] After learning that her permissible asset level was $3,000, Ms Harley received a draft in that amount from her daughter on 29 May 2006 and she purchased a GIC in that amount.

[8] Taking the view that Ms Harley had disposed of personal property to reduce assets contrary to s. 13(2) of the ***Act***, the Ministry denied the petitioner eligibility for four months (May to August 2006) under the applicable regulations.

[9] It was Ms Harley's position before all three levels of decision making under the legislation that she was not the beneficial owner of the funds. She deposed in her affidavit filed in the proceedings as follows:

> 1. I, Belinda May Harley, was entrusted $4,000.00 from my daughter, Aileen Rosalie May Harley on July 29th, 2003. With her approval I purchased a GIC to safeguard the money.
> 2. My daughter entrusted me her money with the sole intent of purchasing a family home.
> 3. The money never belonged to me, and I have no rights to dispose of it as I please for food or shelter. Therefore, I do not have any beneficial interest in the money.
> 4. This money was collected through my daughter's personal savings from her work.
> 5. Because the money does not belong to me, with the approval of my daughter I forwarded the full amount of GIC ($7,1282.96) [*sic*] into her account to ensure that it be spent for our future plan of purchasing a family home.

(The affidavit from her daughter was to the same effect, but she indicates that only $4,000 was returned to her, which in the end appears to be accurate.)

[10] Ms Harley advances four grounds for judicial review (under the ***Judicial Review Procedure Act***, R.S.B.C. 1996, c. 241) of the Tribunal's decision, but her counsel describes "the core of the petitioner's claim" in her written argument so:

> … **that the EAAT [the Tribunal] did not properly consider a key issue (*whether the property the Petitioner was accused of having disposed of was actually hers to dispose of)*, and that the EAAT did not provide adequate reasons showing that it had considered the evidence and law relevant to this issue.**
>
> [Emphasis in original.]

[11] In making her submission before the tribunal, Ms Harley had assistance and she filed a very detailed argument on the beneficial ownership/trust issue.

[12] I turn briefly to the legislative framework. I have already set out the particular legislative and regulatory provisions resorted to by the decision makers under the legislative scheme.

[13] Under s. 24 of the ***Employment and Assistance Act***, S.B.C. 2002, c. 40 (the "***EAA***") (made applicable to appeals to the Tribunal by virtue of s. 16 of the ***Act***), the Tribunal must determine whether the decision being appealed is:

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

[14] By s. 24(3) of the ***EAA***, the panel of the Tribunal must provide written reasons for its decision.

[15] Finally, s. 24 of the ***EAA*** contains these privative clauses:

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

> (7) A decision or order of the tribunal under this Act on a matter in respect of which the tribunal has exclusive jurisdiction is final and conclusive and is not open to question or review in any court.

[16] The presence of these clauses then engages s. 58 of the ***Administrative Tribunals Act***, S.B.C. 2004, c. 45:

> **Standard of review if tribunal's enabling Act has privative clause**
>
> 58 (1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
>
> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
>
> (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
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> (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
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> (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.
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> (3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion
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> (a) is exercised arbitrarily or in bad faith,
>
> (b) is exercised for an improper purpose,
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> (c) is based entirely or predominantly on irrelevant factors, or
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> (d) fails to take statutory requirements into account.

[17] The petitioner seeks to cast the alleged errors made by the Tribunal as either a failure "to follow the requirements of its enabling legislation" attracting, says the

petitioner, a review on a correctness basis, or as a failure to follow the common law rules of procedural fairness, attracting a review on the basis of fairness.

[18] In order to bring herself within these less stringent standards of review, the petitioner characterizes the alleged errors in this way:

(i) failing to provide reasons that comply with s. 87 of the regulation under the ***Act***;

(ii) receiving submissions "for information only"; and

(iii) breaching a duty "to turn its mind to all of the relevant issues".

[19] The Minister, on the contrary, argues that the Tribunal's decision is clearly made up of findings of fact and law in respect of which it has exclusive jurisdiction. The standard of review according to the respondent is that of patent unreasonableness.

[20] I recall the petitioner's "core" submission:

> … **that the … [Tribunal] did not properly consider a key issue (*whether the property the Petitioner was accused of having disposed of was actually hers to dispose of)*, and that the … [Tribunal] did not provide adequate reasons showing that it had considered the evidence and law relevant to this issue.**

[21] With respect to the duty to provide reasons, s. 87(1) of the ***Employment and Assistance Regulation***, B.C. Reg. 263/2002 provides that the Tribunal's "written determination" must:

> (a) specify the decision under appeal,
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> (b) summarize the issues and relevant facts considered in the appeal,
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> (c) set out the reasons on which the panel based its determination, and
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> (d) specify the outcome of the appeal.

[22] The duty to give reasons must also be considered in the context of s. 87(2) of the ***Regulation***, which requires that the Tribunal provide its determination within five business days of the conclusion of the hearing.

[23] The panel, unlike judges of this court, does not have the luxury of a lengthy period for reserving decision so as to better craft reasons therefor. But still, the duty remains on the Tribunal to give meaningful reasons for its determination.

[24] In that light, I turn to the critical decision impugned in these proceedings.

[25] The Tribunal summarizes the facts by largely drawing on the electronic record created in the proceedings below. Because the facts are important, I set out this portion of the decision:

> According to the Ministry's electronic record (MIS) attached to your Request for Reconsideration EIA100:
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> 1. You have been in receipt of income assistance since July 21 2000 as a sole recipient.
> 2. On Nov. 29, 2001 you became eligible for Persons with a Disability (PWD).
> 3. You currently receive $531.42 support, $325 shelter, $40 vitamins and $165 nutritional supplement for a total of $1061.42 a month less any deductions or repayments.
> 4. On April 6, 2006 you completed an eligibility review and advised the worker you had a guaranteed investment at the Royal Bank for approximately $7000 since 2003. You advised that you had

been saving $200 a month in a sock for many years. The worker requested documentation from the bank and bank statements.

5. On April 11 you advised that your daughter was a waitress and used to come over and put cash in the sock so the two of you could buy a house together.
6. On April 24 you submitted a copy of a bank draft from the Royal Bank dated April 13, 2006 payable to your daughter Aileen for $7282.96.
7. On May 1 the worker received a letter from the Royal Bank confirming that you had cashed in $7282.96 worth of investments and purchased a draft payable to your daughter Aileen Harley.
8. You were denied disability assistance for disposing of an asset from May - August 2006 and given the right to reconsideration.
9. You received the Request for Reconsideration (El A100) on May 2 and submitted for review on May 30.

In your submission you state the following:

1. Please refer to the arguments in your affidavit and that of your daughter's which explains why you believe that you did not dispose of the money.
2. Your advocate has also added a letter which supports your request. The advocate has attached several exhibits to this letter.

[26] The reasons continue and include two paragraphs which are potentially troubling:

> Both the ministry and the appellant provided the Panel with additional information but none of this was taken as evidence. (information only)
>
> …
>
> The appellant's representative discussed with the Panel legitimate mitigating circumstances, beneficial interest, resulting trust and the meaning of "asset". The Panel received all of this as information only.

[27] The petitioner complains that the Tribunal improperly received evidence as "information only". The petitioner did not elaborate on what additional material she placed before the Tribunal as "evidence".

[28] It is clear from the last quoted paragraph, that the Tribunal considered that the petitioner's legal submission and arguments were not "evidence" and in this the Tribunal is of course correct.

[29] In the absence of any indication that the Tribunal actually ignored as "information only" probative evidence, I cannot accede to the petitioner's complaint on this aspect of the decision.

[30] Section 22 of the ***EAA*** regulates the conduct of the hearing before the Tribunal.

[31] Subsection 4 states that the panel may admit as evidence only:

> (a) the information and records that were before the minister when the decision being appealed was made, and
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> (b) oral or written testimony in support of the information and records referred to in paragraph (a).

[32] As I say, the petitioner points to no "oral or written testimony" which the Tribunal improperly refused to receive as evidence.

[33] The presence of this provision also explains why the Tribunal was careful to indicate that the parties submissions were not received as "evidence".

[34] The Tribunal then sets out the actual reasons for its decision. They are brief:

> The Panel listened to both the ministry representative, the appellant and the appellant's representative and reviewed and discussed all the evidence submitted.
>
> The Panel looked for and was unable to find any clear banking evidence (i.e. transfer, and or withdrawal slips from the daughter's

> bank) to substantiate the origin of the first $4,000, indicating that the money belonged to the daughter in the first place.
>
> The Panel felt there was an indication that manipulation did occur.
>
> The Panel did feel that the appellant should have received better advice all along to assist her in how to go about setting monies aside to buy a home, within the ministry's guidelines.
>
> The Panel admired the appellant's tenacity in saving money, but found for the ministry as the evidence pointed toward the fact that the appellant tried to dispose of the money accumulated in order to reduce her assets.
>
> The Panel therefore found that the ministry's decision was a reasonable one, based on the information it had at the time, and agrees that to deny the appellant benefits for the four months was appropriate.

[35] The petitioner makes two central points in attacking the adequacy of these reasons.

[36] The first is that the Tribunal's reasons must indicate that it has turned its mind to the central issues and provide reasons that explain its decision on those issues.

[37] The petitioner cites in this regard, amongst others, the decision of the Ontario Court of Appeal in ***Gray v. Ontario (Disability Support Program, Director)*** (2002), 212 D.L.R. (4th) 353, 59 O.R. (3d) 364 (Ont.C.A.).

[38] The legislative scheme at bar in ***Gray***, like the case here, contained a section requiring the provision of reasons by the Tribunal (at ¶ 18): "… the Tribunal's decision shall include the principal findings of fact and its conclusions based on those findings".

[39] Chief Justice McMurtry (for the court) reviewed the cases and quoted with approval these paragraphs from the Federal Court of Appeal's decision in ***VIA Rail Canada Inc. v. National Transportation Agency*** (2000), 193 D.L.R. (4th) 357, 2 F.C. 25:

> [21] The duty to give reasons is only fulfilled if the reasons provided are adequate. What constitutes adequate reasons is a matter to be determined in light of the particular circumstances of each case. However, as a general rule, adequate reasons are those that serve the functions for which the duty to provide them was imposed. In the words of my learned colleague Evans J.A., "Any attempt to formulate a standard of adequacy that must be met before a tribunal can be said to have discharged its duty to give reasons must ultimately reflect the purposes served by a duty to give reasons."
>
> [22] The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. Rather, the decision-maker must set out its findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision-maker must be set out and must reflect consideration of the main relevant factors.
>
> [Footnotes omitted.]

[40] The statutory duty to give reasons in ***VIA Rail*** directed the tribunal simply to (at ¶ 12) "give orally or in writing the reasons for its … decision".

[41] The petitioner's second concern with the adequacy of the Tribunal's reasons, is its failure to explain why it apparently rejected the sworn affidavit evidence of the petitioner and her daughter, as to the source of $4,000 of the total sum. The petitioner cites ***Re Pitts and Director of Family Benefits Branch of the Ministry of Community & Social Services*** (1985), 51 O.R. (2d) 302 (Ont.H.C.) and

Traverse v. Newfoundland (Minister of Social Services), [1994] N.J. No. 30 (QL), 119 Nfld. & P.E.I.R. 304 (Nfld.S.C.T.D.).

[42] In ***Pitts***, Justice Reid was dealing with a decision under the Ontario legislation denying an allowance to a single mother of two children. The adjudicator simply rejected the appellant's evidence. Justice Reid said (at pp. 310-11):

> The task of determining credibility may be a difficult one but it must be faced. If the board sees fit to reject a claim on the ground of credibility, it owes a duty to the claimant to state clearly its grounds for disbelief. The board cannot simply say, as the member did here, "I feel that I have not received credible evidence to rescind the decision of the Respondent." Some reason for thinking the evidence not credible must be given if an appearance of arbitrariness is to be avoided.
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> In a now famous address, Sir Robert McGarry, Vice-Chancellor of England, has reminded judges that the most important person in a lawsuit is not the judge, sitting in elevated dignity on the dais, nor the lawyers, however eminent they might be; it is the losing party: see "Temptations of the Bench" [1978] XVI Alta. L. Rev., p. 406. In order that faith may be maintained in the legal system, it is necessary that losing parties be satisfied that they have been fairly dealt with, that their position has been understood by the judge, and that it has been properly weighed and considered. It is, therefore, important that the reasons for a decision be stated, and stated in language that the party who has been dealt the blow can comprehend.
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> I think that this applies with equal weight to the decisions of tribunals. Thus, in my opinion, members of the Social Assistance Review Board owe to claimants, in simple justice, a reasonable statement of why their claim failed, particularly when it failed because the claimant or witnesses were not believed. Mr. Manuele's rejection of Ms. Pitts' and her witnesses' evidence as not entitled to credence was neither preceded nor followed by one single word indicating why he did not find it credible. …

[43] In its reasons here, the Tribunal does not even state directly that it has found the sworn evidence of the petitioner and her daughter not to be credible, let alone why it has apparently done so.

[44] There is no analysis at all indicating a weighing of the evidence and a conclusion on credibility.

[45] I turn to test the Tribunal's reasons against the simple direction in ***VIA Rail***:

> … the decision-maker must set out its findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision-maker must be set out and must reflect consideration of the main relevant factors.

[46] In my view, the Tribunal's reasons fail to meet this elementary burden which flows, I find, from the legislative scheme before me, in particular in s. 87 of the ***Regulation***.

[47] The Tribunal makes this critical finding: "The Panel felt there was an indication that manipulation did occur".

[48] The panel does not identify any of the evidence which supports this finding . Indeed it does not state what the nature of the "manipulation" was.

[49] The Tribunal does refer to the absence of banking records "to substantiate the origin of the first $4,000, indicating that the money belonged to the daughter in the first place". But the Tribunal does not say that it rejects the sworn evidence to the effect that the daughter did indeed provide that sum.

[50] Critically, the Tribunal does not make any express finding on the central submission of the petitioner, that she was a trustee of the $4,000, and not the beneficial owner of it.

[51] The Tribunal continues:

> The Panel did feel that the appellant should have received better advice all along to assist her in how to go about setting monies aside to buy a home, within the ministry's guidelines.

[52] The evidence before the Tribunal was to the effect that approximately $3,000 of the money was indeed money saved by the petitioner. Is that what the Tribunal is referring to? If so, the scheme permitted the petitioner to maintain savings up to $3,000 — why would the petitioner need "better advice to assist her"?

[53] The Tribunal then says:

> The Panel admired the appellant's tenacity in saving money, but found for the ministry as the evidence pointed toward the fact that the appellant tried to dispose of the money accumulated in order to reduce her assets.

[54] This is simply stating a conclusion. The panel's reasoning process is not set out; the critical findings of fact are not set out; the conclusion does not reflect a consideration of the main relevant factors. The evidence before the Tribunal "pointed" as well of course to the "fact" that the petitioner and her daughter claimed the daughter was the beneficial owner of at least $4,000 of the total monies. As this evidence was not expressly rejected by the Tribunal, it is misleading to suggest that the evidence "pointed" only one way.

[55] I underline that I am not parsing the reasons of the Tribunal to improperly substitute my view of the evidence for that of the Tribunal. I am doing so simply to test the adequacy of those reasons against the Tribunal's statutory duty to provide reasons.

[56] The respondents place significant reliance on Justice McEwan's decision in ***Serebrova v. British Columbia (Employment and Assistance Appeal Tribunal)***, 2006 BCSC 213, a case which considered an issue similar to that in the case at bar. But Justice McEwan characterized (at ¶ 24) the case before him as "a case about the sufficiency of proof".

[57] Here, on the contrary, the petitioner has attacked the sufficiency of the Tribunal's reasons in the context of the ***Regulation*** and the common law.

[58] In my view, the Tribunal has failed to provide, as required by s. 87(1)(c) of the ***Regulation***, a written determination which "sets out the reasons on which the panel based its determination".

[59] As to what adequate "reasons" consist of for the purpose of this direction, I adopt the Federal Court of Appeal's analysis in ¶ 22 of ***VIA Rail***.

[60] This failure represents non-compliance with a statutory direction. It falls under s. 58(2)(c) of the ***Administrative Tribunals Act*** and the standard of review is that of correctness.

[61] The decision of the Tribunal is set aside and the matter is remitted to a fresh panel for consideration of the petitioner's appeal.

[62] Unless there are circumstances which the parties wish to bring to my attention, the petitioner is entitled to her costs on scale 4.

"R.J. Bauman, J."
The Honourable Mr. Justice R.J. Bauman