

SUPREME COURT OF NOVA SCOTIA

Citation: Nova Scotia (Community Services) v. McIntyre, 2011 NSSC 401

Date: October 31, 2011

Docket: Syd. No. 348131

Registry: Sydney

Between:

Department of Community Services

Applicant

v.

Sally McIntyre

Respondent

Judge: The Honourable Justice Cindy A. Bourgeois

Heard: October 24, 2011 at Sydney, Nova Scotia

Counsel: Terry D. Potter, for the Applicant
Sally McIntyre, in person

By the Court:

INTRODUCTION

[1] The Applicant, the Department of Community Services, filed a Notice of Judicial Review pursuant to Civil Procedure Rule 7 on May 5, 2011, whereby it sought review of a decision of the Assistance Appeal Board rendered April 2, 2011.

[2] The Respondent, Ms. McIntyre, filed a Notice of Participation on her own behalf, and was represented by Counsel at the Review hearing before this Court.

[3] This review involves the narrow consideration of whether retroactive Canada Pension Plan ("CPP") disability benefits received by Ms. McIntyre's husband, can trigger an overpayment of benefits paid to her under the Employment and *Income Assistance Act*, S.N.S.2000. c. 27("the Act").

BACKGROUND

[4] A review of the material available to this Court discloses that in 2009, Ms. McIntyre and her husband, Mr. Leblanc, began to experience significant financial difficulties due mainly to Mr. Leblanc's health concerns. In July of 2009 the couple attended at the local offices of the Department of Community Services, seeking income assistance. The application for assistance was made out in Ms. McIntyre's name, and she began, effective July 2009, receiving income assistance benefits.

[5] In or around the same time, Mr. Leblanc made an application for CPP disability benefits due to his ongoing health problems. His application was approved in August of 2010, with retroactive disability benefits being awarded to him. The retro-active award covered the same time frame in which Ms. McIntyre received income assistance benefits.

[6] Shortly after her husband was advised of the successful outcome of his CPP application, Ms. McIntyre advised her caseworker Mr. Edwards at the Department of Community Services that she would no longer be in need of income assistance

benefits. Mr. Edwards advised her that an "overpayment" may be sought from her due to Mr. Leblanc receiving the retro-active award.

[7] Ms. McIntyre was advised by virtue of letter dated January 6, 2011, that the Department was seeking an overpayment of benefits paid to her from July, 2009 in the amount of \$6,774.51 due to Mr. Leblanc's receipt of CPP disability benefits during that time frame.

[8] Ms. McIntyre appealed that decision, and it was submitted for Administrative review. The original decision of the Department seeking an overpayment, and the amount calculated, was upheld upon review.

[9] Ms. McIntyre appealed that decision to the Assistance Appeal Board ("the Board"). A hearing was held on March 24, 2011, with Mr. Douglas McKinley sitting as the sole Board member. The Board rendered a decision on April 2, 2011 whereby the appeal was "partly denied; partly granted". The Board found that the Department was entitled to seek an overpayment pursuant to the Act, but that the overpayment should be limited to a six month period in accordance with Section

14(3). The Board "recalculated" the overpayment owing to \$2876.92 pursuant to that section. It is that decision which is the subject of this application.

THE ASSISTANCE APPEAL BOARD DECISION

[10] As noted above, the Board rendered a written decision on April 2, 2011.

Board member McKinley thoroughly reviewed the arguments presented by both

Ms. McIntyre and the Department. He then proceeded to outline a number of

"factual findings", as follows:

1. Sally McIntyre properly notified the Department in October 2010, in writing, that by mid September 2010, her spouse received a retroactive CPP lump payment for a period reaching back to July 2009.
2. Roy Edwards properly notified Sally McIntyre by September 21st, 2010, that she may or would likely have to pay back money received by her from the Department for the "dual payment" period.
3. That it took about 4 months for the Department to inform Sally McIntyre as to the size of the overpayment.
4. That by January, 2011, her spouse had spent the CPP lump payment on household needs, that she had not spent the money, and that her household would have a very hard time repaying more than \$6700.00 to the Department.
5. However, it appears Sally McIntyre gave full disclosure. It was not contested by Roy Edwards that Sally McIntyre mentioned her spouse's medical problem (vertigo) at intake (hence hinting at potential CPP benefits as a possibility). It is apparent Sally McIntyre verbally informed Roy Edwards of a lump sum CPP

payment by mid September, 2010, and informed the Department in writing by October, 2010, of the overpayment.

6. It was not asserted by the Department that there was any non-disclosure on the part of Sally McIntyre, which means s. 14(3) should apply. There was no assertion by the Department either at the hearing or in the Administrative Review Report that there was lack of full-disclosure by Sally McIntyre.

7. I find that it is credible that Sally McIntyre likely asked for her household's social assistance benefits be put in her husband's name, and that doing so may have increased the chances of automatic repayment being calculated, but this issue is irrelevant as to whether s. 14(3) is applicable or not.

[11] In his reasons, Mr. McKinley quotes s. 14(3) of the Act and relies upon this provision to recalculate the amount of the overpayment owing by Ms. McIntyre.

Although the Board member expresses concern regarding the period of time it took the Department to communicate the amount of the overpayment, as well as it apparently not exploring a reduction of the recovery pursuant to Policy 8.1.4, these factors did not prevent the Board from finding that an overpayment, in some amount, was owing.

POSITION OF THE APPLICANT DEPARTMENT

[12] The Department asserts that this matter is straightforward - the Board did not in applying s. 14(3) of the Act, properly consider the impact of the

subsection immediately following it. It is asserted that s.14(4) would prevent the application of s.14(3) in the circumstances of the present case.

[13] The two provisions state:

14(3) Where the overpayments were paid notwithstanding full disclosure by the person in receipt of them of all relevant information required by the regulations, the recovery of them is limited to the overpayments for the six months immediately before the making of a demand for the recovery of the overpayment.

(4) Subsection (3) does not apply to assistance paid on condition that it would be repaid from the deferred sale of an asset or otherwise, to sums paid to a person who receives deferred income with respect to any period for which assistance was provided or to assistance that was agreed in writing to be repayable.

[14] The Department asserts that by virtue of the CPP benefits being paid retroactively, such would constitute "deferred income" as contemplated in s. 14(4). It is further submitted that for the purpose of this provision, Ms. McIntyre should be considered to be "a person who receives deferred income", as any other interpretation would be contrary to the overall scheme and intention of the legislation.

[15] The Department is seeking that this Court uphold the Board's decision in the sense that an overpayment in the circumstances is appropriate, but set aside the "recalculation" undertaken based upon the erroneous application of s. 14(3).

POSITION OF THE RESPONDENT MS. MCINTYRE

[16] Ms. McIntyre was not represented at the Board hearing. Her Counsel submits that she may have put forward alternate or additional arguments at that time, should she have had the benefit of legal advice. What Counsel is referring to, is Ms. McIntyre's acknowledgment at the Board hearing that an overpayment was owing. Counsel for Ms. McIntyre submitted that a proper interpretation of the legislation would fail to establish there was an overpayment, as she personally had not received the deferred income. However, Counsel indicated that Ms. McIntyre was not pursuing that argument, was prepared to acknowledge there was an overpayment, but that the Board was correct in applying s. 14(3) to limit the overpayment period to six months. Further, the Board was correct in not considering the provisions of s. 14(4).

[17] Ms. McIntyre's argument is founded on the premise that she was not the recipient of the CPP disability lump sum payment, and as such, the provisions relating to overpayment do not apply to her. The funds were received by her spouse, by virtue of a cheque in his name, and he chose to spend the money

without any ability of Ms. McIntyre to control what Mr. Leblanc did with the money.

[18] Ms. McIntyre draws the Court's attention to the specific wording of s. 14(4) and asserts that she was not a person who received deferred income. That provision should not apply, and therefore she should be able to rely upon the six month cap on recovery contained in s. 14(3). She asserts that any ambiguity in the legislation should be interpreted in her favour, and that the Department made a number of errors in the present instance which would make the application of s. 14(3) fair and equitable in the circumstances.

ISSUES

[19] The issues before this Court are:

- a) What is the appropriate standard of review?
- b) Did the Board err in its application of s. 14(3) of the Act, and in failing to apply s. 14(4)?
- c) If it is determined that the Board did err, what is the appropriate remedy?

ANALYSIS

Standard of Review

[20] The appropriate standard of review relating to Assistance Appeal Board matters has been previously considered by this Court. A thorough analysis was undertaken by Moir, J. in **Legere v. Nova Scotia (Department of Community Services)**, 2010 NSSC 67, where this court said at paragraph 9:

The findings of fact of an appeal board under the Employment Support and Income Assistance Act are reviewable only for their reasonableness in light of the decision as a whole and the record, but an interpretation of the statute or regulations is reviewable for its correctness: *Nova Scotia (Department of Community Services) v. Brenna*, [2005] N.S.J. No. 121 (N.S.S.C.) upheld on other grounds [2006] N.S.J. No. 18 (N.S.C.A.), *Willis v. Nova Scotia (Department of Community Services)*, [2007] N.S.J. No. 391 (N.S.S.C.).

[21] I agree with the approach as outlined above. As this review involves a determination of whether the Board was correct in its statutory interpretation, the standard to be applied is one of correctness.

Did the Board err in its application of s. 14(3) of the Act, and in failing to apply s. 14(4)?

[22] There are a number of other provisions which are relevant to the ultimate disposition of the matter. Two relevant definitions are included in s. 3 of the Act, as follows:

(b) "deferred income" includes retroactive pay, retroactive pension or other benefits and any form of compensation for loss of income, including compensation paid for insufficient notice of termination of employment;

and

(f) "overpayment" means any assistance paid pursuant to the Act that was paid in error, was overpaid or was paid based on false or misleading information supplied by an applicant or that otherwise ought not to have been paid according to this Act and the regulations, and includes sums paid to a person who receives deferred income with respect to any period for which assistance was provided and sums paid to a person that were agreed to be repayable, whether out of the proceeds of the deferred sale of an asset, from deferred income or otherwise.

[23] There is no argument advanced that retroactive CPP benefits do not fall within the definition of "deferred payment". Ms. McIntyre's argument is that her circumstances should not fall within the definition of "overpayment" as she did not receive the deferred income, her spouse did. This necessitates, in this Court's view, an overview of the role of the spouse, and in particular his or her income, in the assessment of eligibility for benefits under the Act.

[24] Although certain provisions of the Act itself reference the statutory objective of assisting families (section 6(1)(a) for example), it is in the *Employment Support*

and Income Assistance Regulations, N.S. Regs 25/2001, where the significance of an applicant or recipient's spouse becomes readily apparent. Section 5 outlines that where an applicant or recipient has a spouse, information pertaining to the spouse, including their income tax assessment form (s. 5(1)(d)) is to be provided to the Department, in order to assess eligibility. Further, the Department is to receive authorization to collect information pertaining to the spouse of the applicant or recipient, including that person's expenses, "chargeable income" and liquid assets (see s. 5(1)(e)). If an applicant or recipient of benefits fails to provide the required information, including that pertaining to a spouse, benefits can be denied, or discontinued (s. 5(2)). Section 7(1) also obligates an applicant or recipient of benefits to provide information regarding not only themselves but the "financial circumstances" of their spouse.

[25] "Chargeable income" is defined in s. 2 (i) as "income that is included for the purpose of computing the amount of assistance payable to the applicant or recipient". Section 47 provides that the income of the spouse, is deemed to be "chargeable income" of an applicant or recipient of benefits. It is readily apparent that in determining whether a person is eligible for income assistance benefits that the income of their spouse is considered to be the same as their own income.

[26] Beyond the eligibility determination, the Regulations also make it readily apparent that a recipient may receive greater benefits if they have a spouse, than if they are single. A recipient's shelter allowance is greater, and they receive an additional "personal allowance" for the benefit of that person, if they have a spouse (s. 31(1) and (2)).

[27] There is no question from the material before this Court, that when she received income assistance benefits, Ms. McIntyre's eligibility was assessed based upon both her income and that of her husband. Further, the amount of the monthly payment was comprised of a shelter allowance contemplating Mr. Leblanc's presence in the household, as well as a personal allowance for him.

[28] There is also no question that once Mr. Leblanc was in receipt of monthly CPP disability benefits that his income would be considered in Ms. McIntyre's ongoing eligibility for benefits, and that she would, in all likelihood, no longer qualify based upon the family's income.

[29] That brings the Court back to a consideration of Sections 14(3) and (4) of the Act, and how the provisions should be properly interpreted. Section 14(4) bears repeating:

(4) Subsection (3) does not apply to assistance paid on condition that it would be repaid from the deferred sale of an asset or otherwise, **to sums paid to a person who receives deferred income with respect to any period for which assistance was provided** or to assistance that was agreed in writing to be repayable.
(Emphasis added)

[30] Ms. McIntyre's preferred interpretation of the above provision would have the effect of a spouse's ongoing CPP disability benefits being treated entirely differently from a lump sum retroactive payment. One would "count" in relation to what she was eligible to receive, and one would not. She asserts that such a result would not be unjust in the circumstances, as if the Department had set up the benefits in her husband's name, or had him sign an authorization directing CPP to make payment to it for any retroactive funds claimed, the whole overpayment would have been avoided.

[31] With respect, this Court cannot accept that Ms. McIntyre's interpretation of section 14(3) and (4) of the Act is consistent with its overall intent, nor how the income of a spouse is treated in the overall determination of eligibility. There is no

justification in my view, that a retro-active award of deferred income over an identifiable period of time, should be treated any differently than if those same funds had been received over the same time frame by virtue of monthly cheques.

[32] In my view, "*sums paid to a person who receives deferred income*", must necessarily include either the applicant/recipient of benefits as well as their spouse. This interpretation is entirely consistent with the provisions in the regulations which treat both parties within the household the same in terms of their income, and the resulting impact on eligibility. The wording of s. 14(4) is not ambiguous when the overall scheme of the legislation and the eligibility provisions are considered.

[33] On a final matter, Ms. McIntyre points to a number of "errors" on the part of the Department which should prevent the application of s. 14(4). Undoubtedly the Department could have taken steps earlier to have any CPP benefits received by Mr. Leblanc more easily applied to any subsequent overpayment, either by having benefits placed in his name, or by virtue of requesting an authorization for direct payment be signed by him. The Department's failure to take these steps will likely make the collection of the overpayment more difficult, however, I do not view

such as preventing the Department from claiming an overpayment in these circumstances. Similarly, a four month delay in calculating the amount of an overpayment does not impact on the applicability of s. 14(4).

[34] The Board decision does not reference s. 14(4), accordingly, it is not clear whether that provision was considered or not. It should have been, and it was an error for the Board to apply s.14(3) in light of its contents.

What is the appropriate remedy?

[35] Civil Procedure Rule 7.11 addresses the remedies available at the conclusion of a judicial review, including "an order setting aside the decision under review, or part of it".

[36] In the present instance, the Board's determination that an overpayment would arise in the circumstances is correct. The Board's decision did not question the calculation of the overpayment, and the material before me supports the amount claimed of \$6774.51.

[37] The Board erred in reducing the overpayment to reflect the six month cap in s. 14(3) of the Act. That "recalculation" is hereby set aside.

J.