SUPREME COURT OF YUKON

Citation: *Holbein v. Director of Social Supports*, 2019 YKSC 31

Date: 20190628
S.C. No. 19-AP002
Registry: Whitehorse

BETWEEN

BYRON HOLBEIN

APPELLANT

AND

THE DIRECTOR OF SOCIAL SUPPORTS and
THE SOCIAL ASSISTANCE REVIEW COMMITTEE

RESPONDENTS

Before Mr. Justice G. Mulligan

Appearances:
Baird Makinson — Counsel for the appellant
Karen Wenckebach — Counsel for the respondents

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an appeal of the decision of the Social Assistance Review Committee ("SARC") dated April 12, 2019.

[2] The relief sought by the Appellant, Byron Holbein ("Holbein") is captured in his Amended Notice of Appeal, as follows:

> That the court send this matter back to the Social Assistance Review Committee for rehearing with directions that the RWAM short term disability payments received by Mr. Holbein were "earned income" for the purposes of the *Social Assistance Regulations*.

[3] The background facts are not in dispute.

[4] As a result of illness, Mr. Holbein was forced to leave employment and became eligible for short term disability payments. He had been employed at Home Hardware. Those benefits were provided by RWAM Disability Management. He subscribed to this monthly benefit plan after six months of employment and paid $70.28 per month as a payroll deduction. The amounts he received were calculated based upon his pre-disability weekly earnings, and were fully taxable.

[5] Were the short term disability payments received "earned income" or were they "insurance benefits"? This is the discrete issue that faced SARC and is at issue in this appeal. SARC framed the issue in its written decision, as follows:

> Issue:
>
> The issue raised during this review is whether Mr. Holbein's income from RWAM Disability Management should be considered as earned income under the Social Assistance Act and Regulation, thus eligible for the 50%/25% earned income deduction and the $3,900 YSA deduction, or should be considered as insurance income that is not earned, thus not eligible for the earned income or YSA deductions, when determining eligibility for social assistance.

Jurisdiction

[6] The *Social Assistance Act,* R.S.Y. 2002, c. 205, as amended, (the "*Act*") provides that an appeal lies to the Supreme Court of Yukon. Paragraph 12 provides:

> 12(1) The parties to a review request may appeal the decision to the Supreme Court on a question of law or fact within 30 days of the date of the committee's decision.
>
> (2) The Supreme Court may
>
> (a) confirm or rescind the decision of the committee;

> (b) substitute its decision for that of the committee, exercising in doing so all the powers of the committee; or
>
> (c) refer the matter back to the committee for rehearing, in whole or in part, in accordance with such directions as the court considers proper.
>
> (3) An appeal to the court does not suspend the effect of the decision being appealed, unless the court on application orders otherwise. S.Y. 2008, c.22, s.10

[7] In this case, the Director determined that these benefits were insurance and not earned income.

[8] The majority of the Committee agreed with the Director but added this comment within its written decision: "The Committee would like to comment that it would be beneficial to have more clearly defined legislation regarding earned income."

[9] The minority came to a different conclusion stating:

> As there is no specific definition for earned income, it is not clear that insurance payments received through a benefit plan that is part of someone's employment situation should not be considered as earned income. There does not appear to be precedent for disability benefit payments to be considered as earned income, in other Canadian jurisdictions.
>
> In line with the Yukon Interpretation Act, Section 10, I believe the department should interpret the definition as per the intent of the Social Assistance legislation, which is clearly benefit-conferring. (emphasis in original)

[10] The regulations under the *Act* provide no definition of "earned income". Income is defined in s. 8 of the *Social Assistance Act Regulations* (the "*Regulations*"), in part as follows:

> 8.(1) The income of an individual for an income measurement period is the total of all amounts, net of mandatory source deductions, that the individual received

> (or, for greater certainty, is deemed by this section to have received) during the income measurement period
> (a) as salary, wages and other remuneration, including gratuities, in respect of an office or employment;
>
> …
>
> (c) as income from property (determined, in the case of income from the rental of a part of the individual's home, under subsection (6));
>
> (d) as income from trapping, logging, fishing, farming and any other business carried on by the individual;
>
> (e) as proceeds of insurance or compensation awarded by a court or received in settlement of a legal liability, except amounts that are in respect of damage to, or loss of, property and that are used to repair the damage or to replace the lost property.

Standard of Review

[11] The parties do no agree in the standard of review to be applied here.

[12] The appellant submits that the standard of review is correctness, pointing out the four factors as set out by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, ("*Dunsmuir*") at para. 64:

> [64] 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…

[13] I pause to note that the *Act* does not contain a privative clause. But as noted in *Dunsmuir* at para. 64:

> … 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.

[14] The respondents submit that the standard of review is reasonableness. As the Supreme Court of Canada stated in *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, ("*Edmonton*") at para. 22:

> [22] Unless the jurisprudence has already settled the applicable standard of review (*Dunsmuir*, at para. 62), the reviewing court should begin by considering whether the issue involves the interpretation by an administrative body of its own statute or statutes closely connected to its function. If so, the standard of review is presumed to be reasonableness (*Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 46). This presumption of deference on judicial review respects the principle of legislative supremacy and the choice made to delegate decision making to a tribunal, rather than the courts. A presumption of deference on judicial review also fosters access to justice to the extent the legislative choice to delegate a matter to a flexible and expert tribunal provides parties with a speedier and less expensive form of decision making.

[15] As the respondents state in their outline at para. 8(c), based on guidance from *Edmonton*:

> 8(c) Circumstances in which the presumption of reasonableness will be rebutted, and a standard of correctness applied are:
>
> (i) Constitutional questions regarding the division of powers;
>
> (ii) Issues "both central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise";
>
> (iii) "true questions of jurisdiction or *vires*"; and
>
> (iv) Issues "regarding the jurisdictional lines between two or more competing specialized tribunals".

Analysis on the Standard of Review

[16] The appellant submits that the standard of review is correctness, the issue having been determined in *Myttenar v. Social Services (Director of)*, 2005 YKSC 73, ("*Myttenar*") at paras. 20-27.

[17] The respondents submit that the standard is reasonableness noting that *Myttenar* was decided prior to the Supreme Court of Canada's guidance in *Dunsmuir*.

[18] Both parties further acknowledge that the legislation has been substantially changed since the *Myttenar* decision.

[19] I am satisfied that the standard is reasonableness. Although there is no privative clause, the Committee was interpreting its home statute. The members of the Committee are presumed to have expertise in interpreting the *Act*. Section 9(2)(c) provides, "the membership should include persons with knowledge or experience of persons in need of assistance."

[20] The role of the Committee is outlined in s. 10.1 of the *Act* as follows:

> 10.1 The role of the committee under this Act is to reassure applicants that their applications for assistance receive impartial consideration and that the resulting decisions as to eligibility and amount
>
> (a) are based on reasonable findings of fact; and
>
> (b) result from a reasonable application of the regulations to those findings of fact.

[21] In my view, the presumption of reasonableness has not been rebutted.

[22] At the conclusion of this motion, I asked the respondents to provide an affidavit as to how the Director would deal with a recipient who was in receipt of employment insurance ("EI"). EI is a form of public income benefits provided by the Government of

Canada to qualified workers after their employment has ended. EI is funded by mandatory contributions by employers and employees.

[23] Both parties were then invited to make further submissions. Those submissions have now been received.

[24] Both agreed that any additional evidence not be taken into account in any decision of the court.

Definition of Earned Income

[25] It is clear that the *Act* and *Regulations* do not define "earned income". The Committee wrestled with the decision and one member dissented. The majority found that these short term disability benefits were not earned income and thus, not entitled to the earned income benefits provided by the legislation.

[26] In *British Columbia v. McLean*, 2013 SCC 67, the Supreme Court of Canada provided this guidance at paras. 40 and 41:

> [40] The bottom line here, then, is that the Commission holds the interpretative upper hand: under reasonableness review, we defer to *any* reasonable interpretation adopted by an administrative decision maker, *even if* other reasonable interpretations may exist. Because the legislature charged the administrative decision maker rather than the courts with "administer[ing] and apply[ing]" its home statute (*Pezim*, at p. 596), it is the decision maker, first and foremost, that has the discretion to resolve a statutory uncertainty by adopting any interpretation that the statutory language can reasonably bear. Judicial deference in such instances is itself a principle of modern statutory interpretation.
>
> [41] Accordingly, the appellant's burden here is not only to show that her competing interpretation is reasonable, but also that the Commission's interpretation is *unreasonable*. And that she has not done. Here, the Commission, with the benefit of its expertise, chose the

> interpretation it did. And because that interpretation has not been shown to be an unreasonable one, there is no basis for us to interfere on judicial review — even in the face of a competing reasonable interpretation.

CONCLUSION

[27] The *Social Assistance Act* and *Regulations* enables a recipient to receive income, to a limited extent, while in receipt of benefits. *Regulation* s. 9(1)(b) states:

> (b) if the applicant was excluded from the labour force during all or substantially all of the income measurement period, earned income to a maximum total of $3,900 for the calendar year in which the income measurement period ends …

[28] However, "earned income" is not defined.

[29] The Committee noted the submission of the respondents in its decision stating:

> …[Counsel] argued that Mr. Holbein's income falls into 8.(1)(e) as proceeds of insurance, because Mr. Holbein paid into a benefit plan, to be able to access a disability benefit if required, and was indeed now in receipt of such benefits. [Counsel] also discussed the dictionary definition of earned, as "to receive as return for effort and esp. for work done or services rendered" and that her opinion was that Mr. Holbein was not receiving the insurance just because he had worked. He had had to pay into the benefit plan, and therefore his "proceeds of insurance" were not earned income. …

[30] The Committee then concluded as to the short term disability benefits received by Mr. Holbein:

> … The department indicated they have never considered proceeds of insurance to be earned income. The committee agrees with this interpretation. The committee understands that the legislation does not define earned income and therefore the committee must interpret the legislation's intent, regarding earned income and associated deductions. The committee feels that insurance is not something that is "earned" in the common understanding of the word. …

[31] I am satisfied that the Committee's decision was reasonable and fell within the range of reasonable outcomes. Mr. Holbein was in receipt of short term disability benefits, a form of private insurance. The Committee was interpreting its home statute. Once appointed, the Committee members are presumed to have the level of expertise required by the legislature. The Committee clearly understood the purpose of the legislation. It used its discretion to resolve the statutory uncertainty by adopting a reasonable interpretation of the phrase "earned income". In these circumstances, deference is owed to the Committee.

[32] The appeal by Byron Holbein is dismissed.

[33] No order as to costs was sought, none are awarded.

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MULLIGAN J.