



Fowlie v. Canada, 2000 CanLII 15876 (F.C.)

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Docket: T-1971-98
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Date: 20000719

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BETWEEN:

FRANK FOWLIE

Applicant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR ORDER

GIBSON, J.

INTRODUCTION

[1] These reasons arise out of an application for judicial review of a decision of an officer of the Ca Employment Insurance Commission (the "Commission") at Victoria, British Columbia, rejecting the :

application for employment benefits under Part II of the *Employment Insurance Act*¹ (the "*Act*"). The decision under review is the 2nd of October, 1998. The decision was communicated to the applicant on

BACKGROUND

[2] At all relevant times, the applicant was resident at or in the vicinity of Victoria, British Columbia and has an extensive and impressive employment history that included experience in alternative dispute resolution and a background in law and law enforcement as a former member of the Royal Canadian Mounted Police. Commencing in 1993, he experienced significant health difficulties culminating with a diagnosis in 1997 that he was suffering from severe Bi-Polar II Disorder.

[3] In March of 1997, the applicant began an extended sick leave from employment with the Office of the British Columbia Ombudsman. In June of 1997, he accepted a severance package from that office that provided for six months of severance benefits.

[4] On the 22nd of December, 1997, the applicant became eligible for benefits under Part I of the *Act*. During the period of time following that date, the applicant remained in a medical disability category for the purposes of the *Act*. His Part I benefits were scheduled to expire in mid-October, 1998. During his period of eligibility for benefits, the applicant maintained what he describes as a "...conscientious job search by applying for well over a hundred positions, and competing in nearly two dozen selection processes." His job search went without success.

[5] In the early summer of 1998, the applicant attended a retraining session with the Access Centre (the "Centre"), an independent agency that apparently performed services for the Commission, including the preparation of applications for benefits under the *Act*.

[6] With the aid of the Centre, the applicant sought out an appropriate retraining forum.

[7] Based upon his work experience, and the skills acquired on the basis of that experience, and on the basis of the fact that he had a Bachelor of Arts degree from the University of Manitoba in 1980 and a Bachelor of Human Resources Management from the University of Regina in 1992, the applicant chose as a retraining program a Master of Arts program in Conflict Analysis and Management at Royal Roads University. He was accepted into the two year program and the program was designated as a full-time course of study by the Registrar of the University and which was also designated as a full-time course of study by Revenue Canada, for taxation purposes.

[8] On or about the 19th of August, 1998, with the aid of the Centre, the applicant made application for benefits under Part II of the *Act* to support him during the first year of his program at Royal Roads University. The decision of the Commission with respect to that application that is here under review.

[9] In mid September, 1998, an officer of the Commission at Victoria, British Columbia contacted the applicant by telephone to advise him that his application for benefits under Part II of the *Act* had been denied. The applicant did not accept this decision and, by letter dated the 18th of September, 1998, wrote to the officer's supervisor indicating that: "I am appealing her [the officer's] decision on several grounds of administrative fairness."

[10] On the 21st of September, 1998, the Manager, Employment Services and Programs, for the Commission in Victoria wrote to the applicant reiterating the decision to reject his application. That letter reads in part

I am responding to your request for a written explanation of our decision regarding the above request.

1. The program you are requesting is a distance education program which is not usually supported by the Victoria Human Resource Centre.

2. You plan to pursue a Masters level educational program at the University level. Our training fund from the Employment Insurance fund, an account created by employees and employers in Canada to support the re-employment of workers. Support for students attending post-secondary education is more appropriate by the Canada Student Loans Program. This decision is based on the June 18, 1998 policy of this Department which states:

"...you are to (continue to) restrict Section 25 (of the *Employment Insurance Act*) referrals for training claimants who are unemployed workers and who as part of an approved return-to-work action plan request to return to work."

3. The program that you wish to undertake is not a priority for our labour market area as described in your business plan and training investment strategy. Accordingly, we are not prepared to approve the return-to-work action plan that you propose.

We are not prepared to support your request for assistance on the above mentioned basis.²

[11] The applicant remained dissatisfied. He sought a meeting with the writer of the letter dated the 21st of September, 1998 and requested a copy of the "1998 policy of this Department" referred to in that letter. His requests were initially refused although the refusal was later withdrawn on both counts following the advice of the applicant's then counsel.

[12] The requested meeting took place on the 30th of September 1998. At that time, the applicant attended the offices of the Commission in Victoria with an advisor. The advisor was not permitted to be present at the meeting. During the course of the meeting, the author of the letter of the 21st of September, 1998 apparently contacted Dr. James Bayer, Director of the Conflict Analysis and Management Program at Royal Roads University to confirm the full-time status of the program that the applicant proposed to attend. The author also consulted her Director prior to making a final decision on the applicant's application.

[13] By letter dated the 2nd of October, 1998 the author of the letter of the 21st of September, 1998 contacted the applicant on her contact with the office of Dr. Bayer, not with Dr. Bayer himself, and on the result of the consultation with her Director. The result of the contact with the office of Dr. Bayer was apparently inconclusive. At least from the point of view of the Commission, regarding the full-time nature of the program. The result of the consultation with the writer's director was more conclusive: the Director agreed with the decision not to approve the applicant's application for benefits, apparently primarily, if not exclusively, on the basis of the 1998 policy of October, 1998 letter concluded: "We consider this matter to be closed."

[14] There followed this application for judicial review.

THE LEGISLATIVE FRAMEWORK

[15] Part II of the *Employment Insurance Act* is entitled: "EMPLOYMENT BENEFITS AND NATIONAL EMPLOYMENT SERVICE".

[16] The most relevant provisions of Part II of the *Act* for the purposes of this matter are the following:

56. The purpose of this Part is to help maintain a sustainable employment insurance system through the establishment of employment benefits for insured participants and the maintenance of a national employment service.

56. La présente partie a pour objet d'aider à maintenir un régime d'assurance-emploi durable par la mise en place de prestations d'emploi pour les participants et par le maintien d'un service national de placement.

57. (1) Employment benefits and support measures under this Part shall be established in accordance with the following guidelines:

57. (1) Les prestations d'emploi et les mesures de soutien prévues par la présente partie doivent être mises en place conformément aux lignes directrices suivantes :

...

...

(b) reduction of dependency on unemployment benefits by helping individuals obtain or keep employment;

b) la réduction de la dépendance aux prestations de chômage au moyen de l'aide fournie pour obtenir ou conserver un emploi;

...

...

(d) flexibility to allow significant decisions about implementation to be made at a local level;

d) la flexibilité pour permettre que des décisions importantes relatives à la mise en oeuvre soient prises par les agents locaux;

(e) commitment by persons receiving assistance under the benefits and measures to

(i) achieving the goals of the assistance,

(ii) taking primary responsibility for identifying their employment needs and locating services necessary for them to meet those needs, and

(iii) if appropriate, sharing the cost of the assistance; and

(f) implementation of the benefits and measures within a framework for evaluating their success in assisting them to obtain or keep employment.

e) l'engagement des personnes bénéficiant d'une aide au titre d'une prestation d'emploi ou d'une mesure de soutien à

(i) à s'attacher à la réalisation des objectifs visés par l'aide fournie,

(ii) à assumer la responsabilité première de déterminer leurs besoins en matière d'emploi et de trouver les services nécessaires pour les combler,

(iii) s'il y a lieu, à partager les coûts de l'aide;

f) la mise en oeuvre des prestations et des mesures selon une structure permettant d'évaluer la pertinence de ces prestations et mesures pour obtenir ou conserver un emploi.

...

...

59. The Commission may establish employment benefits to enable insured participants to obtain employment including benefits to

59. La Commission peut mettre sur pied des prestations d'emploi en vue d'aider les participants à obtenir notamment des prestations visant à :

...

...

(e) help them obtain skills for employment, ranging from basic to advanced skills.

60(1) National employment service

e) les aider à acquérir des compétences " de nature générale ou spécialisée " liées à l'emploi.

60(1) Service national de placement.

...

...

64. A decision of the Commission made in relation to employment benefits or support measures, other decision under section 65.1, is not subject to appeal under section 114 or 115.

64. Aucune décision de la Commission relative à une prestation d'emploi ou une mesure de soutien, au décision prise au titre de l'article 65.1, n'est susceptible d'appel au titre de l'article 114 ou 115.

THE ISSUES

[17] The issues pursued before the Court were essentially those described in the respondent's memorandum and are simply stated: first, did the Commission deny the applicant natural justice and procedural fairness in arriving at the decision under review; and second, against the appropriate standard of review, was the decision under review open to the Commission?

POSITIONS OF THE PARTIES

[18] Counsel for the applicant urged that the Commission denied the applicant procedural fairness in

- it took unconscionably long in reaching the decision with respect to his application for Part II benefits;
- it presented him with a "moving target" of reasons for its decision and for denial of his response to the concerns of the Commission;
- it failed to provide him with a reasonable opportunity to present his response to the concerns of the Commission;
- it initially denied him an opportunity to meet with an appropriate officer to review his application and the tentative decision of the Commission;

- it only begrudgingly and belatedly provided him with the 1998 policy document referred to in the Commission's letter of the 21st of September, 1998; and
- finally, it failed to effectively consult with Dr. Bayer of Royal Roads University as a Commissioner undertaken to do.

[19] Counsel urged that, against whatever might be considered to be the appropriate standard of review decision such as that here under review, and he urged that it should be reasonableness *simpliciter*, the standard reached by the Commission was simply not open to it.

[20] Counsel for the respondent, by contrast, urged that there was no denial of natural justice or procedural fairness in the process leading to the decision under review, that an appropriate standard for review of the decision is patent unreasonableness, and that, against that standard, the decision of the Commission was reasonable.

[21] Both counsel referred me to *Baker v. Canada (Minister of Citizenship and Immigration)*³ where the Supreme Court of Canada addressed both natural justice and procedural fairness requirements in the context of a discretionary, administrative decision making process and the issue of standard of review in respect of decisions such as that here under review.

ANALYSIS

[22] As to procedural fairness, Madame Justice L'Heureux-Dubé, writing for the majority in *Baker* paragraph 21, cited her own reasons in *Knight v. Indian Head School Division No. 19*⁴ where she wrote "the concept of procedural fairness is eminently variable and its content is to be decided in the specific facts of each case". Madame Justice L'Heureux-Dubé identified the following factors to be considered in arriving at the content of the duty of fairness: first, the nature of the decision being made and the process followed in arriving at the decision; second, the terms of the statute under which the decision-maker is operating and the role of the decision-maker within the statutory scheme; third, the importance of the decision in question to the individual or individuals affected; fourth, the legitimate expectations of the person challenging the decision; and finally, the choice of procedure made by the decision-maker, particularly when the statutory scheme leaves to the decision-maker the ability to choose his, her or its own procedures or when the agency making the decision has an expertise in determining what procedures are appropriate in the circumstances. Finally, Madame Justice L'Heureux-Dubé stated that the foregoing list of five factors is not exhaustive.

[23] Against the statutory scheme applicable here and the foregoing factors, I am satisfied that the applicant was not always treated with the respect to which he was entitled as an applicant for benefits under the statutory scheme, as a long-time contributor to the unemployment and employment insurance funds and, generally, as a taxpayer and member of the Canadian public, he was, nonetheless, not denied the degree of procedural fairness to which he was entitled. He was provided an opportunity to file an application for benefits with the assistance of a contractor to the Commission, he was provided with an opportunity to respond to the concerns of the Commission, he was provided, however reluctantly, with an opportunity to meet with an officer of the Commission to review his concerns, the officer undertook to follow up on certain of those concerns, to raise the applicant's concerns with her superior, he was provided with the 1998 policy referred to in the Commission's letter of the 21st of September, 1998, and was only, after all of the foregoing, provided with a final decision, albeit that decision remained unsatisfactory to him. No person such as the applicant is entitled as of right to a decision that is satisfactory to him or her where the decision is required to be made within the context of a statutory scheme that vests the decision-maker with substantial discretion.

[24] Again in *Baker*, Madame Justice L'Heureux-Dubé reviews factors affecting the standard of review. One of the facts of this matter, the decision under review is protected by a privative clause, a factor that Madame

L'Heureux-Dubé indicates affects the level of deference owed to the decision-maker. Further, the decisions involved in the various stages of consideration of the applicant's application are, I am satisfied, reasons for the evaluation of applications such as that of the applicant. In such circumstances, a significant degree of deference is owed.

[25] I am satisfied that the purpose of Part II of the *Act*, as quoted above, is such as to vest a high degree of discretion in officers of the Commission and thus this is also a factor militating in favour of a significant degree of deference. Finally, decisions of the nature of the decision here under review relate primarily to questions of policy as opposed to determinations of law, this factor, once again, militates in favour of a degree of deference.

[26] Whether the foregoing considerations point to a standard of review of patent unreasonableness *simpliciter*, I am satisfied is not a matter that I need determine on this application. I consider the overall consideration of all of the material before me and in the light of the guidance provided by *Baker*, that the standard of review here under review was open to the decision-makers.

CONCLUSION

[27] Based on the foregoing brief analysis, I conclude that this application for judicial review must be dismissed.

COSTS

[28] There will be no order as to costs.

J.F.C.C.

Ottawa, Ontario

July 19, 2000

¹ S.C. 1996 c. 23.

² Respondent's Record, Tab 1 C.

³ 1999 CanLII 699 (S.C.C.), [1999] 2 S.C.R. 817.

⁴ 1990 CanLII 138 (S.C.C.), [1990] 1 S.C.R. 653.