

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sahyoun v. British Columbia (Employment and Assistance Appeal Tribunal)*,  
2012 BCSC 1306

Date: 20120905  
Docket: S110473  
S121839  
Registry: Vancouver

Between:

**Dr. Nabil Riad Sahyoun**

Petitioner

And

**Employment and Assistance Appeal Tribunal of  
British Columbia, and  
Minister of Social Development of B.C., and  
Attorney General of B.C.**

Respondents

Before: The Honourable Madam Justice Stromberg-Stein

Corrected Judgment: The judgment was corrected on  
the cover page September 12, 2012

## Reasons for Judgment

The Petitioner:

Appeared on his own behalf  
and assisted by his wife

Counsel for the Respondent,  
Employment and Assistance Appeal Tribunal of British  
Columbia:

A. Westmacott

Counsel for the Respondent, Minister of Social  
Development of B.C. and Attorney General of B.C.

B. Mackey

Place and Date of Hearing:

Vancouver, B.C.  
March 19-20;  
May 28, 30-31, 2012

Place and Date of Judgment:

Vancouver, B.C.  
September 5, 2012

## Overview

[1] Two applications for judicial review are being heard together as both concern decisions of the

Employment and Assistance Appeal Tribunal (the “Tribunal”), which upheld reconsideration decisions by the Ministry of Housing and Social Development (the “Ministry”) that the petitioner, Dr. Nabil Sayhoun, did not have Person with Persistent Multiple Barriers to Employment (“PPMB”) status under s. 2 of the *Employment and Assistance Regulation*, B.C. Reg. 263/2002 (the “*EA Regulation*”).

[2] In Petition No. 110473, the petitioner challenges the Tribunal decision of May 10, 2011, which confirmed a Ministry reconsideration decision that the petitioner did not qualify as a PPMB under s. 2 of the *EA Regulation*.

[3] In Petition No. 121839, the petitioner challenges another Tribunal decision, which confirmed a Ministry reconsideration decision that the petitioner did not meet the eligibility requirements for medical services only (“MSO”) under ss. 66.1 or 67 of the *EA Regulation* because he was not designated as a PPMB at the date he turned 65 and began receiving Old Age Security benefits. I will refer to these decisions as the “Tribunal Decisions”.

## **Issue**

[4] As stated by counsel for the Tribunal in written submissions, the fundamental issue at the core of these proceedings surrounds the question of whether the petitioner’s status under the *Guaranteed Available Income for Need Act*, R.S.B.C. 1979, c. 158 (the “*GAIN Act*”), automatically transitioned him to PPMB status under the *EA Regulation* even though he did not meet the initial and continuing requirements under the current legislation.

[5] I make a general attribution at the outset to indicate that I have adopted some parts of counsels’ submissions in my reasons, at times without specific attribution.

## **The Legislative Scheme**

[6] Social assistance recipients are required to meet initial and continuing conditions of eligibility for statutory benefits under the province’s social assistance schemes, which may be amended, repealed or replaced from time to time. Recipients do not carry rights forward from former legislative schemes unless they meet the initial and continuing conditions for eligibility under the new scheme.

[7] Section 4 of the *Employment and Assistance Act*, S.B.C. 2002, c. 40 (the “*EA Act*”), provides that the minister may, subject to regulation, provide income assistance and supplements to eligible persons. Persons receiving income assistance are required to meet employment related requirements under ss. 8 and 9 of the *EA Act*. Section 10 of the *EA Act* states that at the direction of the Ministry, a recipient or applicant may be required to provide information for determining eligibility.

[8] Individuals who have received income assistance for at least 12 of the preceding 15 months, are unable to achieve financial independence, and have long-term barriers to employment may be assessed for PPMB status under s. 2 of the *EA Regulation*. PPMB status exempts recipients from employment obligations and provides higher support rates and access to certain health supplements under Schedule 1 of the *EA*

*Regulation*. The test for PPMB status is set out in s. 2 of the *EA Regulation*. PPMB status under the *EA Act* is distinguished from persons with disabilities (“PWD”) status under the *Employment and Assistance for Persons with Disabilities Act*, S.B.C. 2002, c. 41 (the “*EAPWD Act*”), in that PPMB status can be temporary, and can change if the individual improves their employability.

## **Record of Proceedings**

[9] The petitioner has added new material not before the Tribunal. I agree with the respondents that the grounds of review raised in these petitions do not give rise to any basis for admitting extra-record material: *SELI Canada Inc. v. Construction and Specialized Workers’ Union, Local 1611*, 2011 BCCA 353 at para. 80; *Telus Communications Co. v. Telecommunication Workers’ Union*, 2009 BCSC 1289; *Kinexus Bioinformatics Corp. v. Asad*, 2010 BCSC 33.

## **Background**

[10] The petitioner and his wife received income assistance from 1986 until November 10, 2010, the month following the petitioner’s 65<sup>th</sup> birthday. He has three children, one of which is now considered a disabled adult. I will not delve into the long history of court proceedings regarding the receipt of income assistance by the petitioner and his family.

[11] The petitioner claims he was designated as unemployable in 1990 and permanently unemployable in 1992, but these designations are not documented in the record of proceedings.

[12] In 1992, the petitioner was approved for handicap benefits under the *GAIN Act*. The *GAIN Act* was repealed in 1996 and replaced by the *BC Benefits (Income Assistance) Act*, R.S.B.C. 1996, c. 27, and the *Disability Benefits Programs Act*, R.S.B.C. 1996, c. 97.

[13] In 2002, these acts were repealed and replaced by the *EA Act* and the *EAPWD Act*.

[14] In 2003, the Ministry determined that the petitioner did not meet the conditions for eligibility to be designated as a PWD under the *EAPWD Act*. That decision was confirmed by a tribunal in 2003.

[15] In 2004, the Ministry discontinued assistance because the petitioner refused to comply with conditions of an employment plan under the *EA Act*. In a reconsideration decision of December 8, 2004, reconsideration officer David Butcher found the evidence was insufficient to establish non-compliance with an employment plan, and temporarily exempted the petitioner and his wife from completing an employment plan until they could obtain updated medical information. Contrary to the petitioner’s assertion, Mr. Butcher’s decision did not approve the petitioner for PPMB status.

[16] On September 7, 2010, the petitioner requested that the Ministry recognize his PPMB status without completing the application process on the basis that his status flowed from what he described as his permanently unemployable status under the *GAIN Act*, which he argued automatically transitioned to PPMB status under the *EA Act*.

[17] On September 13, 2010, the Ministry denied the petitioner's request for PPMB status because he refused to complete the PPMB application process and submit current medical information confirming his condition had lasted at least a year and was expected to last at least another two years. Further, the Ministry found the petitioner was no longer eligible for income assistance as his income was then in excess of ministry income assistance rates for his family unit.

[18] The petitioner filed a request for reconsideration on September 21, 2010. On October 26, 2010, the reconsideration officer confirmed the September 13, 2010 decision that the petitioner had not met the conditions for PPMB status.

[19] On October 29, 2010, the petitioner appealed the reconsideration decision to the Employment and Assistance Appeal Tribunal. The Tribunal heard the appeal and issued a decision on December 3, 2010, confirming the reconsideration decision.

[20] The petitioner challenged the Tribunal's decision under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241. Before the judicial review was set for hearing, it was discovered the record of proceedings was missing some documents the petitioner had tendered. As a result, with the consent of all parties, a rehearing of the appeal was conducted before a new panel on April 28, 2011. On May 10, 2011, his panel confirmed the reconsideration decision in the Tribunal Decisions.

[21] Essentially, the Tribunal confirmed the Ministry's reconsideration decision that it was reasonable for the Ministry to conclude the petitioner had not automatically transitioned to PPMB status without completing the application process and supplying the necessary current medical information. Further, the Tribunal confirmed that pursuant to s. 10(2) of the *EA Regulation*, the petitioner was no longer eligible for income assistance once he turned 65 on September 24, 2010, as he now received income from Old Age Security and Guaranteed Income Supplement (OAS/GIS), which put his income in excess of income assistance rates for his family unit.

[22] On July 8, 2011, the petitioner again challenged the Tribunal Decisions under the *Judicial Review Procedure Act*.

[23] After the petitioner turned 65, he also requested a continuation of MSO benefits. On January 7, 2010, the Ministry denied his request on the basis there was no statutory authority to continue these benefits. On February 1, 2011, the petitioner filed a request for reconsideration of this decision. On November 21, 2011, the reconsideration officer confirmed the initial decision that the petitioner did not meet the statutory criteria for MSO because he was ineligible for income assistance on November 1, 2010, and he was not designated as a PPMB the month prior to his 65<sup>th</sup> birthday. The appeal was heard on December 16, 2011, and the Tribunal confirmed the reconsideration decision in reasons issued on January 12, 2012.

### **Position of Petitioner**

[24] The petitioner maintains he has three chronic and severe disabilities which restrict his abilities: advanced degenerative changes of the dorsal spine and bilateral osteitis condensans ilii, secondary to old

Scheuermann's disease; degenerative arthritis of the dorsal spine with flare-ups of large joints, secondary to old Scheuermann's disease; and myofascial pain disorder affecting his temporomandibular joints and muscles of mastication. He also claims to be restricted by other medical conditions including: glaucoma; severe myopia bilaterally; left ankle and left humerus fractures; ENT problems; left sensorineural hearing loss; asthma; hypertension; severe gastroesophageal reflux; a stroke which has impaired functioning of his right arm; and diabetes. He maintains that he requires four assistive devices: a back and ankle brace; a dental appliance; a dental splint; and a TENS machine for pain management.

[25] The petitioner asserts he had a vested right to PPMB status all along, or as found by Mr. Butcher. The petitioner maintains he was certified and designated as an unemployable person on August 2, 1990, under the *GAIN Act*. He argues that he was designated as permanently unemployable under the *GAIN Act* on February 25, 1992, when he says his doctor, Dr. J.W. Grymaloski, confirmed he was permanently unable to work or to retrain due to his medical conditions. The petitioner maintains that as a permanently unemployable person, he received handicap benefits from a GAIN tribunal decision dated April 30, 1992, under the *GAIN Act* and *Regulations*.

[26] The petitioner says he had permanently unemployable status, which survived his handicapped status, and his dual status transitioned from the *BC Benefits (Income Assistance) Act*, to PPMB status under the *EAPWD Act* and the *EA Act*. He asserts that PPMB status under the *EA Act* and *Regulations* is equivalent to and is transitioned from the unemployable status under the *GAIN Act* and *Regulations*, and that PWD status under the *EAPWD Act* and *Regulations* is equivalent to and transitioned to handicapped status under the *GAIN Act* and *Regulations*. He claims the Ministry improperly cancelled his permanent handicapped/PWD status, but not his permanent unemployable/PPMB status in 2003.

[27] In short, the petitioner claims he was not required to complete a PPMB application because he was designated with permanent unemployable status under the *GAIN Act*. Further, he was exempted from entering into an employment plan and from any employment related obligations in 2004, as a result of Mr. Butcher's reconsideration decision. Finally, his doctors Grymaloski, Hunt, Blasberg and others have confirmed the permanent duration of his disabilities over the past 20 years, up to the present time.

### **On the Petition for Judicial Review No. S-121839**

[28] The petitioner applies for the following orders:

1. that the orders of the Employment and Assistance Appeal Tribunal Panels made on May 10, 2011 be set aside;
2. that the Ministry acknowledge the confirmation of December 8, 2004 by the Adjudicator Mr. David Butcher that the petitioner who is a permanent "unemployable person" under the *GAIN Act* since February 25th, 1992, is deemed to have been designated as a PPMB under the current *EA Act*;
3. that the petitioner, as a person with "PPMB" status, is entitled to retroactively receive benefits starting from April 1, 2007 up to and including the month of September 2010 as set out in the amended Schedule A of the *EA Regulation*;

4. that the petitioner, as a person with "PPMB" status, is entitled to retroactively receive General Health Supplements starting April 1, 2007, pursuant to the amended s. 67 of the *EA Regulation*; and
5. an order for costs;

The petitioner argues that the Tribunal Decisions were patently unreasonable because the panel based their discretion entirely or predominately on irrelevant factors, the panel failed to take statutory requirements into account, or the panel committed a jurisdictional error. The petitioner continues:

- a. The second Tribunal denied the Petitioner's tangible and preponderant evidence that he was in receipt of unemployable benefits in the 1990's as he was medically certified as an "unemployable person" pursuant to the amended definition of the GAIN Regulations...
- b. The second Tribunal denied the Petitioner's tangible and preponderant evidence that he was medically certified on February 25, 1992 as a permanent "unemployable person" pursuant to the last amended definition of the GAIN Regulations...
- c. The second Tribunal denied the Petitioner's tangible and preponderant evidence that the Ministry has repeatedly received medical certificates confirming the duration of his disabilities as permanent or chronic since 1991...
- d. The second Tribunal erred in law by wrongly making the May 10th, 2011 decision based on the very outdated and repealed definition of "unemployable person" provided for in Section 2(21) of the GAIN Regulations instead of the last amended "unemployable person" definition ordered by BC Reg. 322/91.
- e. The second Tribunal erred in law by wrongly interpreting the old definition of "handicapped person" provided for in Section 2(12) of the GAIN Regulations...by accepting the Ministry's argument that the GAIN Tribunal's Panel of April 30th, 1992, which awarded the Petitioner handicapped pension, rescinded his permanent "unemployable person" status at the same time by the "handicapped person" definition in the GAIN Regulations.
- f. The second Tribunal erred in law by wrongly making the May 10th, 2011 decision based on the repealed definition of "handicapped person" provided for in Section 2(12) of the GAIN Regulations instead of the last amended "handicapped person" definition ordered by BC Reg. 506/95...
- g. The second Tribunal failed to take statutory requirements into account by neglecting the significant effect of the December 8th, 2004 decision of...Mr. David Butcher... Mr. Butcher reviewed the Petitioner's medical history of November 18, 2004 with its 45 enclosures, then, he made his decision pursuant to Section 29 of the *EA Regulation*, which determined that the Petitioner is exempt from participating in employment-related activities as he is a "Person with Persistent Multiple Barriers to Employment" due to his permanent disabilities.
- h. The second Tribunal failed to accept the Petitioner's tangible and preponderant evidence that the ministry did not inform him of the amendments made to Section 67 of the *EA Regulation*..., which made him eligible to receive general health supplements...; in contrast they made their May 10, 2011 decision based on fabricated evidence, committed by some of the Ministry's employees and submitted by Mr. Nelson, which claims that some Ministry employees asked him to apply for PPMB in 2003 & 2004 in order to obtain general health supplements, when in fact the old s. 67 of the *EA Regulation* was a bar to receive these benefits as it stipulated that all adults in a family

unit must be designated as a PPMB.

- i. The second Tribunal erred in law by stating that a person who is in receipt of OAS/GIS is not eligible for general health supplements as they are in receipt of income in excess of income assistance, when in fact all PPMB and all PWD who are in receipt of income in excess of income assistance in the form of OAS/GIS are eligible to general health supplements pursuant to s. 67(1)(f) of the *EA Regulation*, and s. 62(1)(c) of the *EAPWD Regulation*, respectively.
- j. The second Tribunal denied the existence of a transitional provision to PPMB status from under the former *Disability Benefits Program Act* despite the provision set out in s. 40(d) of the *EA Act*.
- k. The second Tribunal did not acknowledge receipt of 70 pages of the legislation with an Index of Authorities from the Petitioner's Representative... which was applicable in the matter of the Petitioner's permanent "unemployable person"/"PPMB" status; at the same time, in the Tribunal's Summary of Facts of May 10, 2011... they admitted the receipt of the ministry's submission including an excerpt of the oldest GAIN Regulations...yet they acted upon the inapplicable definition of "unemployable person" in the Petitioner's case.
- l. The second Tribunal made jurisdictional errors by wrongly interpreting X-Ray records as they referred to the cause of one of the Petitioner's disabilities, namely old Scheurmann's disease, as a healed disability, when in fact the Petitioner's disabilities in relation to old Scheurmann's disease are the by-products of this disease, specifically: (1) advanced degenerative changes of the dorsal thoracic spine...
- m. The second Tribunal made jurisdictional errors by referring to the effect of one of the Petitioner's disabilities as to preclude the Petitioner from walking instead of as to preclude him from working, that is to preclude him from accepting employment.
- n. The second Tribunal made jurisdictional errors by stating that the ministry requested the Tribunal Panel to observe the Petitioner's characterization, and as such, the Petitioner sees that both Respondents are blatantly questioning the valued integrity of his treating physicians, the 1992 GAIN Tribunal Panel, and the Ministry's Regional Reconsideration Adjudicator Mr. David Butcher.
- o. The second Tribunal did not ensure that the Petitioner's accurate and complete personal information in the matter of his permanent "unemployable person" status be disclosed by the ministry prior to making their decision of May 10, 2011, which directly affects the Petitioner and is a violation of his equality right to use his accurate and complete personal information, which is in turn a denial of natural justice contrary to *R. v. Stinchcombe*, [1991] Vol. 3. C.S.C.R., pp. 326 to 348 at 340.

### **On Petition for Judicial Review No. S-110473**

[29] Under this petition, the petitioner applies for the same orders as the other petition.

[30] The grounds on which this petition is brought are that the Tribunal Decisions are patently unreasonable on both substantive and procedural grounds because the Tribunal:

- a. ignored evidence the petitioner was in receipt of general health supplements under Schedule C;
- b. refused to hear his submission under ss. 23(1.1) and 61.1 of the *EAPWD Regulation*;

- c. failed to recuse itself and adjourn the hearing to enable the petitioner to submit further records;
- d. made errors of fact without regard to the material before it;
- e. made an error of law in limiting eligibility under ss. 2 or 3 of Schedule C to the categories outlined in s. 67 without consideration of s. 76 of the *EA Regulation*; and
- f. refused to consider the petitioner's written submissions and material.

### **Position of the Ministry**

[31] The Ministry relies on *McIntyre v. Employ. & Assist. Appeal Tribunal*, 2005 BCSC 1179, for the proposition that statutory benefits are not vested rights that can be carried forward from legislative scheme to legislative scheme. The petitioner and his family have received various types of public assistance for over 20 years under various legislative schemes. The Ministry took the position the petitioner was required to submit a form and provide the required medical information to establish his eligibility for PPMB under s. 2 of the current legislation scheme, which requires the opinion of a medical practitioner to confirm that the condition giving rise to PPMB status has continued for at least one year and is likely to continue for an additional two years.

[32] The Tribunal found the reconsideration decision was reasonably supported by the evidence that the petitioner had declined to provide the necessary documentation, including current medical information, to apply for PPMB status.

[33] In addition, the Ministry makes an interesting point that the petitioner never completed an application for PPMB status and thus never triggered the exercise of statutory discretion by the Ministry to found a judicial review.

### **Standard of Review**

[34] The applicable standards of review of the Tribunal's decision, having regard to s. 58 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, and ss. 19.1 and 24 of the *EA Act*, is patent unreasonableness with respect to the Tribunal's findings of fact or law or an exercise of discretion in respect of matters over which the Tribunal has exclusive jurisdiction, and fairness with respect to the application of common law rules of natural justice and procedural fairness: *McIntyre*, paras. 16-18.

[35] Patently unreasonable means not just unsupported by reasons that are capable of withstanding a probing examination, but openly, evidently and clearly unreasonable or irrational: *Gichuru v. Palmar Properties Inc.*, 2011 BCSC 827 at para. 34.

### **Result**

[36] In the Tribunal Decisions, the Tribunal set out the relevant facts, the relevant legislation and the law. The Tribunal conducted fair and proper hearings. The Tribunal reviewed the reasonableness of the

Ministry's reconsideration decisions which found that the petitioner did not have automatic PPMB status as a result of any prior status under the *GAIN Act*, the petitioner did not have PPMB status because he refused to apply for it and refused to provide current medical information, and he is not entitled to MSO because he did not have PPMB status. The Tribunal found these conclusions to be reasonable, and, considering s. 10 of the *EA Act* that states that the Ministry may direct a recipient or applicant to provide information for determining eligibility, and considering the *McIntyre* decision, I conclude that the Tribunal Decisions are neither patently unreasonable nor is there any jurisdictional error.

[37] The petitions are dismissed.

"STROMBERG-STEIN J."