

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Underwood v. Employment & Assistance
Appeal Tribunal*,
2014 BCSC 598

Date: 20140117
Docket: S11314
Registry: Campbell River

Between:

Andrea Lynn Underwood

Petitioner

And

Employment and Assistance Appeal Tribunal

Respondent

Before: The Honourable Mr. Justice Baird

On appeal from: Employment and Assistance Appeal Tribunal,
Appeal #2013-00551, August 20, 2013

Oral Reasons for Judgment

Appearing on her own behalf:

Andrea Underwood

Counsel for the Defendant,
appearing by teleconference:

A.R. Westmacott, Q.C.

Place and Date of Hearing:

Campbell River, B.C.
January 13, 2014

Place and Date of Judgment:

Campbell River, B.C.
January 17, 2014

Introduction

[1] **THE COURT:** Ms. Andrea Lynn Underwood seeks judicial review of a decision by the BC Employment and Assistance Tribunal ("the Tribunal") dismissing her appeal from a decision of the Ministry of Social Development ("the Ministry") concerning the manner in which her disability assistance is calculated under the *Employment and Assistance for Persons with Disabilities Act*, S.B.C. 2002, c. 41, ("the Act") and its Regulations.

[2] The Tribunal enjoys the expert status particularized in s. 58 of the *Administrative Tribunals Act* S.B.C. 2004 c. 45. Accordingly, a finding of fact or law or an exercise of discretion by the Tribunal must not be

interfered with unless it is patently unreasonable. This standard has been described as whether the decision is "clearly irrational, not in accordance with reason, or openly, evidently, and clearly unreasonable": *Lee v. British Columbia (Employment and Assistance Appeal Tribunal)* [2103] BCJ 575 (SC).

Background

[3] Ms. Underwood was permanently brain injured in a motor vehicle accident on June 26, 1992. Under s. 5 of the *Act* and its Regulations, she receives disability assistance from the Ministry for shelter and support in the amount of \$1,242 per month. Her eligibility for assistance is subject to deductions for any earned or unearned income not specifically exempted by the Regulation. Earned income includes, of course, money or value received in exchange for work or the provision of services. Unearned income is defined in s. 1, Part 1, of the *Employment and Assistance for Persons with Disabilities Regulation* 265/2002 ("the Regulation") and includes insurance benefits except insurance paid as compensation for a destroyed asset.

[4] The Insurance Corporation of B.C. ("ICBC") is obligated to pay Ms. Underwood the amount of \$343.79 per month in total disability wage loss benefits in accordance with ss. 80 and 86 of Part 7 of the *Insurance (Vehicle) Regulation* B.C. Reg. 447/83. In August 2011, ICBC purchased a single premium annuity policy from BMO Life Assurance as the means by which this obligation would henceforth be paid. The record suggests that ICBC did this out of a recognition that Ms. Underwood is permanently unemployable, and that this monthly amount will have to be paid until Ms. Underwood passes away or reaches the age of 65 years, whichever comes first. ICBC owns the annuity, but has directed the monthly amount generated by it to be paid directly to Ms. Underwood.

[5] In evaluating Ms. Underwood's eligibility for disability assistance, the Ministry decided that the monthly annuity payments were an insurance benefit constituting unearned income for which the Regulation creates no exemption. On July 24, 2013, Ms. Underwood requested that the Ministry reconsider this decision. She argued that her Part 7 benefits were a "structured settlement annuity payment" as defined in ss. 7(1)(d.1) and (2) of Schedule B of the Regulation, and ought therefore to be exempt from deduction. The Ministry rejected her argument and confirmed the original decision.

[6] Ms. Underwood appealed to the Tribunal, which held a hearing on August 20, 2013. The Tribunal confirmed the Ministry decision employing the standard of review set out in s. 24 of the *Employment Assistance Act* SBC 2002 c. 40, namely, that it was reasonably supported by the evidence, or constituted a reasonable application of the *Act* and its regulations in Ms. Underwood's circumstances.

[7] The Tribunal held that::

...with respect to the [Employment and Assistance for Persons with Disabilities Regulation], Schedule B(7)(2)(a) the evidence shows that ICBC, not the appellant, entered into a structured settlement agreement with the life assurance company. As indicated in The Structured Settlement Annuity Application, ICBC, as an insurance corporation, is the owner and annuitant of the structured settlement agreement, not the appellant. Further, the evidence shows that the income the appellant receives is not "in relation to damages in respect of personal injury or death" but are "wage loss benefits and are not damages" as stated in the letter of May 28th, 2013 to the appellant from ICBC.

Further, the panel finds that with respect to the [Employment and Assistance for Persons with Disabilities Regulation], Schedule B(7)(2)(b)(ii)(A), the evidence shows that the appellant is the payee of a policy that is assignable, commutable and transferable as stated in the September 13th, 2011 endorsement to the policy.

Given the evidence above, the panel finds that the ministry's determination of the funds the appellant received from ICBC are not a structured settlement annuity payment but are rather insurance benefits which are not exempt from income and must be deducted from disability assistance is reasonable. The panel therefore confirms the Ministry decision.

Discussion

[8] Ms. Underwood's Part 7 payments under the *Insurance (Vehicle) Regulation* B.C. Reg. 447/83 constitute insurance benefits, but she argues that they constitute exempt unearned income because they are "structured settlement annuity payments" as described in section 7(1)(d.1) of Schedule B of the Regulation.

[9] However s. 7(2) of the same Schedule specifies that insurance proceeds can only be considered in this way if they are paid as part of a settlement agreement with the defendant in relation to a claim for damages in respect of personal injury or death; the settlement agreement requires the defendant, amongst other things, to purchase a single premium annuity contract that is not assignable, commutable, or transferable; and the agreement requires the defendant to make an irrevocable direction to the issuer of the annuity contract to make all payments under that annuity contract directly to the person.

[10] In this connection, there was no evidence in the record to suggest that purchasing the annuity formed part of a structured settlement agreement for damages in respect of personal injury or death. As previously stated, it was merely the means chosen by ICBC to discharge its legal obligation to pay Ms. Underwood's statutorily mandated Part 7 wage loss benefits.

[11] Furthermore, ICBC was not required to purchase the BMO annuity. The record of evidence suggests that doing so was a pragmatic business decision taken unilaterally by ICBC for which Ms. Underwood's consent or agreement, even if sought, was not required. ICBC is not bound by any agreement, furthermore, to continue paying Ms. Underwood's insurance benefits by means of the annuity. They could, without notice or consultation, choose some other means of payment, and Ms. Underwood would have no cause for complaint as long, of course, as Part 7 benefits continue to be paid in accordance with law.

[12] In any event the annuity, by means of an endorsement, is expressly stated to be assignable, commutable and transferable, and the same endorsement specifies that ICBC's direction to BMO to make all payments directly to Ms. Underwood is revocable.

Result

[13] Accordingly I find that the payments to Ms. Underwood from the BMO annuity are insurance benefits which fall outside the definition of "structured settlement annuity payments" contained in section 7(1)(d.1) and (2) of Schedule B of the Regulation, and they do not qualify as exempt unearned income.

[14] The Tribunal's decision to this effect is hereby upheld and the petition is dismissed.

"Baird J."