Date: 2010 07 06
Docket: S-0001-CV-2010000104

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

GREG MCMEEKIN

Applicant

- and -

GOVERNMENT OF THE NORTHWEST TERRITORIES
Department of Education, Culture and Employment

Respondent

The style of cause has been amended to reflect the accurate description of the Respondent.

Corrected judgment: A corrigendum was issued on July 7, 2010; the correction has been made to the text and the corrigendum is appended to this judgment.

MEMORANDUM OF JUDGMENT

[1] This is the second time that the applicant has asked this court to judicially review the decision of a statutory appeal committee terminating his eligibility for social assistance payments. For the reasons that follow, the application is dismissed.

Background Circumstances:

[2] The history of this matter was recounted in my reasons for judgment on the earlier judicial review application (cited as 2010 NWTSC 27).

[3] The applicant has a hearing disability. He has been in receipt of income assistance for many years. In June, 2009, a review of his file revealed that the applicant had not filed tax returns for the previous 6 years. A demand was made that he do so since the *Income Assistance Regulations*, made pursuant to the *Social Assistance Act*, R.S.N.W.T. 1988, c. S-10, require recipients of assistance to provide information as to their finances. They further provide that assistance shall be terminated where the recipient refuses or neglects to utilize all financial resources that he or she may access. The point is that by filing tax returns a person becomes entitled to certain rebates such as the GST tax credit and the Northwest Territories cost of living tax credit.

[4] The applicant has consistently refused to comply with these demands. He asserts that the department has no right or authority to make such demands and that any inquiries into his tax status amounts to an invasion of his privacy.

[5] The applicant's income assistance was terminated in August, 2009. In October, 2009, the applicant appealed pursuant to the Act. His appeal was heard by what was called the "Administrative Review Group". The decision to terminate his assistance was upheld. The applicant appealed further to the Social Assistance Appeal Board in November. That Board also upheld the decision to terminate his eligibility for income assistance.

[6] The applicant then brought his first judicial review application. I ordered a rehearing of his appeal since I found that the "Administrative Review Group" was not a lawfully enacted body. I held that the regulation setting up that body was invalid. Therefore a new hearing must be held before a properly constituted social assistance appeal committee as required by the Act. The Minister then proceeded to appoint three members to the Hay River Social Assistance Appeal Committee: Michael Hansen (Chair), Angela Jones and Michelle Staszuk. Copies of their formal appointments, dated April 14, 2010, and signed by the Minister responsible for the Act, have been provided to me (since the applicant questioned their appointments).

[7] The Appeal Committee set May 12, 2010, as the date for the hearing. Notice was given to the applicant. The applicant did not appear. The Committee proceeded with the hearing and upheld the decision to terminate income assistance. Two days later the applicant wrote to the Committee asking that they hold another hearing and give him an opportunity to present his case. He acknowledged that his

non-attendance was due to his own mistake. When the Committee refused a rehearing, the applicant launched this application for judicial review.

Scope of Review:

[8] As I noted in my earlier reasons for judgment, the court's role on judicial review is limited. I recognize that since the applicant is self-represented he may not appreciate the distinction between an appeal on the merits of his case and a judicial review of the legality of the proceedings. Judicial review does not go into the merits unless there is a jurisdictional dimension to the alleged error. The question to be asked on a judicial review, as opposed to an appeal, is whether the tribunal in question exceeded its jurisdiction, lost its jurisdiction or failed to exercise its jurisdiction, or made an error of law.

[9] The limited role of the court in this case is emphasized by the appeal provisions found in the Act. Section 8(1) states that a recipient of income assistance may appeal any decision, first, to the local Appeal Committee and, second, to the Appeal Board. Subsection (5) states that the decision of the Appeal Board is "final". So there is no further right of appeal. The only recourse to the court is the limited one by way of judicial review. The applicant may not like it, or he may not understand it, but a court cannot go around the clearly expressed dictate of the legislature in this regard. There is no inherent right to an appeal on the merits, an appeal to the court, in the absence of statutory authority.

[10] I point this out once more because the applicant includes in this judicial review application claims for damages and costs that have no bearing on the jurisdictional questions that this court is limited to examining.

[11] I will address each of the applicant's claims as I understand them.

1. Apprehension of Bias:

[12] The applicant submitted that the members of the Appeal Committee are biased or, at least, there is a reasonable apprehension of bias. He bases this claim on the following assertions:

(a) Mr. Hansen is a lawyer in private practice who does legal aid work and therefore receives payments from the Legal Services Board, a government entity.

(b) Ms. Jones is employed by the Department of Social Services.

(c) Ms. Staszuk is also a lawyer and has had past personal dealings with the applicant's files and, as well, her husband is employed by the Northwest Territories Power Corporation, another government entity.

[13] An allegation of bias is a jurisdictional issue. In *Canadian Pacific Ltd.* v. *Matsqui Indian Band*, [1995] 1 S.C.R. 3, the Supreme Court stated that one of the principles of natural justice is that a party appearing before an adjudicative tribunal should receive a hearing before a tribunal which is not only independent, but also appears to be independent.

[14] A party, of course, need not establish actual bias. The requirement is that there be demonstrated a reasonable apprehension of bias. And the test for that is the one formulated in *Committee for Justice and Liberty* v. *National Energy Board*, [1978] 1 S.C.R. 369 (at p. 394 per deGrandpré J.): "the reasonable apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information". In other words, "what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude".

[15] This test recognizes that the grounds for the apprehension must be substantial. There must be a probability or reasoned suspicion of biased appraisal and judgment, unintended though it may be. This is to be determined on an objective, rational and informed basis. A mere suspicion of bias is not sufficient; there must be some factual basis to sustain the allegation. The party alleging bias has the onus of proving it on a balance of probabilities. And, it is important to reiterate that the test is not whether a party to the proceeding (such as the applicant) would apprehend bias but whether the reasonable and informed member of the public would apprehend it.

[16] In this case there is no evidence of either Mr. Hansen or Ms. Staszuk ever acting for or against the applicant on any matter. One of the other lawyers in Mr.

Hansen's firm acted for him on some real estate matters in 1996 and 1999 as well as a court matter in 2001. But there is no indication that these two lawyers were involved. Mr. Hansen also gave some advice to the applicant's father some five years ago. Given the time elapsed since these matters were handled, and the unrelated nature of these matters, I fail to see how any reasonable and informed observer would conclude that there was an appearance of bias.

[17] The fact that Mr. Hansen and Ms. Staszuk may take on legal aid cases, and be paid for that by the Legal Services Board, is immaterial. The Board is established as a corporation by legislation; it is administered by a board representing various interests; private lawyers accepting legal aid assignments do so as private contractors; and, the government has no power to direct how the lawyer carries out the assignment or how the lawyer is paid. Furthermore, Mr. Hansen and Ms. Staszuk, as lawyers, are bound by professional codes of conduct. I cannot see how an informed person, viewing the matter realistically, could conclude that there was a reasonable apprehension of bias in this regard.

[18] I also think it would be unreasonable for anyone to conclude that just because a person's spouse is employed by government, no matter how indirectly, that that should somehow influence that person in carrying out her or his responsibilities as a tribunal member. Something more than the mere fact of a marital relationship must be present as a disqualifying factor: see *Newfoundland* v. *Newfoundland Association of Public Employees*, [1999] N.J. No. 356 (S.C.).

[19] With respect to Ms. Jones, the allegation is simply ill-founded since the evidence is wrong. Ms. Jones is employed by the Natsejeekeh Treatment Centre on the Hay River Reserve. There is no government connection.

[20] There is no question that parties appearing before any administrative tribunal, such as this Appeal Committee, are entitled to decision-makers who will approach the issues before them free of any bias or interest. However, there is also a presumption that tribunal members will act impartially in the absence of evidence to the contrary: S. Blake, *Administrative Law in Canada* (3rd ed., 2001), at p. 106. Here there is no such evidence. I reject this aspect of the judicial review application.

2. <u>Proceeding in the Applicant's Absence</u>:

[21] The applicant acknowledged before me that it was clearly an error on his part that led him to miss the Appeal Committee hearing. He submitted, however, that he should have been given the chance for a re-hearing. To deny him that would be unfair.

[22] The *Income Assistance Regulations* provide, in s. 54, that "where an appellant or an Officer has been given notice of an appeal and he or she fails to appear, the proceedings shall continue in his or her absence". The important thing to note is that this is phrased in the imperative: "the proceedings *shall* continue". There is no discretion given to the Appeal Committee. And, there is no section in the Act or the Regulations providing for a re-hearing.

[23] The fact that a statute or a regulation provides for hearings in the absence of a party, if that party fails to appear, is not unusual. For example, many provincial and territorial summary conviction offence proceedings statutes have such provisions. Many of them, such as highway traffic violations, even carry the possibility of incarceration as a sentence after an *ex parte* hearing where the accused fails to appear. At least three provincial appellate courts have upheld the validity of such provisions: *R.* v. *Tarrant* (1984), 13 C.C.C. (3d) 219 (B.C.C.A.); *R.* v. *Rogers*, [1984] 6 W.W.R. 89 (Sask. C.A.); *R.* v. *Felipa* (1986), 55 O.R. (2d) 362 (C.A.). If such provisions are valid in a quasi-criminal context, they are certainly valid in a regulatory context.

[24] Even if there were a discretion to grant a re-hearing, the applicant has offered no evidence to suggest that the Committee should have considered other factors, or should not have considered the factors it did. In these circumstances the refusal to grant a re-hearing is not a jurisdictional error.

3. Committee Exceeding its Jurisdiction:

[25] The applicant claimed that the Appeal Committee exceeded its jurisdiction by engaging in discussion about his Canada Pension Plan disability claim and the question of his tax returns. He argued that the Committee and the department officials were trying to rule on something that they have no authority to deal with. I do not agree.

[26] The Appeal Committee's responsibility was to determine if the applicant's client officer was correct in terminating his eligibility for income assistance. I will quote from my previous decision (at paras. 15 & 16):

> The Regulations set forth a scheme to determine eligibility for income assistance. The initial requirement is to be a "person in need". However, subsection 1.1(2) of the Regulations stipulates that an applicant is not a "person in need" where, among other things, the applicant "refuses or neglects to utilize all of the financial resources that he or she may access". The "financial resources" of an applicant include such things as tax credits and tax refunds (see s. 20(4) of the Regulations). And the Regulations are explicit in stating, in s. 7, that an officer "*shall* refuse assistance to any applicant whom the officer determines is not a person in need" (emphasis added).
>
> The applicant kept referring in his submissions to the fact that the Director cannot force him to file his tax returns. That is true. Nothing in the Act or the Regulations authorize the Director to force anyone to do anything. But, if one wants to receive income assistance, there are eligibility requirements that one must meet. The question of whether income assistance should be a right is a different issue, one more political and social than legal.

[27] The fact that the Appeal Committee engaged in a discussion about other sources of income available to the applicant should come as no surprise. There is an obligation on those administering the income assistance program to ensure that only eligible recipients receive it. And this is the basic fact that the applicant seems to not understand. If he wants income assistance, there are eligibility requirements. He does not have to file his tax returns if he does not want to. But, he may have to if he wants income assistance.

4. <u>Attempts to Mislead Appeal Committee</u>:

[28] The applicant alleges that department officials attempted to mislead the Appeal Committee by referring to alleged information about the applicant's disabilities (other than his deafness) and how he acts when he is on and off medication. The applicant referred to these comments as defamatory and an abuse of power by these officials. He has launched a civil suit claiming damages. I make no comment on the validity of his allegations in that suit.

[29] I see nothing in the evidence that would warrant speculative comments by the client officer about the applicant's mental state or anything else that has nothing to

do with eligibility requirements. Be that as it may, however, this is not a jurisdictional or legal issue. I see no evidence that such comments affected the issue the Appeal Committee had to decide. Also, a claim for damages is beyond the scope of a judicial review application. His recourse is to follow through on the civil proceedings.

Other Considerations:

[30] There is a further aspect to this proceeding that must be considered.

[31] Respondent's counsel referred me to the principle of administrative law that an applicant should, generally speaking, exhaust available appeal remedies before proceeding to judicial review. In this case the applicant has filed an appeal before the Appeal Board. A date for hearing has not yet been set.

[32] There are numerous cases of the highest authority that have affirmed the proposition that, where a comprehensive statutory scheme of review exists, a proceeding by way of an application before a superior court should not be considered before recourse to the statutory scheme is exhausted: see, for example, *Harelkin* v. *University of Regina*, [1979] 2 S.C.R. 561; *Canadian Pacific Ltd.* v. *Matsqui Indian Band (supra)*.

[33] The *Social Assistance Act* provides an appeal as of right to the Appeal Board. That right is unlimited. Section 8(3) of the Act stipulates that "any finding" of an Appeal Committee may be appealed to the Appeal Board. The applicant said that he has no faith in the Appeal Board. Yet, the *Income Assistance Regulations* expressly provide that no official of the respondent department is eligible for appointment as a member of the Appeal Board.

[34] It seems to me that it is before the Appeal Board that the applicant can have the broadest hearing touching on every aspect of this case. That is another reason to deny judicial review.

Conclusion:

[35] In my previous judgment I had made some comments suggesting the exercise of some discretion on the part of the department officials handling this file.

Whether they take that route is up to them. But it might be a better use of everybody's time and resources to look at an alternative way of handling this file. It is acknowledged that the applicant has no sources of income. He is obviously in need. And, but for his adamant refusal to file income tax returns, he would be eligible for assistance. Some other means to resolve this, other than constant litigation, should at least be considered.

[36] Having said that, it is nonetheless my conclusion that the Appeal Committee made no jurisdictional error and no error of law. The judicial review application is dismissed but, under the circumstances, without costs.

" J.Z. Vertes"
J.Z. Vertes
J.S.C.

Dated this 6th day of July, 2010.

The Applicant represented himself.

Counsel for the Respondent: William Rouse

Corrigendum of the Memorandum of Judgment

of

The Honourable Justice J.Z. Vertes

The date of filing on the first page should read:

Date: 2010 07 06

Docket: S-0001-CV-2010000104

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

GREG MCMEEKIN

Applicant

- and -

GOVERNMENT OF THE NORTHWEST TERRITORIES
Department of Education, Culture and Employment

Respondent

The style of cause has been amended to reflect the accurate description of the Respondent.

Corrected judgment: A corrigendum was issued on July 7, 2010; the correction has been made to the text and the corrigendum is appended to this judgment.

MEMORANDUM OF JUDGMENT OF
THE HONOURABLE JUSTICE J.Z. VERTES