

SUPREME COURT OF NOVA SCOTIA

Citation: *Nova Scotia (Community Services) v. G.(R.)*, 2017 NSSC 41

Date: 20170224

Docket: Hfx. No. 455785

Registry: Halifax

Between:

Nova Scotia (Department of Community Services)

Applicant

v.

G.(R.), Assistance Appeal Board (Nova Scotia)

Respondents

LIBRARY HEADING

Restriction on Publication:

Pursuant to *Civil Procedure Rule 85.04* and *85.05*

Judge: The Honourable Justice Ann E. Smith

Heard: February 2, 2017, in Halifax, Nova Scotia

Written Decision: February 24, 2017

Judge: The Honourable Justice Ann E. Smith

Subject: Judicial review of decision of Assistance Appeal Board (Nova Scotia)

Summary: The applicant applied for judicial review of a decision of the Assistance Appeal Board which determined that G.(R.) was entitled to a shelter allowance in excess of the maximum allowance provided for in Section 45 of the *Regulations* made under the *Employment Support and Income Assistance Act*, S.N.S. 2000, c. 27.

Issues: Did the Board err in law when he interpreted Section 46 of the *Regulations* to allow a supervisor to grant a shelter allowance in excess of the \$535 provided in Section 45 of the *Regulations*?

Result: The standard of review is reasonableness. The Adjudicator's decision did not meet the reasonableness standard. An interpretation of Section 45 of the *Regulations* which has the effect of removing the regulatory cap on shelter allowances is not reasonable as it inconsistent with the scheme of the *Act* as a whole. The decision of the Board is quashed and the decision of the Department of Community Services to deny G.(R.) an additional shelter allowance is upheld.

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Counsel: Sheldon Choo, for the Applicant
I. Claire McNeil, for Respondent G.(R.)

By the Court:

Introduction

[1] The Department of Community Services (DCS) seeks judicial review of a decision of the Assistance Appeal Board dated August 22, 2016. The decision was rendered pursuant to the *Employment Support and Income Assistance Regulations*, N.S. Reg. 84/2016, regulations made under the authority of the *Employment Support and Income Assistance Act*, S.N.S. 2000, c. 27 (the *Act*).

[2] The Respondent, G.(R.), is a recipient of income assistance from DCS. She has been diagnosed with the medical condition of multiple chemical sensitivities. Because of her disability, she was approved a shelter allowance of \$535 per month pursuant to s. 45 of the *Regulations*. G.(R.) reported having difficulty finding an apartment that accommodated her medical needs. In April 2016 she advised DCS that she wished to move into an apartment with monthly rent of \$850 and electrical costs of approximately \$40 per month. She requested a higher shelter allowance to accommodate the rent at the new apartment. DCS denied this request on April 13, 2016. G.(R.) appealed the decision. On May 10, 2016 the decision was upheld by DCS on the basis that G.(R.) did not qualify for an exemption for barrier-free access. The decision notes that “although the Department does acknowledge the diagnosis of multiple chemical sensitivities, it does not provide incremental shelter funding for this diagnosis either through regulations or (sic) policy.”

[3] G.(R.) appealed this decision to the Assistance Appeal Board (the Board). The Board is an administrative tribunal established pursuant to s. 11 of the *Act*. The matter was heard by Ian Gulliver, Board member on August 18, 2016.

[4] The Board allowed G.(R.)'s appeal on the basis that s. 46 of the *Regulations* allowed a supervisor to exempt a recipient from the provisions in the *Regulations* regarding the calculation of the budget deficit when it is necessary to protect the health and safety of the recipient. The Board found that “the budget required by the appellant exceeds the maximum of \$535 and should be covered at \$850 per month; the appellant has provided medical documentation to fully support this need.”

[5] The Board referred in his decision to a letter dated August 5, 2016 from Deputy Minister Lynn Hartwell addressed to Dalhousie Legal Aid. The letter was received

through a *Freedom of Information and Protection of Privacy Act* request. The letter stated, in part:

On July 25, 2016 you advised Rubina Ayub that information about number of cases having shelter costs exceeding the IA shelter allowance rates will suffice.

Responsive records have been located and are attached.

[6] In his decision the Board stated as follows about the letter and attached records:

The Appellant's counsel provided documentation supplied by the Deputy Minister of DCS, Lynn Hartwell that shows that on a monthly basis in excess of 11,000 individuals in the province are receiving shelter above the maximum of \$535 per month.

[7] DCS advances the following grounds of review:

1. Did the Board make an error in law when he interpreted s.46 of the *Regulations* to allow a supervisor to grant a shelter allowance in excess of the \$535 provided in s. 45 of the *Regulations*?
2. Did the Board make an error in fact in the interpretation of the correspondence of Lynn Hartwell provided by the Respondent at the hearing?

Standard of Review

[8] The Board is a statutory tribunal, whose mandate and powers are set out in s. 13 of the Act:

Powers and duties of appeal board

13 (1) An appeal board shall hear an appeal in camera, permitting access only to a representative of the Minister, the appellant, the appellant's counsel or agent and such other persons as the board may determine.

(2) The board shall determine the facts and whether the decision made, on the basis of the facts found by the board, is in compliance with this Act and the regulations.

(3) Where the Board determines that the decision is contrary to this Act and the regulations, the board shall vary or reverse the decision in accordance with this Act and the regulations.

(4) A decision of the board shall contain the facts found by the board, a statement of the issue in the appeal, the applicable provisions of this Act and the regulations and a statement of the reasons for the board's decision.

[9] The Nova Scotia Court of Appeal in *Jivalian v. Nova Scotia*, [2013] NSCA 2, citing *Nova Scotia v. McIntyre* [2012] NSCA 106, determined that the standard of review in matters of income assistance is one of reasonableness.

[10] In *Jivalian*, Fichaud J.A. explained the meaning of “reasonableness”:

15. Reasonableness is neither mechanical acclamation of the tribunal's conclusion nor a euphemism for the court to impose its own view. Rather the reviewing court shows respect for the Legislature's choice of a decision maker, by analysing that tribunal's reasons to determine whether the result, factually and legally occupies the range of possible outcomes. *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, [2011] 3 S.C.R. 709 (S.C.C.), paras 11, 14-17, per Abella, J. for the Court.

[11] In *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)* Abella, J. repeated certain of the key passages in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para. 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. (emphasis of Abella, J.)

[12] The parties agree and I concur that the standard of reasonableness applies to both issues raised on review. Accordingly, I must assess the justification, transparency and intelligibility of the Board's decision-making process in order to determine whether he made a reasonable decision. In other words, I must determine whether the decision and outcome falls within the range of possible, acceptable outcomes.

[13] In order to determine whether the decision of the Board was reasonable, it is important to review the statutory regime whereby individuals receive income assistance in this Province.

Overview of the *Act* and *Regulations*

[14] The purpose of the *Act* as set out in s. 2 is to “provide for the assistance of persons in need and, in particular, to facilitate their movement toward independence and self-sufficiency.”

[15] The *Act* sets out the requirements where assistance is provided to persons in need. A person in need is defined in s. 3(g):

3(g) “person in need” means a person whose requirements for basic needs, special needs, and employment as prescribed in the regulations exceed the income, assets and other resources available to that person as determined pursuant to the regulations.

[16] “Assistance” is defined in s. 3(a):

3(a) “assistance” means the provision of money, goods or services to a person in need for

- (i) basic needs, including food, clothing, shelter, fuel, utilities and personal requirements,
- (ii) special needs,
- (iii) employment services

[17] Section 7(1) of the *Act* states that “Subject to this Act and the regulations, the Minister shall furnish assistance to all persons in need.” Section 21(1) of the *Act* gives the Governor-in-Council broad power to make regulations. Relevant to this review are the following subsections:

21(1) The Governor in Council may make regulations

...

(c) prescribing standards for assistance to be granted to persons in need;

(d) prescribing maximum rates of assistance that may be granted;

(e) prescribing for the modification, suspension and cancellation of assistance;

...

(k) respecting the form in which assistance may be granted including money, goods, shelter, health care services, social services, training or other form, or any combination of them;

(l) respecting eligibility for assistance or for any program or service provided pursuant to this Act;

(m) respecting the determination of the income, assets and other resources that are available to a person in need and respecting the exclusion of a principle residence from such assets;

...

(r) providing for supplementary assistance in addition to any maximum amount of assistance that may be provided in the regulations and prescribing maximum amounts for supplementary assistance;

[18] The *Regulations* are the framework by which assistance is provided to persons in need. Section 29(2) provides:

29(2) In determining ongoing eligibility for assistance, a caseworker shall include

(a) Expenses as prescribed in the regulations for basic needs and special needs; and

(b) Expenses for participation in an employment plan

in the calculation of the budget deficit of a recipient.

[19] A budget deficit is defined in s. 2(g) of the *Regulations* as:

2(g) “budget deficit” of an applicant or recipient means the amount by which the total expenses of the applicant or recipient exceed the total chargeable income of the applicant or recipient.

[20] Section 30 of the *Regulations* mandates that the amount of assistance payable shall be 100% of the budget deficit except as provided for in subsection 27(2). Section 27(2) provides as follows:

27(2) In urgent circumstances pertaining to the health or safety of an applicant or recipient or spouse or dependent child of the applicant or recipient, the total cost of an item of special need may be provided to the applicant or recipient where there is a budget deficit for a portion of the cost of the special need and payment of the total cost is approved by a supervisor. (emphasis added)

[21] Shelter, including the renting of a home or apartment, is a “basic need.” *Regulation 31(2)* provides:

31(2) An applicant or recipient who is renting or who owns his or her own home shall be allowed the following allowances, in the amount and in the manner prescribed in Appendix “A” as expenses:

- (a) a shelter allowance;
- (b) a personal allowance for each of
 - (i) the applicant or recipient,
 - (ii) the spouse of the applicant or recipient, and
 - (iii) each dependent child of the applicant or recipient who is 18 years of age or older.

[22] Appendix A prescribes that a single person in need of assistance is entitled to a \$300 shelter allowance and a \$275 personal allowance.

[23] Rent, heating, electricity and water costs are allowed 100% of the actual amount paid monthly as an expense. Section 35 provides as follows:

35(1) Except as provided in subsection (2), in respect of any combination of expenses mentioned in Sections 36 to 42, the amount of

assistance payable to an applicant or recipient shall not exceed the lesser of

- (a) 100% of the actual total of any combination of expenses; and
- (b) The amount prescribed in Appendix “A” for the size of the applicant's or recipient's family.

[24] The *Regulations* make it clear that the amount a person in need of assistance is eligible to receive for their basic needs is capped at the amount allowed in Appendix A.

[25] However, the *Regulations* provide that the shelter allowance prescribed in Appendix A may be increased in certain circumstances. Section 32 of the *Regulations* allows a supervisor to increase a recipient's shelter allowance when the recipient or spouse or dependent child is terminally ill or has special needs with respect to barrier-free access to, from or within their accommodations.

[26] The Board found that s. 32 of the *Regulations* did not apply to G.(R.) and the parties to this review agree.

[27] Section 45 of the *Regulations* sets forth other circumstances where single persons in need of assistance are eligible to an increased shelter allowance of up to \$535. Section 45 provides:

Despite clauses 31(1)(a) and 31(2)(a), the shelter allowance for any of the following persons shall be allowed as an expense in an amount up to \$535 for those who own or rent their shelter

- (a) single person who is disabled;
- (b) a single person who is fleeing an abusive situation;
- (c) a single person who has a chronic mental, cognitive or physical condition that limits participation in employment services;
- (d) a single person who is 55 years of age and over; or
- (e) a single person who is a youth and otherwise meets the requirements of the Act and these regulations.

[28] The parties agree that G.(R.) is a single person in need of assistance and qualified under s. 45 of the *Regulations* for a \$535 shelter allowance and a \$275 personal allowance for a total of \$810 per month for basic needs.

[29] Applicants or recipients are also eligible for “special needs” such as dental care, optical care, pharma care coverage, etc. Section 24(2)(e) of the *Regulations* provides that shelter costs and personal allowances are not included in the definition of “special expenses.”

[30] The Board determined that G.(R.) was entitled to an increased shelter allowance pursuant to s. 46 of the *Regulations* which provides as follows:

s. 46 A supervisor may exempt an applicant or recipient from the provisions regarding the calculation of the budget deficit where a supervisor considers it necessary to

[clause 46(a) repealed: O.I.C. 2011-308, N.S.Reg. 251/2011]

(b)protect the health or safety of an applicant or recipient, or dependent child or spouse of an applicant or recipient; or

(c)preserve the dwelling of an applicant or a recipient.

[31] The Board interpreted s. 46 of the *Regulations* to give a supervisor the ability to provide a higher shelter allowance to protect G.(R.)'s health and safety.

Issue I

Did the Board make an error in law when he interpreted Section 46 of the *Regulations* as allowing a supervisor to grant a shelter allowance in excess of the \$535 provided in Section 45 of the *Regulations*?

[32] DCS argues that the Board's interpretation of *Regulation 46* is unreasonable when it is considered within the full context of the statutory regime for providing income assistance to individuals in need.

[33] The Board's decision provides as follows:

The normal calculation of the applicant's budget deficit would be calculated under Regulation 45, as a diagnosed disable (sic) individual. Regulation 46 however allows a supervisor to exempt a recipient from the provisions regarding the calculation of the budget deficit when it's necessary to protect the health and safety of the recipient.

Shelter can't be considered under the identification of Special Needs as per Regulation 24 2 (e), which states “Except as provided in subsection (4), the following items and services are not included in the definition of

“special needs” (e) shelter costs and personal allowances. Regulation 32 doesn't meet the terms for the appellant's needs as she is not terminally ill and isn't impacted by a barrier to access her home.

Therefore when a need arises that is unique and the Health and Safety of an individual is affected there must be a mechanism for the department to deal with this. Regulation 46 isn't one that is expected to be used to override or supersede regulations that are in place to deal with every circumstance. When a client supplies well documented medical information that clearly shows that a major health concern and long term impact to health is at risk the board believes there must be a way for the department to address these concerns. In the appellant's case the needs for accommodations are numerous, unique and well out of the norm for her to be safe and healthy.

Regulation 46 allows for a supervisor to exempt an applicant or recipient from the provisions regarding the calculation of the budget deficit if it is necessary to protect the health and safety of the appellant or recipient. In order for the health of the appellant to be protected due to a unique medical condition that requires specific accommodations.

The Board finds that the budget required by the appellant exceeds the maximum of \$535 and should be covered at \$850 per month; the appellant has provided medical documentation to fully support this need. (emphasis of Board)

[34] Counsel for G.(R.) argues that the calculation of the budget deficit is based on prescribed expenses and prescribed income. She says that s. 46 of the *Regulations* allows a supervisor to exempt a recipient from both calculations, not simply the calculation of income, to allow for higher costs where it is necessary to protect the health or safety of an individual. Counsel says that in the implementation and delivery of income assistance programs it is not possible to envisage every circumstance which might result in an individual requiring additional assistance. She says that the design of the *Regulations* is to anticipate as many scenarios as possible, but s. 46 allows a supervisor to have the residual discretion to provide for the needs of a person in the circumstances of G.(R.).

[35] DCS says that the exemption from the calculation of the budget deficit provided for in s. 46 does not allow G.(R.) to qualify for an additional shelter allowance. DCS says that G.(R.) is a person in need of assistance who has qualified for the maximum assistance the *Act* and *Regulations* provide for by way of a shelter allowance.

Analysis

Does the Board's construction of s. 46 of the *Regulations* occupy the range of acceptable interpretive outcomes so as to satisfy the reasonableness standard?

[36] For the reasons which follow, I conclude that the Board's interpretation of s. 46 does not meet the reasonableness standard.

[37] The *Act* and the *Regulations* are a complete scheme to provide for individuals in need of assistance. Pursuant to the *Act*, Governor-in-Council may make regulations “prescribing maximum rates of assistance that may be granted” (s. 21(1)(d)) and (r) “providing for supplementary assistance in addition to any maximum amount of assistance that may be provided in the regulations and prescribing maximum amounts for supplementary assistance.”

[38] The Governor-in-Council made ss. 31, 32 and 45 of the *Regulations* to provide for maximum rates of basic assistance (s. 31) and supplementary shelter allowances for individuals in need of assistance in the following scenarios:

- (a) Where an applicant or recipient, or the spouse or dependent child of an applicant or recipient is terminally ill or has special needs with respect to barrier-free access to, from or within their accommodations (Section 32)
- (b) In the case of a single person, where the person is disabled, fleeing an abusive situation, has a chronic mental, cognitive or physical condition that limits participation in employment services; is 55 years of age and over or is a youth and otherwise meets the requirements of the Act. (Section 45)

[39] What is a reasonable interpretation of the phrase “A supervisor may exempt an applicant or recipient from the provisions regarding the calculation of the budget deficit” as set forth in s. 46 of the *Regulations*?

[40] In order to answer that question, I made the observations which follow.

[41] First, the budget deficit is the amount by which the total expenses of the applicant or recipient exceed the total chargeable income of the applicant or recipients.

[42] Secondly, an applicant is not eligible to receive assistance if at the time of the application, the applicant's chargeable income is equal to or greater than the applicant's expenses. (*Regulations*, s. 11).

[43] Thirdly, in determining ongoing eligibility for assistance, a caseworker must include expenses as prescribed in the *Regulations* for basic needs and special needs in the calculation of the budget deficit of a recipient (*Regulations*, s. 29(2)).

[44] Since the calculation of the budget deficit means that prescribed expenses exceed chargeable income, the finding of a deficit entitles an individual to access the allowances provided for in the *Regulations*.

[45] A reasonable interpretation of s. 46 is that it allows a supervisor to deem a recipient or an applicant to have a budget deficit. Having a budget deficit means that that individual may access allowances and special needs in stated circumstances; i.e. where it is necessary to do so to protect the health or safety of the individual, or his or her dependent child or spouse or to preserve the individual's dwelling. In other words, an applicant or recipient who is not then a "person in need" may nonetheless be provided with assistance.

[46] Section 46 makes no reference to s. 31 which mandates the maximum personal and shelter allowances. By contrast, s. 45 of the *Regulations* does so:

Despite clauses 31(a) and 31(2)(a), the shelter allowance for any of the following persons shall be allowed as an expense in an amount up to \$535 for those who own or rent their shelter...

[47] G.(R.) is a person in need of assistance. She does not need to be deemed so. G.(R.) has no chargeable income. Section 45 of the *Regulations* sets out an exhaustive list of the circumstances where a person may have an increased shelter allowance, and the maximum of that increase is to \$535. G.(R.) has allowed expenses for shelter in the maximum amount of \$535.

[48] The Board's interpretation of s. 46 has the effect of removing the regulatory cap on shelter allowances, a result inconsistent with the scheme of the *Act* as a whole. As noted above, s. 21(1)(d) of the *Act* provides that the Governor-in-Council may make regulations "(d) providing for the maximum rates of assistance that may be granted" and "(r) providing for supplementary assistance in addition to any maximum amount of assistance that may be provided in the regulations and prescribing maximum amounts for supplementary assistance."

[49] The Governor-in-Council has done what it was enabled to do by s. 21(1)(d) and (r) of the *Act* through ss. 31, 32 and 45 of the *Regulations*. The maximum personal and shelter allowances are prescribed (s. 31) and the circumstances where the shelter allowance may be increased stipulated (ss. 32 and 45 of the *Regulations*).

[50] I conclude that an interpretation of s. 46 which removes the cap on the amount of allowance on basic needs (shelter) is an unreasonable interpretation.

[51] Moir, J. in *Legere v. Nova Scotia (Department of Community Services)*, 2010 NSSC 67 wrote the following concerning the cap on assistance for basic needs:

65 These provisions make a distinction between assistance for basic needs and assistance for special needs. The cap on assistance for basic needs serves particular purposes that are not necessarily within the general purpose of the statute. No doubt fiscal constraint is one purpose of the cap provisions. Another is uniformity. All people share the need for food and the need for shelter. Most would have difficulty filling those needs within the capped amounts, but the legislation uniformly applies the caps on basic needs assistance. It recognizes that the needs are uniform.

[52] It is true that the *Act* has been amended since *Legere* and Moir, J. did not refer to s. 46 of the *Regulations*. However, the basic purpose of the *Act* and the caps on basic needs have not changed since *Legere*.

Issue II

Did the Board make an error in fact in the interpretation of the correspondence of Lynn Hartwell provided by the Respondent at the hearing?

[53] It is unnecessary for the Court to consider Issue II given my decision that the Board's decision fell outside the scope of possible reasonable interpretations of s. 46 of the *Regulations*.

[54] As noted above, the Board referred to the August 5, 2016 letter from Deputy Minister Hartwell and attached information as showing that 11,000 individuals in the province are receiving shelter above the maximum of \$535 per month. Although the Board refers to the letter and the attached information in the section of his decision titled, "Finding of Facts", he does not refer to the letter and the information again, including that part of the decision titled, "Decision." It is unknown, therefore, whether the letter and information formed any part of the Board's decision-making

process and analysis. Whether it did or it did not, is irrelevant given that I have determined that his decision is unreasonable (as it relates to s. 46 of the *Regulations*). I note that a separate part of the Board's decision allowed G.(R.)'s appeal with respect to her entitlement to a damage deposit, which was not an issue before the Court on judicial review.

[55] It is also unnecessary for me to consider the Applicant's motion for fresh evidence, since the proposed fresh evidence concerns the Board's interpretation of the Deputy Minister's letter and the number of individuals receiving increased shelter costs pursuant to s. 32 of the *Regulations*.

Conclusion

[56] The Board's decision dated August 22, 2016 which interpreted s. 46 of the *Regulations* to allow G.(R.) to receive a shelter allowance of \$850 per month is quashed and the May 10, 2016 decision of the DCS is upheld.

Costs

[57] DCS did not seek costs and none are granted.

Smith, J.