SUPREME COURT OF NOVA SCOTIA

Citation: Amero v. Nova Scotia (Community Services), 2017 NSSC 231

Date: 2017-08-30
Docket: *Annapolis Royal*, No. SAR 462118
Registry: ANNAPOLIS ROYAL

Between:

CYNTHIA AMERO

Applicant

v.

MINISTER OF COMMUNITY SERVICES and the ASSISTANCE APPEAL BOARD

Respondents

Judge: The Honourable Justice Pierre L. Muise

Heard: June 21, 2017, in Digby, Nova Scotia

Counsel: David Baker, for the Applicant
Sheldon Choo, for the Respondent,
Minister of Community Services
Appeal Board not participating

INTRODUCTION

[1] In July 2016, the Department of Community Services ("DCS") granted Cynthia Amero, and her spouse, Matthew Amero, income assistance. It was an interim measure to support them until the anticipated renewal of Mr. Amero's funding through Employment Nova Scotia, in September 2016, when he would be returning to his educational program.

[2] On August 24, 2016, Ms. Amero advised her Caseworker that she and Mr. Amero had separated. By letter dated August 31, 2016, she was informed that her income assistance had been "discontinued due to separation for convenience". The decision was upheld in the Administrative Review that followed. Ms. Amero appealed to the Assistance Appeal Board ("the Board"). The Board agreed with DCS's determination regarding eligibility.

[3] Ms. Amero brought the matter to this Court for Judicial Review.

[4] There is no dispute that the standard of review is that of reasonableness, and applies to the determination of facts, along with the interpretation and application of the *Employment Support and Income Assistance Act* and the *Employment Support and Income Assistance Regulations*, as no jurisdictional or constitutional questions, nor questions of law "of central importance to the legal system as a

whole and that are outside the [Board's] expertise", are raised: ***Jivalian v. Nova Scotia (Community Services)***, 2013 NSCA 2; ***Sally McIntyre v. Department of Community Services (Nova Scotia)***, 2012 NSCA 106; and, ***Sparks v. Nova Scotia (Assistance Appeal Board)***, 2016 NSSC 201.

ISSUE

[5] The issue to be determined is whether the decision of the Board was reasonable.

LAW AND ANALYSIS

APPROACH TO ASSESSING REASONABLENESS

[6] The Supreme Court of Canada, in ***Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)***, 2011 SCC 62, dealt with a situation where a decision was found to be unreasonable on judicial review based on insufficiency of reasons. At paragraphs 11 to 18, Justice Abella, for a unanimous Court, provided the following comments on the proper approach to assessing reasonableness on judicial review:

> "**11** It is worth repeating the key passages in *Dunsmuir* that frame this analysis:
>
> > Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of

> reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> ... What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in respect for governmental decisions to create administrative bodies with delegated powers" ... . We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of [page714] a decision"... . [Emphasis added; citations omitted; paras. 47-48.]

12 It is important to emphasize the Court's endorsement of Professor Dyzenhaus's observation that the notion of deference to administrative tribunal decision-making requires "a respectful attention to the reasons offered or which could be offered in support of a decision". In his cited article, Professor Dyzenhaus explains how reasonableness applies to reasons as follows:

> "Reasonable" means here that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise,

> etc, then it is also the case that its decision should be presumed to be correct even if its reasons are in some respects defective. [Emphasis added.]

….

14 Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses - one for the reasons and a separate one for the result (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at ss.12: 5330 and 12: 5510). It is a more organic exercise - the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).

15 In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.

16 Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

17 The fact that there may be an alternative interpretation of the agreement to that provided by the arbitrator does not inevitably lead to the conclusion that the arbitrator's decision should be set aside if the decision itself is in the realm of reasonable outcomes. Reviewing judges should pay "respectful attention" to the decision-maker's reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful.

18 Evans J.A. in *Canada Post Corp. v. Public Service Alliance of Canada*, 2010 FCA 56, [2011] 2 F.C.R. 221, explained in reasons upheld by this Court (2011 SCC 57, [2011] 3 S.C.R. 572) that *Dunsmuir* seeks to "avoid an unduly formalistic approach to judicial review" (para. 164). He notes that "perfection is not the standard" and suggests that reviewing courts should ask whether "when

> read in light of the evidence before it and the nature of its statutory task, the Tribunal's reasons adequately explain the bases of its decision" (para. 163). I found the description by the Respondents in their Factum particularly helpful in explaining the nature of the exercise:
>
> > When reviewing a decision of an administrative body on the reasonableness standard, the guiding principle is deference. Reasons are not to be reviewed in a vacuum - the result is to be looked at in the context of the evidence, the parties' submissions and the process. Reasons do not have to be perfect. They do not have to be comprehensive. [para. 44]"

[7] In ***Construction Labour Relations v. Driver Iron Inc.***, 2012 SCC 65, the Court, at paragraph 3, relying on its prior decision in ***Newfoundland and Labrador Nurses' Union***, summarized the approach to determining reasonableness of a decision of an administrative body as follows:

> "The Board did not have to explicitly address all possible shades of meaning of these provisions [of the *Labour Relations Code*]. This Court has strongly emphasized that administrative tribunals do not have to consider and comment upon every issue raised by the parties in their reasons. For reviewing courts, the issue remains whether the decision, viewed as a whole in the context of the record, is reasonable … ."

[8] A finding of fact will be reasonable if there is some evidence reasonably supporting it: ***Bresson v. Nova Scotia (Community Services)***, 2016 NSSC 64, at para 49; and, Sara Blake, *Administrative Law in Canada*, *5th Edition* (Toronto: LexisNexis, 2011), at page 219.

APPLICATION TO THE DECISION OF THE BOARD

[9] The Board's decision was rendered in an appeal from the Administrative Review upholding the caseworker's decision on assistance eligibility as of August 31, 2016. Therefore, I must assess the reasonableness of the Board's decision in the context of the circumstances which existed on August 31, 2016.

[10] However, the Board received additional evidence which was not presented to the Caseworker, nor in the Administrative Review. That additional information must be considered, along with the information in the Caseworker's termination letter and in the Administrative Review Report, which were before the Board, in assessing the reasonableness of the Board's decision.

[11] As provided in Section 13(2) of the ***Employment Support and Income Assistance Act***, S.N.S. 2000, c. 27, (the "Act"), the Board has a duty to "determine the facts and whether the decision made, on the basis of the facts found by the board, is in compliance with [the] Act and the regulations".

[12] Therefore, I must assess whether the Board was a reasonable in its: findings of the facts essential to its decision; interpretation and application of the Act and regulations; and, upholding of the DCS Decision.

Was the Board Reasonable in Its Findings of Essential Facts?

[13] The central essential finding of fact made by the Board is that Ms. Amero "was still in a family unit relationship" in September 2016, thus, finding that, as of August 31, 2016, she would also have been in that relationship.

[14] It also referred to the income of Ms. Amero's spouse from Employment Nova Scotia without stating the amount. However, there does not appear to have been any dispute that his Employment Nova Scotia income was based on a five-person family, as it had been prior to Ms. Amero applying for assistance in the first place. Therefore, it was unnecessary for the Board to make a specific finding of fact as to the amount of her spouse's income.

[15] The decision of the Board notes that it came to its conclusion regarding the continued existence of the family unit relationship "after analyzing all the information and facts presented". Unfortunately, the "Analysis" portion of the decision is not thorough and comprehensive. However, I must look to the record as a whole, to see whether there are additional reasons and information which could be offered to supplement those articulated by the Board and support its conclusion, without substituting my own reasons for those of the Board.

[16] I will have to take the same approach in assessing the reasonableness of the Board's: interpretation and application of the relevant statutory provisions; and, upholding of the DCS Decision.

[17] The "Analysis" notes a belief in the sincerity of Ms. Amero's desire to have all her children under her care and of her concern for her eldest daughter. It also states: "The decision to separate as both husband and wife and as a family unit was taken because of the eldest daughter not wanting to continue living under the same roof as her father."

[18] Viewed in isolation, those comments would appear to be inconsistent with the stated finding of a continued family unit relationship, as well as with the upholding of the DCS decision based on separation for convenience. However, they cannot be viewed in isolation. They must be read in the context of the decision and record as a whole.

[19] The Analysis highlights various reasons for which the entire family planned to move to Yarmouth, including services for the children and it being the location of the educational institution Mr. Amero would be attending in September, having switched from the Digby Campus to the Yarmouth Campus.

[20] It also states: “The decision to separate seems to have been made within a short time span that occurred in mid-august as the family was looking to relocate to Yarmouth.” In addition, it notes that nothing was done to begin the process of a legal separation.

[21] These other comments, and the information upon which they are based, support a finding that, even if a joint decision was made that the father would, at some point, vacate the house to facilitate the return of the eldest daughter, they were still making decisions and functioning as a joint family unit, and, as such, had not actually ruptured the family unit relationship.

[22] There is also the following additional support for such a conclusion in the record.

[23] On August 24, 2016, Ms. Amero sent her caseworker an email advising that she and her husband had separated several weeks prior, even though they were still living in the same home. On the same day, her husband signed a contract for funding with Employment Nova Scotia which would have him receive a weekly family rate for a five-person family unit.

[24] As of September 2016, the eldest daughter was still residing at SHYFT, a youth transition house in Yarmouth. Thus, the purported reason for him to reside in

a different home had not yet materialized at the point when Ms. Amero alleged they had “separated”.

[25] Both Mr. and Ms. Amero had reported that, as of September, they were still residing in the same home, albeit with Mr. Amero staying in the basement. Ms. Amero stated that this was because the “homestead” was no longer liveable and she had not found other accommodations. In my view, the living circumstances were consistent with continued functioning as a joint family unit, and inconsistent with there having been a “separation” to facilitate the eldest daughter’s return.

[26] Mr. Amero had two motor vehicles. Ms. Amero paid the insurance on, and used, one of them, indicating financial interdependence.

[27] In my view, there was sufficient evidence before the Board to support its finding of a continued family relationship, and, its conclusion on that point was within the “range of acceptable and rational solutions”.

Was the Board Reasonable in Its Interpretation and Application of the Act and Regulations?

[28] All three decisions made in this matter refer to s. 10 of the *Employment Support and Income Assistance Regulations*, N.S. Reg. 24/2001, as amended. It states: “An applicant is not eligible to receive assistance if the applicant has

separated from his or her spouse for the purpose of enabling the applicant to qualify for assistance."

[29] Both DCS decisions cited DCS Policy 5.17.3, which states: "An applicant/recipient is not eligible to receive or to continue to receive ESIA when the couple separate to qualify for ESIA." That indicates it interpreted s. 10 as applying to both applicants and recipients.

[30] The Board upheld the DCS decision and concluded that, despite it not being a "new application", s.10 had "some bearing" on Ms. Amero's request to have her situation reviewed.

[31] Ms. Amero takes the position that s. 10 does not apply to her situation because she was already receiving assistance, and, therefore, was a "recipient" as defined in s. 2(z) of the *Regulations*, not an "applicant", which is defined in s. 2(c) as meaning "a person who applies for assistance". She submits that: it was unreasonable to conclude s. 10 applied; and, instead, s. 15(4) of the *Regulations* applies to her situation as it involves a change in circumstances.

[32] S. 15(4) states:

> "A caseworker shall increase, reduce, discontinue or suspend assistance to a recipient where there is a change in the circumstances of the recipient or person

> on whose behalf assistance is being provided to the recipient that relates to the recipient's eligibility for assistance." [Emphasis by underlining added]

[33] S. 15(4) clearly does apply.

[34] However, in my view, it is within the range of rational and acceptable outcomes to conclude that the reference in s. 15(4) to a change which relates to the recipient's eligibility also incorporates, and brings into play, provisions dealing with eligibility, including s. 10.

[35] Sections 10 to 13 of the *Regulations* each describe a different situation of non-eligibility. Sections 10 and 11 refer to an "applicant" not being eligible, while sections 12 and 13 refer to an "applicant or recipient". The exclusion in sections 10 and 11 of the reference to a "recipient" might arguably make it reasonable for the Board to have interpreted s. 15(4) as bringing into play only sections 12 and 13, and not sections 10 and 11.

[36] However, the question is not whether there is another reasonable interpretation. It is whether the interpretation in question was reasonable.

[37] Sections 10 to 13 all refer to ineligibility to "receive" assistance. In contrast, s. 14(2) describes a situation where a person is not eligible to "apply" for assistance. If s. 10 was meant to apply only to persons making an application for assistance, similar language stating the person in question would not be eligible to

apply could have been used. This supports the reasonableness of a conclusion that the reference to "recipient" was omitted from s. 10, not because it was intended to have no application to a person who had already been receiving assistance, but because the Legislature did not foresee a situation where a recipient would separate to qualify or continue to qualify for assistance. That is because the removal of a person from a household, by itself, would, on its face, reduce the amount of assistance required.

[38] Also, unlike s. 11, s. 10 does not make reference to the described circumstances existing "at the time of the application". That difference is support for the reasonableness of a conclusion that s. 10 would apply when determining continued eligibility of a recipient, even if s. 11 was determined not to apply.

[39] It would have been preferable if the Board's decision had more clearly articulated the link between s. 15(4) and s. 10 of the *Regulations*. However, the reasonableness standard of review does not require every point leading to the conclusion to be articulated, nor every argument to be addressed.

[40] Also, I refer once again to the noteworthy comment at the bottom of the second from last page of the Board's decision, that, despite it not being a "new" application for assistance, s. 10 "has some bearing in that the separation issue is

still pre-dominant in the appellant's request to have her situation reviewed". In my view, in making that comment, combined with its consideration of the income of the Applicant's spouse, the Board was articulating how s. 10 informs the eligibility inquiry associated with a purported change in circumstances.

[41] This reasoning is sufficiently "justifiable, intelligible and transparent", to meet the reasonableness standard.

[42] Ultimately, the decision to discontinue assistance was based upon the finding that the change, i.e. the purported "separation", did not involve an actual separation. It was presented to the caseworker as being a separation to facilitate the daughter's return to the home, even though that had not even occurred by the time of the hearing before the Board. It was presented to continue the Applicant's eligibility to receive assistance past the pre-determined time of termination, which was when the Applicant's spouse would, once again, have arranged Employment Nova Scotia funding.

[43] The reference to the request for review not being a "new" application, in my view, is an articulation of a finding that, Ms. Amero was asking that her situation be reviewed so that she could qualify for assistance past the pre-determined termination time.

[44] In such circumstances, in the event I am wrong in concluding that the determination that s. 10 applies to recipients was reasonable, it was reasonable to treat the request for review as an application to extend assistance benefits, and, thus, reasonable to conclude that s. 10 had "some bearing on", or application to, the issue.

[45] Ms. Amero also argued that the finding that Ms. Amero and her spouse remained in a family unit relationship made it unreasonable to conclude that there was a separation to qualify for assistance.

[46] There was a finding that they were still in a spousal relationship, for reasons which included continued sharing of a residence and car, planning a "separation" only to facilitate the daughter's return, and continued financial interdependence. That finding did not change the fact that Ms. Amero had put forward what she characterized as a separation for the purposes of prolonging eligibility.

[47] In my view, it would not make sense to discontinue assistance where there was an actual separation effected for the purpose of enabling an applicant to continue to qualify for assistance, while not doing so in a purported separation situation, such as the case at hand. Therefore, I view the approach taken by the Board as being reasonable.

[48] The Board referred to the Employment Nova Scotia source of income. It had been noted in the initial letter of discontinuance that the Applicant's spouse would be receiving that income based upon the full family unit. The Board, citing s. 47(1)(a) of the *Regulations*, considered it.

[49] In my view, it was reasonable for the Board to interpret s. 47 as requiring consideration of the fact that the Applicant's spouse would be receiving that income. It articulated its conclusion on that point as being that "the Department's determination of eligibility at this time should have included the entire family income of both the appellant and the spouse".

[50] S. 7(2)(b) of the *Act* mandates such an approach. It states that persons assisting the Minister of Community Services "shall", among other things, "determine the other forms of assistance available that would benefit the applicant". In my view, that includes the income of the Applicant's spouse.

[51] It results in an outcome which is in keeping with the purposes of the *Act*, as identified in the preamble, which states, among other things, that "employment support and income assistance must be effective, efficient, integrated, coordinated and financially and administratively accountable". If the Department had ignored

the Employment Nova Scotia benefits, it would have failed to meet the objectives of efficiency, integration, coordination and accountability.

[52] For these reasons, I am of the view that the Board's interpretation and application of s. 47(1)(a) of the *Regulations* was also reasonable.

Was It Reasonable for the Board to Uphold the DCS Decision?

[53] The Administrative Review conclusion was that, even if the Applicant and her spouse decided to separate to accommodate their eldest daughter's issues, they were still a family unit, and the total family income was to be considered in determining eligibility for assistance. That included the "second phase" of the Employment Nova Scotia funding her spouse was approved for. That decision upheld the conclusion reached by the Caseworker that Ms. Amero's assistance was being "discontinued due to separation for convenience", given that her spouse would be receiving Employment Nova Scotia funding based on a five-person family unit.

[54] For the reasons already noted, I have found to be reasonable the Board's: findings of essential facts; and, interpretation and application of the relevant portions of the *Act* and *Regulations*. The Board concluded there was a statutory requirement to consider the entire family income in determining eligibility,

including on a purported change in circumstances, where the person seeking income assistance remains in the family unit relationship in question. Applying that statutory requirement to the finding that Ms. Amero remained in a family unit relationship which included her spouse, it was reasonable to consider the Employment Nova Scotia funding for a five-person family unit her spouse had been approved for.

[55] When Ms. Amero was approved for income assistance, it was to bridge the gap between the termination of the Employment Nova Scotia funding to her spouse at the end of the school year and its anticipated reinstatement at the beginning of the ensuing school year. Funding was reinstated at the five-person family unit level. In my view, in those circumstances, it was within the range of acceptable and rational incomes that the assistance to Ms. Amero be discontinued.

[56] Conversely, in my view, in the factual circumstances found to have existed, ignoring the reinstatement of the Employment Nova Scotia funding would not have produced a rational and acceptable outcome. It would have resulted in the family unit double-dipping, as the family unit was fully funded through Employment Nova Scotia.

[57] As such, in my view, it was reasonable for the Board to uphold the DCS decision to terminate Ms. Amero's income assistance.

CONCLUSION

[58] For the reasons I have outlined, having read the reasons of the Board, which are sufficiently intelligible, together with the outcome reached by it, and looking to the Record as a whole, I am of the view that the Board's decision falls within the range of acceptable and rational solutions. As such I conclude that it is reasonable.

[59] No party is seeking costs.

[60] Therefore, Ms. Amero's Application for Judicial Review of the Board's decision is dismissed without costs to any party.

ORDER

[61] I ask counsel for the Minister of Community Services to prepare the order.

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Pierre Muise, J.