SUPREME COURT OF NOVA SCOTIA

Citation: Nova Scotia (Community Services) v. E. M., 2011 NSSC 12

Date: 20110111
Docket: Hfx No. 325930
Registry: Halifax

Between:

Department of Community Services

Applicant

v.

E. M.

Respondent

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Judge: The Honourable Justice John D. Murphy

Heard: July 13, 2010, in Halifax, Nova Scotia

Counsel: Terry D. Potter, for the applicant
Susanne M. Litke, for the respondent

By the Court:

INTRODUCTION

[1] The Department of Community Services brings this application for judicial review of a decision of the Assistance Appeal Board dated February 3, 2010. The decision was rendered pursuant to the *Assistance Appeal Regulations,* N.S.

Reg. 90/2001, as amended, a regulation made under the authority of the *Employment Support and Income Assistance Act*, S.N.S. 2000, c.27.

BACKGROUND

[2] The respondent is a client of the Services for Persons with Disabilities Program (the SPD Program), which is administered by the Department of Community Services. She requires care at home due to Angelman's Syndrome, a genetic disorder that causes intellectual and developmental delay. Her mother cares for her with the support of the SPD Program, and under the auspices of the Direct Family Support Program (the DFS Program), which provides services to children and adults with disabilities who live at home with their families.

[3] The respondent sought increased funding through the SPD Program for respite. This request was denied by the Care Coordinator on the basis that she was already receiving more than the maximum allowed under a Departmental directive. She then sought, but did not receive, increased respite funds as an item of special need under the *Employment Support and Income Assistance Act*. On an administrative review, the Care Coordinator's decision to deny respite funding was affirmed, without a decision on the "special need" request under the Act, although the decision made reference to "ESSIA Regulation 26." The respondent then appealed to the Assistance Appeal Board.

THE APPEAL BOARD DECISION

[4] The Assistance Appeal Board rendered a decision on February 3, 2010, in respect of the respondent's appeal of the Department's refusal to increase special needs funding in order to provide respite to a primary caregiver. The Board member who heard, and allowed, the appeal reviewed the arguments as follows:

> **Arguments of the Appellant**
>
> Primary care giver has limited respite (only maximum 6 hours every two weeks). Letter from Dr. Brenda Joyce indicated potential health problems for primary care giver if not sufficient respite. Also an affidavit from P.W. expressing similar concern. Also indicated that there was no alternative care facility available in this area at the present time.

Arguments of the Department

Department stated at the outset of the hearing that they had reviewed the application under the wrong program. Stated that respite is only time away from primary care and this means that time at work should be considered as respite. Also stated that a directive from 2006 indicated that maximum that could be given in this or similar cases was $2,200.

He went on to provide the following findings and decision:

Finding of Facts

Department agreed that directive could not overrule policies or regulations. Parties agreed no alternative care available in the region of the province at present. Respite according to policy. Section 6.3, 6.3.1, and 6.3.2 of the Department of Social Services "Services for Persons with Disabilities Direct Family Policy" gives direction in cases where funding should exceed $2,200.

Decision

The appeal is supported to the extend [sic] of the November 2, 2009 request for an additional $500-$600 per month for respite and $500 is awarded. The later request in the affidavit of [the appellant's mother] dated January 25, 2010 is found not to be timely and should be part of any reapplication to the department.

Reasons

The Department erred in the manner in which the application was evaluated and the policies of the Services for Persons with Disabilities Direct Family Policy are specific in their permitting additional time for respite or other special needs and the 2006 departmental directive do not [sic] overrule policies or regulations.

[5] The Policy in question – DFS Policy 6.3, upon which the respondent client relied when seeking increased respite funding – was publicized by the applicant, effective July 28, 2006. The Directive referred to in the Appeal Board decision was an internal Departmental memorandum, dated October 13, 2006, from the Coordinator of the Services for Persons with Disabilities Program. This directive was not a public document.

[6] It appears that before the appeal, the respondent received monthly funding of $1076.11 for home care and $1253.89 for respite. The Appeal Board decision

resulted in an additional monthly amount of $500 for respite. Evidence submitted in support of a claim that the respondent actually required a further $1,200 for respite costs was rejected as untimely at the Appeal Board hearing.

GROUNDS OF REVIEW

[7] The applicant, the Department of Community Services, advanced the following grounds of review in its Notice for Judicial Review:

> 1. The Assistance Appeal Board erred in it's [sic] understanding of the role of the directive. The Department did not state "that directive could not overrule policies". The directive from the Department does override Department policy.
>
> 2. The Assistance Appeal Board erred by not indicating in the written decision what legislative authority is relied upon.
>
>   In the alternative, the Assistance Appeal Board incorrectly applied the provisions from the *Employment Support and Income Assistance Act*. The Respondent is not a client of the Income Assistance program. The Respondent is part of the Services for Person's [sic] with Disabilities program that is governed by the *Social Assistance Act.*
>
> 3. The Assistance Appeal Board incorrectly interpreted the definition of "respite" in awarding additional respite for the Respondent.

STANDARD OF REVIEW

[8] The Assistance Appeal Board is a statutory tribunal, whose mandate and powers are set out in section 13 of the *Employment Support and Income Assistance Act:*

> Powers and duties of appeal board
>
> 13 (1) An appeal board shall hear an appeal in camera, permitting access only to a representative of the Minister, the appellant, the appellant's counsel or agent and such other persons as the board may determine.

> (2) The board shall determine the facts and whether the decision made, on the basis of the facts found by the board, is in compliance with this Act and the regulations.
>
> (3) Where the board determines that the decision is contrary to this Act and the regulations, the board shall vary or reverse the decision in accordance with this Act and the regulations.
>
> (4) A decision of the board shall contain the facts found by the board, a statement of the issue in the appeal, the applicable provisions of this Act and the regulations and a statement of the reasons for the board's decision.

[9] The leading authority on determining the standard of review of a decision of a statutory tribunal is the majority judgment in **Dunsmuir v. New Brunswick**, 2008 SCC 9, [2008] S.C.J. No. 9. The majority, per Bastarache and Lebel JJ., set out two standards of review: reasonableness, where some level of deference is called for, and correctness, where no deference is required. The majority summarized the relevant process and considerations in determining the standard of review at paras. 62 and 64:

> In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.
>
> ....
>
> The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

[10] The applicant Department submits that the standard of review is correctness. It maintains that there is no privative clause in the *Employment Support and Income Assistance Act*, but also no further right of appeal. This factor, it submits, "is not particularly helpful and indicates a medium amount of deference to the

Appeal Board's decision." As to expertise, the Department submits that neither the court nor the Appeal Board have particular expertise in the subject matter of the appeal, also indicating "a medium amount of deference." However, the Department argues that the purpose of the *Employment Support and Income Assistance Act* "is a very important one and leads in the direction of less deference to the decision maker's decision." The written submission does not elaborate on this last point. However, the Department adds, the decisive factor in determining the standard of review is the nature of the question before the Appeal Board, and the nature of the error being alleged. On this factor, the Department submits that "generally an issue relating purely to law" will call for a correctness standard, permitting the court to intervene "where the Board misinterprets or misapplies the ESIA and regulations." The Department says the three errors it alleges all fall into this category, and thus properly attract review on a correctness standard.

[11] The standard of review applicable to a decision of the Assistance Appeal Board was considered in **Legere v. Nova Scotia (Department of Community Services)**, 2010 NSSC 67, 2010 CarswellNS 112 (S.C.) (Legere), where this court said, at para. 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.).

After noting that **Brenna** and **Willis** predated **Dunsmuir**, but were consistent with it, the court went on, at paras. 12-17:

> There is no privative clause protecting decisions of the assistance appeal board.
>
> The board is not specialized. One who possesses the following is qualified under s. 4(4) of the *Assistance Appeal Regulations*, N.S. Reg. 90/2001:
>
> (a) experience in human or social services;
>
> (b) an ability to conduct meetings;

> (c) communication and writing skills;
>
> (d) an ability to apply and interpret enactments; and
>
> (e) an ability to think analytically.
>
> The general purpose of the statute is to provide financial assistance to people in need. The purpose of the scheme for appeals is to adjudicate the entitlement of persons to the assistance.
>
> As I said, the issues involve legislative interpretation, the daily work of the courts, and fact finding. The legislation allows fact finding without a record.
>
> So, I follow **Brenna** and **Willis.**
>
> Mr. Potter argues that the issues involve mixed questions of law and fact, and the standard for those is reasonableness. In my assessment it is possible to distinguish the decision-maker's legislative interpretation from his findings of fact and his application of the interpretation to the facts. As such, it is unnecessary to introduce the complex concept of mixed issues into this review. See para. 164 of Justice Deschamps' dissent in **Dunsmuir**.

[12] See also **Savary v. Nova Scotia (Department of Community Services)**, 2009 NSSC 123, 2009 CarswellNS 298, at paras. 6-16.

[13] The Appeal board was not making determinations of fact in this case. The question of which legislation to apply, whether to apply a directive or a policy and the definition of "respite" are matters of law. The standard of review is therefore correctness.

ISSUES

1) Directive vs. Policy

[14] The respondent client submits that if an internal directive is intended to override an existing policy, it should be integrated into the written policy, and thus made available for public knowledge. It appears that the monthly funding the respondent was receiving before the Board decision totalled some $2330, which was in excess of the $2200 limit indicated by the October 2006 Directive. Evidently, the respondent submits, the Department had not followed its own

Directive in setting her previous level of support, but then sought to rely on the Directive to limit the additional funding request. The respondent submits that the Board's decision, based on the language of the DFS Policy in existence on January 29, 2010, was correct.

[15] The Department denies that it conceded in the Appeal Board hearing that it reviewed the application under the wrong program, and maintains that the only error it conceded was the reference to the ESIAA in the administrative review decision. The Department says the respondent's request was properly considered under the Direct Family Support Program. The Department also maintains that, contrary to the statement in the decision, it "only agreed that regulations supercede the directive. It was clearly stated that the Directive modifies or changes the policy and overrules it."

[16] The Department's position is that the Appeal Board erred in holding that the Directive could not displace a policy. According to the Department, "[p]olicy is created by the Department and at any time can be changed or modified by the Department. Any statement or change to policy becomes part of that body of policy. The latest statement of Department policy is what is that binding policy, even if that particular statement is not integrated into a consolidated policy." The Department says the Appeal Board "effectively ignored" the Directive, which had changed the Department's policy, resulting in a decision that effectively applied the "outdated policy." As such, the Department submits, the decision should be quashed for being "based on the wrong policy," so that it can be reheard under the "proper policy."

[17] The Department offered no support for the proposition that the Appeal Board erred in applying the language of the DFS Policy. The claim that the directive amounted to the creation of a new policy was not supported by reference to any enactment – whether statute, regulation or policy – that would bear out such a submission. Leaving aside the question of whether the Department agreed that a directive could not displace a policy, there is no basis on the arguments advanced by the Department to conclude that the Board was incorrect in relying upon the policy.

(2) Indicating legislative authority

[18] The applicant takes the position that the Appeal Board erred in failing to identify the provisions of the Act and regulations upon which the decision was based. Referring in particular to ss. 13(2) and (4) of the *Employment Support and Income Assistance Act*, the Department says the Appeal Board's decision did not cite any legislative authority, contrary to the requirement in s. 13(4) that "[a] decision of the board shall contain the facts found by the board, a statement of the issue in the appeal, the applicable provisions of this Act and the regulations and a statement of the reasons for the board's decision."

[19] The Department cites **Nova Scotia (Department of Community Services) v. Brenna**, 2006 NSCA 8, [2006] N.S.J. No. 18 (C.A.), where the Court of Appeal dismissed an appeal of a chambers judge's decision to quash a decision of the Assistance Appeal Board. Cromwell J.A. (as he then was), said, at paras. 3-4:

> The issue before the Board was whether the Department had been justified in discontinuing Mr. Brenna's benefits and finding an overpayment on either of two bases: (i) that he failed to disclose his ownership of certain real property; and, (ii) that he had refused to provide additional financial information or a proper authorization for the Department to obtain it when such had been demanded. The Board's obligation was to " ... determine the facts and whether the decision made, on the basis of the facts found by the board, [was] in compliance with ... [the Act] ...": s. 13(2) *Employment Support and Income Assistance Act*, S.N.S. 2000, c. 27. Where the Board determines that the decision is contrary to the Act and the regulations, it is to vary or reverse the decision in accordance with the Act and the regulations: s. 13(3).
>
> It is apparent from the reasons of the Board that it failed both to make critical findings of fact and to reach conclusions about how the Act ought to be applied to the facts. It did not make a finding as to whether Mr. Brenna failed to disclose his ownership of property or whether he had failed to provide financial information when it was demanded. It did not determine whether the decision was contrary to the Act and the regulations. The Board thus, in our view, failed fundamentally to discharge the tasks assigned to it under ss. 13(2) and 13(3) of the Act. On any standard of review, that is a reversible error. The appellant says in his factum that the test on judicial review is whether the tribunal did its job. In this case, the Board did not do the job assigned to it by the Act.

[20] The Department says the Appeal Board decision "has very similar errors" to those addressed in **Brenna**. It argues that it was necessary for the Appeal Board to identify the provisions of the statute or regulations it was relying upon, whether it was the *Employment Support and Income Assistance Act* or the *Social Assistance*

Act. The respondent says the Board was not required to refer to legislation that does not directly apply to the circumstances. The Appeal Board relied on the Direct Family Support Program. Sections 6.3, 6.3.1 and 6.3.2 of the Direct Family Policy are specifically referenced in the decision. The respondent submits that there were no "applicable provisions" for the purpose of s. 13(4) of the ESIAA.

[21] I have rejected the appellant's submission that the policy upon which the Appeal Board relied was overridden or superseded by a subsequent directive (Issue (1)). The applicant does not otherwise suggest that the published policy was *ultra vires*, or that the Department personnel were not expected to adhere to it. The Department's authority to implement policy was not an issue before the Appeal Board, and it was not necessary when rendering its decision that the Board examine the *Employment Support and Income Assistance Act* and Regulation 26 to trace the policy's origin. It can be assumed that the applicant knows the basis for its published policies, and no prejudice arises when the Board does not identify authority to support implementation. It was sufficient for the Appeal Board to identify the sections of the Direct Family Services policy upon which it based its decision.

[22] I am satisfied that the Board identified the authority under which it was dealing with the appeal. The appeal did not involve the direct interpretation of a provision of an Act or regulation, but was concerned with a Departmental policy, which the Board identified. I am not satisfied that the Board was incorrect on this ground.

[23] The Department also says the Appeal Board applied the wrong legislation. As has been noted, the Appeal Board relied on sections 6.3, 6.3.1 and 6.3.2 of the Direct Family Support policy. The Department submits that the *Employment Support and Income Assistance Act* does not apply to the Direct Family Support Program. It argues that the respondent is not an ESIAA "recipient" – that is, "a person who is receiving assistance" – as defined in the *Employment Support and Income Assistance Regulations*, N.S. Reg. 25/2001, s. 2(z). She is therefore not entitled to receive assistance pursuant to the ESIAA, nor is she entitled to "special needs" funding. The respondent's position is that she is a "person in need" under s. 3(g) of the ESIAA, and therefore is entitled to assistance under s. 7, and under ss. 24-27 of the *ESIAA Regulations* for special needs, if the ESIAA applies in the circumstances. A "person in need" pursuant to s. 3(g) is,

> a person whose requirements for basic needs, special needs and employment services as prescribed in the regulations exceed the income, assets and other resources available to that person as determined pursuant to the regulations.

[24] The Department says the Services for Persons with Disabilities Program "serves children, youth and adults with intellectual disabilities, long-term mental illness and physical disabilities in a range of community-based, residential and vocational/day programs," under the "combined authority of the *Social Assistance Act*, R.S.N.S. 1989, c. 432, and the *Homes for Special Care Act*, R.S.N.S. 1989, c. 203. The introduction of the ESIAA in 2000 led to the repeal of certain sections of the *Social Assistance Act*, while the rest remained in force "as supporting legislation for SPD programs." As such, the Department submits, the program is governed by the *Social Assistance Act*, and the Appeal Board erroneously applied the wrong legislation.

[25] The respondent adds the additional submission that if she were not cared for at home by her mother, she would presumably be in a home for special care or community-based option home. As such, it is argued, she should be considered to be covered by the *Social Assistance Act* provisions governing "persons in need" living in those facilities. I am not convinced that this is a supportable position.

[26] Respondent's counsel adds that if the Services for Persons with Disabilities program is governed by the *Social Assistance Act*, it would be unclear how a person in need would seek additional funding for special needs under that Act. As such, it is argued, the ESIAA provisions should be relied upon.

[27] I do not conclude that the Appeal Board was incorrect in (apparently) applying the ESIAA. The network of legislation governing social assistance is confusing. The Appeal Board relied on the Department's Direct Family Support Policy when it awarded respite funding, and I am unable to discern a principled basis upon which to conclude that in doing so it was wrong to apply the broad definition of "person in need" under the ESIAA (assuming that this is indeed what it did). In all the circumstances, I cannot conclude that the Appeal Board erred on a correctness standard on this ground.

(3) Interpretation of "respite"

[28] The respondent submits that the Appeal Board correctly interpreted the meaning of ‘respite" in the Department's Direct Family Support Policy (July 28, 2006), where it is defined as follows at s. 2.25:

> Respite is the relief provided to the parent, family, guardian or an individual with a disability, for a specific period of time. The main function of respite is to provide the Individual with a positive and rewarding experience while at the same time providing the primary care giver with a break from care and the supervision of their family member with a disability.

[29] The respondent maintains that the caregiver requires funding for hiring additional caregivers on weekends when she is not at work in order to allow her time to rest and do chores or errands, and that the time she is at work cannot reasonably be considered respite time in the sense contemplated by the policy. While there was no specific reference to this definition in the Appeal Board's decision, there is no basis upon which to find that the Board incorrectly interpreted the meaning of "respite."

(4) The request for funding up to $1200

[30] The respondent submits that the Appeal Board erred in refusing to increase her funding by $1200 in accordance with the new evidence that the Appeal Board rejected as being untimely. Counsel submits that the Appeal Board should have considered the additional evidence, despite the absence of such a procedure from the legislative scheme, citing **Welsh v. Mont**, 2002 CarswellNS 599 (S.C.) (an application for leave to amend a defence) and **Caldi v. Budget Rent-A-Car** (1995), 140 N.S.R. (2d) 158, 1995 CarswellNS 19 (C.A.) (an application for leave to amend a statement of claim). Neither case deals with an attempt to introduce new evidence before a statutory appeal tribunal. Section 13 of the ESIAA does not contemplate the introduction of new evidence before the Appeal Board, and I am satisfied that the Board's decision to exclude the new evidence should not be disturbed, whether the standard of review is correctness or reasonableness.

CONCLUSION

[31] For the foregoing reasons, the application is dismissed. If the parties are unable to agree with respect to costs, written submissions may be provided within 30 days.

J.