SUPREME COURT OF NOVA SCOTIA

Citation: Cleary v. Nova Scotia (Community Services), 2010 NSSC 231

Date: 20100608
Docket: Hfx. No. 325062
Registry: Halifax

Between:

Andrea Cleary

Applicant

v.

Department of Community Services

Respondent

D E C I S I O N

Judge: The Honourable Justice Suzanne M. Hood

Heard: June 8, 2010

Written Decision: June 25, 2010 (*Written release of oral decision rendered June 8, 2010)*

Counsel: Andrew Pavey for the Applicant
Terry D. Potter for the Respondent

By the Court:

[1] First of all, I will reiterate that I earlier decided the affidavit which the respondent wished to submit was not relevant to the issues before me. Secondly, let me say that the parties have agreed that the standard of review is one of correctness.

[2] I concluded earlier this afternoon that the interpretation of *Regulation 69* by the Appeal Board was incorrect pursuant to the standard of correctness. It provides as follows:

> *69* Where a recipient receives less assistance than the recipient is entitled to receive through no fault of the recipient, the recipient is eligible to receive the unpaid amount calculated on the basis of the most recent 6 months for which the lesser amount was paid.

[3] I conclude that does not mean there is a cap on the amount to be paid. In my view, it provides for the recipient to receive the unpaid amount and then sets out how that amount is to be calculated. It uses the words "to be calculated on the basis of." In my view, those are not words clearly stating that there is a limit on the period for which the amount is to be paid. If that were the case, it would be

inconsistent with the provision of the Appeal Regulations. Regulation 13(1)(b) states:

> 13 (1) A decision of an appeal board
>
> (b) must comply with *Act* and the Employment Support and Income Assistance Regulations and these Regulations.

Section 14(2) of those Regulations provides:

> 14. (2) An appeal board decision is retroactive to the date of the decision that is being appealed.

[4] I refer to Policy 8.1.5 which is pursuant to these regulations. It provides:

> 8.l.5 Underpayments
>
> Where recipient receives less Income Assistance than they are eligible to receive, through no fault of their own, the underpayment will be calculated for the most recent six (6) months for which the lesser amount was paid.

This is wording which sets a cap. It sets out what I have concluded is the incorrect interpretation. Therefore, the policy is invalid because it is inconsistent with the

regulations I have just quoted. The policy does not follow the proper interpretation of those regulations.

[5] I will now deal with the issue of whether a student loan is income for the purposes of the *Employment Support and Income Assistance Act,* S.N.S. 2000, c. 27. Both counsel agree that there is no reference to student loans in the *Act* or the *Regulations*. This is different from the situation in *Clyke v. Nova Scotia (Minister of Community Services),* 2005 NSCA 3 where there was a specific provision in the *Regulations* following from and consistent with the *Act.* There is no specific provision in the *Act* or *Regulations* dealing with student loans. Such a provision, in my view, could have been enacted but was not. Therefore, I must consider what is in fact in the *Regulations*.

[6] Section 3 (g) of the *Act* defines "person in need." It refers to "income, assets and other resources available." It then makes reference to "as determined pursuant to the Regulations." There is much in the *Regulations* with respect to income, some reference to assets but nothing with respect to other resources. Section 12 of the *Regulations* provides:

> **12** An applicant or recipient is not eligible to receive assistance where there is another feasible source of income or applicable assets available that is sufficient to provide the applicant or recipient with basic needs, special needs or employment services that are being applied for or provided, as the case may be.

That Regulation does not refer to other resources at all.

[7] Therefore, if the person is eligible, the amount of the assistance must be determined. In this case, for various reasons which were referred to in the Appeal Board decision, the assistance for Ms. Cleary ended. The Appeal Board decision referred to department errors. But it went on to say that since student loans were not included in the definition of those things excluded from income, therefore, it was income. The question then is, is that correct?

[8] There are limits in the *Act* and *Regulation*s for those attending post-secondary education. The general principle is that you are not eligible if you are taking post-secondary education. There are some exceptions and I do not think it is disputed at this point that Ms. Cleary would have fit within one of the exceptions.

[9] The *Act* sets out regulation making powers in s. 21. These include:

> (l) respecting eligibility for assistance or for any program or service provided pursuant to this Act;
>
> (m) respecting the determination of the income, assets and other resources that are available to a person in need and respecting the exclusion of a principal residence from such assets;

[10] The *Regulations* themselves define various phrases. There is a definition of chargeable income under s. 2:

> (i) 'chargeable income' of an applicant or recipient means income that is included for the purpose of computing the amount of assistance payable to the applicant or recipient pursuant to these regulations;

That same section also defines in (x) what a "post-secondary education program" is. It provides:

> (x) 'post-secondary education program' means a program designated for student loan purposes;

[11] There is a further definition in s. 2 of "unearned income":

> (ag) 'unearned income' includes income maintenance payments, workers' compensation, regular periodic insurance payments, income from mortgages, any maintenance payments, superannuation and income from investments such as stock and bonds;

[12] Section 47 is one of the sections that begins to discuss what chargeable income is. It does not refer to student loans. Section 48 refers to net wages and s. 48A refers to net commissions and tips. Section 49 deals with training allowances and s. 50 deals with the net profit from business. There are a number of sections which list items which are not chargeable: ss. 52, 52A, 53 and 53A. Sections 54 ff. deal with assets.

[13] Sections 67 ff deal with post-secondary education. Subsection (1) of s. 67 deals with programs of more than two years and subsection (2), programs of less than two years. With respect to programs of less than two years, subsection (3) of that section says:

> 3) A recipient to whom subsection (2) applies shall not receive assistance for tuition or school books or student fees.

It does not refer to student loans but provides that there would be no social assistance payments for tuition, etc. Therefore, the person would get assistance for their living expenses but not their tuition.

[14] Policy 7.3.2 is an additional exception for persons wanting to take post-secondary education. It is my understanding that that is the one applicable to Ms. Cleary.

[15] Policy 5.9.1 has a list of "Exempt Income" which is somewhat broader than the exemption in the regulation I have just quoted. It includes:

> Bursaries, scholarships and stipends received for the purpose of assisting with the costs associated with attending an approved educational program or persons to whom Section 67 of the Regulations apply.

[16] Mr. Pavey says that it is not logical to exclude these but to include, as income, the loan portions of money received. The question is whether the Appeal Board was correct in saying, as it did in the decision:

> Regulations are clear to the point that Student Loans are not listed as being exempt. The Board therefore does not find that the student loan received by the appellant would be exempt and would need to be considered in the calculation of income and expenses in determining the appellant's needs.

[17] In my view, this is not correct. There are many sections dealing with what is income and no mention of student loans. Then there is a short list of exemptions and, in the Policy to which I have referred, there is a reference to grants, bursaries

and stipends as further exemptions. These, in my view, might otherwise be considered income since they do not create a debt. Therefore, in my view, they need to be specifically mentioned. Not mentioning student loans as exempt does not, I conclude, mean they are to be considered as income.

[18] In s. 67(3), which I have quoted above, there is a specific mention of tuition and a provision that such things will not he covered. The conclusion is that persons receiving assistance must look after these themselves one way or another. One way could be through student loans; however, this does not deprive the person of assistance. Subsection (2) says the person must be a recipient. In my view, the only logical inference is that the person on assistance would, in certain circumstances, continue to be on assistance but would possibly pay specific education expenses such as tuition and books, for example, by a student loan.

[19] Therefore, in my view, that student would not be treated as having income for the purposes of that subsection. Accordingly, student loans are not within the definition of chargeable income. They are not within the definition of unearned income. In my view, it is clear why they are not listed as exempt income in the list

of exemptions. It is not the same as these. It is a debt. I therefore conclude that a student loan is not income for the purposes of the ESIA.

COSTS

[20] Costs are always in the discretion of the court. In my view, there is reason in this case for a costs award. I agree that costs of $1,500.00 plus disbursements, according to Tariff C, is an appropriate amount to be awarded to the successful applicant.

Hood, J.