Date: 20070704

Docket: T-806-06

Citation: 2007 FC 692

OTTAWA, Ontario, July 4, 2007

PRESENT: The Honourable Max M. Teitelbaum

BETWEEN:

KAREN COMMANDANT

Applicant

and

WAHTA MOHAWKS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Band Council of the Wahta Mohawks (the "Band Council") respecting the payment of an education allowance to the applicant.

[2] Karen Commandant, the applicant, is a member of the Wahta Mohawks. She was employed as Band Administrator with the Wahta Mohawks (the "Band") from August 1998 until July 2004. The applicant claims she was wrongfully dismissed and has brought an action against the Band, the Band Council and the Band Chief. She is currently an elected Band Councillor.

[3] Since September 2003, the applicant has been enrolled as a student in the Public Administration and Governance Program jointly administered by the First Nations Technical Institute – Ryerson University. The program offers a Certificate, an Advanced Certificate and a Bachelor of Arts in Public Administration and Governance. The applicant obtained her Certificate in June 2005 and she received the Advanced Certificate in April 2006. She was working towards completing a Bachelor of Arts degree to be completed in June 2009.

[4] At the hearing the applicant's counsel informed the Court that as a result of the respondent's refusal to "fund" the applicant's education, the latter had to quit her studies.

[5] On July 7, 2004, the Band adopted an education policy (the "Education Policy"). The Education Policy provides that students may receive full payment of tuition fees, textbook reimbursement up to $600, and a monthly living allowance of $800. The monthly living allowance is available only to those students registered as full time students. The Education Policy also states that anyone not in good standing with the Band will not receive any financial assistance until that person's "account" with the Board is clear and in good standing.

[6] In March 2005, the applicant applied for her monthly living allowance for the 2005-06 academic year and in March 2006 she applied for the 2006-07 academic year. On September 29, 2005, the Band Education Counsellor telephoned the applicant to advise her that her monthly education living allowance had been approved. On October 15, 2005, the applicant was again contacted by the Band Education Counsellor and was informed that the Band Council was not

prepared to process her allowance because it believed that she owed the Band $961.00 and thus the applicant's "account" was not in good standing.

[7] The debt owed by the applicant to the Band was the subject of an arbitration decision dated March 15, 2002 by Micheal Sherry (the "Arbitrator"). For the purpose of summarizing the facts which gave rise to the dispute over this debt I have adopted the facts as determined by the Arbitrator.

[8] In 1989, the Band loaned the applicant in excess of $35,000. In February 1990, the applicant repaid $13,000 leaving a balance of $22,428. The applicant was eligible to apply for a reimbursement from the Band for her daughter's school transportation costs and some of these reimbursements were applied directly against the balance owing on the loan. By March 31, 1995 the loan was reduced to $16,312. At some point this arrangement broke down and the parties were not able to agree on the amount outstanding on the loan. The Band held that the applicant owed $11,046.36 but the applicant believed that amount outstanding was $961.91. In June 2001 the applicant sent the Band a cheque for $961.91 as a final payment on the loan. Having received no confirmation of payment from the Band, the applicant suggested that the parties use binding arbitration as a way to settle the dispute. The Arbitrator held that the applicant owed the Band $961.91 and stated that there was no interest on that amount since the applicant had presented the Band with a cheque for this amount at an earlier date. According to his decision, payment of $961.91 by April 15, 2002 would have the effect of terminating the loan. Upon payment the Band was to provide the applicant with written confirmation that the loan has been paid in full and in the

event that the Band failed to provide such confirmation then the applicant's cheque along with the arbitration decision would stand as final proof of the termination of the loan even if the cheque was not cashed.

[9] The applicant presented the Band with a cheque for $961.91 by April 15, 2002 but the Band Council again refused to cash it. The matter remained unresolved until the applicant received a letter from the Band Council, dated November 29, 2005, which reads as follows:

> It is the opinion of this Council that the intent of the arbitration decision had been stated very clearly. The intent of the decision was to settle the disputed loan amount which resulted in the resolution of a final payment by you of $961.00. Although you had experienced difficulties with the Council of the day in presenting your final payment that would not in any way negate the intention of the decision, nor should it have impeded your obligation to fulfill the intent of the decision.
>
> (Affidavit of Karen Commandant, sworn June 1, 2006, Exhibit N)

[10] In a reply letter, the applicant stated that according to the Arbitrator's decision, which the parties agreed would be binding, the loan was terminated because the Band did not provide written confirmation that the loan was paid in full. She stated that there was no amount owing but that, in the interests of retaining some civility and to resolve the long outstanding issue, she was willing to have the $961.91 deducted from her education living allowance for the period September to December 2005 (Affidavit of Karen Commandant, sworn June 1, 2006, Exhibit O).

[11] By April 2006, the Band had not replied to the applicant's offer to have the $961.91 deducted from her education living allowance. On May 10, 2006, the applicant commenced this application for judicial review. On May 19, 2006, the Band Council sent the applicant a letter informing the applicant that her applications for the education living allowance for the years 2005-06 and 2006-07 were being denied because of her outstanding debt to the Band.

[12] In its written submissions, the respondent claims that the $961.91 cannot be offset against anything since the applicant is not eligible for the education living allowance since she is not a full-time student.

ISSUES

[13] This case raises the following issues:

1. Is there a decision for the Court to review?
2. Did the applicant fail to exhaust an alternative remedy?
3. Is there a reasonable apprehension of bias of the part of the Band Council?
4. Was the Band Council's decision to deny the applicant the educational living allowance reasonable?

ANALYSIS

1. Is there a reviewable decision?

[14] The respondent submits that there is no decision for the Court to review since the Band's decision was not made until after the applicant started this application for judicial review.

[15] I am satisfied that the respondent's submission is without merit. The Band Council's decision to deny the applicant's application was communicated to her by the Education Counsellor on October 15, 2005. On October 19, 2005, the Education Counsellor sent the applicant a letter explaining that the applicant request for a disbursement of $800 was not processed. Attached to the letter, is a slip indicating that the first instalment of the educational living allowance was deposited in the applicant's account on September 26, 2005 and then cancelled (Affidavit of Karen Commandant, sworn June 1, 2006, Exhibit M). This letter, along with the phone call of October 15, 2005, constitutes a reviewable decision. The respondent cannot rely on the decision letter dated May 19, 2006 to argue that there was no decision made until that time especially as this letter was sent after the application for judicial review was commenced and could have been conceived as a tactic to frustrate this application for judicial review. There were seven months between the time the Education Councillor contacted the applicant to communicate to her that the Band Council would not approve her application and the time the Band Council sent the decision letter. Nothing changed during that time and the respondent provided no explanation as to why it delayed 7 months to send a decision letter.

<u>2. Was there an alternative remedy available to the applicant?</u>

[16] The respondent submits that the applicant is barred from seeking judicial review because she failed to exhaust the alternative resolution mechanism provided in the Education Policy. Subsection 9(4) of the Education Policy reads as follows:

> If the student does not think the terms are being followed by the counsellor, and the matter cannot be solved between the counsellor and the student, then a letter of

> appeal should be directed to the Manager within two weeks of the proposed grievance. A meeting will be set up with the Manager and Education Counsellor, and the Student to reach a decision. A parent may not represent the student, although they are welcome to attend the meeting for moral support of the student. Similarly, if the Education Counsellor cannot solve a problem with a student after a reasonable attempt to do so, then the Education Counsellor can seek advice from the Manager for a decision on the matter. A meeting amongst all people involved can be set up, or written notification of the decision will be sent to the student.

[17] The doctrine of adequate alternate remedy will usually bar relief in judicial review if an applicant failed to pursue a statutory remedy that is considered to be an adequate alternative to judicial review (Donald J.M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada*, (Toronto: Canvasback Publishing, 2004) § 3:2100). In *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3 at para. 37, the Supreme Court of Canada held that:

> …a variety of factors should be considered by courts in determining whether they should enter into judicial review, or alternatively should require an applicant to proceed through a statutory appeal procedure. These factors include: the convenience of the alternative remedy, the nature of the error, and the nature of the appellate body (i.e., its investigatory, decision-making and remedial capacities). I do not believe that the category of factors should be closed, as it is for courts in particular circumstances to isolate and balance the factors which are relevant.

[18] Applying these factors to the present case, I find that the applicant was not required to have made an appeal under 9(4) of the Education Policy.

[19] The Indian and Northern Affairs Canada document entitled *Post-Secondary Education, National Program Guidelines*, dated November 2003, sets out a useful example of what an adequate

appeal mechanism might look like. This document sets out guidelines for the administration of the department's post-secondary program. Section 8.0 of that document states the following:

> To ensure fairness and equitable treatment under the PSE program, administering organizations must have an appeal process in place. This process must incorporate the following basic elements:
>
> …
>
> b) Ensuring that the student has a right to an established appeal process. This includes the existence of an impartial appeal board.
>
> …
>
> f) The establishment of specific time frames for appeal hearings to be set and for decisions to be made.
>
> g) Confirmation that the administering organization will abide by the appeal board's decision.
>
> (Affidavit of Karen Commandant, sworn June 1, 2006, Exhibit I)

[20] The alternative remedy set out in section 9(4) of the Education Policy contains none of these elements. There is no impartial board of appeal. The "appeal" provided under section 9(4) requires the student to approach the Education Counsellor and the Manager. The Manager is not defined in the Education Policy so it is not possible to determine whether the Manager is impartial. Moreover, the remedy set out in this section is not adequate as a remedy to the issue of the applicant's problem because according to this section the Education Counsellor is the person mandated to resolve the dispute but the issue facing the applicant was one which the Education Counsellor apparently has no authority to solve the problem, i.e. the applicant's financial standing with the Band Council. The

remedy in s. 9(4) also fails to meet the criteria in (f) and (g) of the *Post-Secondary Education, National Program Guidelines*: there is no time frame provided in section 9(4) and there is no confirmation that the administering organization would abide by the appeal board's decision. In short, the alternative remedy provided in section 9(4) is an informal dispute resolution mechanism and cannot be characterized as an appeal process. As such I am satisfied that it falls short of constituting an adequate alternative remedy and, therefore, the applicant's failure to avail herself of this remedy should not bar her from seeking judicial review.

3. Is there a reasonable apprehension that the Band Council is biased?

[21] The applicant submits that there is a reasonable apprehension that the Band is biased based on the Band's refusal to accept the finding of the binding arbitration decision, the Band's continuing efforts to find new grounds to deny her financial assistance and the fact that the Band, Band Council and Band Chief are engaged as defendants to the applicant's claim for wrongful dismissal.

[22] The law of the reasonable apprehension of bias was set out by de Grandpré J., writing in dissent, in *Committee for Justice & Liberty v. National Energy Board* (1978), 68 D.L.R. (3d) 716). The test is whether an informed person, viewing the matter realistically and practically and having thought the matter through would conclude that the decision-maker would decide fairly or not.

[23] Applying the test for reasonable apprehension of bias in a particular context requires an assessment of the content of the duty of procedural fairness. The following factors may determine what is fair in a given case: the nature of the decision and the process followed in making it; the

statutory scheme; importance of the decision; the legitimate expectations of the parties; and the tribunal's choice of procedure (*Baker v. Minister of Citizenship and Immigration*, [1999] 2 S.C.R. 817). The list of factors is not exhaustive. In *Chiau*, the Federal Court of Appeal held that there are three factors relating to the nature of the decision which point to a relatively high procedural content to the duty of fairness: if the decision was based on reasonably objective criteria, rather than pursuant to an open-ended and subjective discretion; if the decision was based on facts concerning the individual; and if the decision applied only to the individual party (*Chiau v. M.C.I.*, [2001] 2 F.C. 297 at para. 42).

[24] Applied to the facts of the present case, a number of these factors point to a low content of procedural fairness. The process of the decision-making body does not closely resemble judicial decision making and thus fewer procedural protections are required (*Baker* at para. 23). Moreover, the composition of the decision-making body suggests a lower content of procedural fairness. The Supreme Court of Canada has held that a less stringent standard in the test for bias will be applied where the administrative body in question is a board composed of popularly elected members (*Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 at 638). With respect to the importance of the decision to the applicant, I conclude that the decision is relatively unimportant given that it is a financial decision rather than a decision affecting the applicant's rights, reputation or livelihood. The factor of legitimate expectation also suggests a low content of procedural fairness since the applicant did not submit that she had any legitimate expectations with respect to the procedure to be followed by the Band Council.

[25] Other factors suggest a higher content of procedural fairness. The decision to provide the education living allowance according to the Education Policy uses objective criteria and is not a decision made using open-ended and subjective discretion. Moreover, the decision was based on facts concerning the individual and the decision applied only to the applicant. I conclude that the content of procedural fairness is somewhere towards the middle of the spectrum.

[26] A reasonable apprehension of bias may be established with proof of personal hostility and prejudice towards a party. The applicant alleges a reasonable apprehension of bias against the Band Council. The current Band Council which was elected in April 2005 is comprised of the applicant, Lawrence Schell, Shirley Hay, Gloria Greasley and Blaine Commandant, the current Band Chief. The last three individuals were elected as incumbents.

[27] One of the grounds on which the applicant bases her allegation of bias is the fact that the Band Council is named as a defendant in her wrongful dismissal lawsuit. In *Grabowski v. Joint Chiropractic Professional Review Committee*, 1999 SKQB 9 aff'd 2000 SKCA 61, the Saskatchewan Queen's Bench held that involvement in another legal proceedings will not necessarily establish bias. In that case the parties against whom the applicant was alleging bias had been named as defendants in an action commenced by the applicant. The Court noted that those individuals the applicant was alleging bias against were not the initiators in the lawsuit and held that their status as recent defendants in a lawsuit brought against them did not give rise to a reasonable apprehension of bias. In the present case, the Band Council was not the initiator in the action against

the applicant and, therefore, adopting *Grabowski*, I find that this factor alone does not give rise to a reasonable apprehension of bias.

[28] The applicant also submits that the Band's refusal to accept the finding of the binding arbitration decision gives rise to a reasonable apprehension of bias. Based on the evidence before the Court, the Band Council does not agree with the decision and refused to cash the applicant's cheque and thereby settle the dispute. At the time the applicant applied for the educational living allowance, the Band Council, 3 members of which had also been members of the previous Band Council, similarly refused to follow the terms of the binding arbitration as is evidenced from the letter from the Band Council, dated November 29, 2005, wherein the Council states that its position is that the dispute would be resolved upon the payment of $961.00. In my view, it is quite clear from the evidence before the Court that the Band Council believed the applicant still owed the Band money despite its own acknowledgement that the applicant had "experienced difficulties" with the Council of the day in presenting the final payment and despite the fact that the binding arbitration decision stated that the applicant would no longer owe the Band $961 if the applicant provided the Band Council within the required time period a cheque for $961 regardless of whether the Band Council cashed her cheque or not. Considering this, along with the fact that one of the requirements of receiving educational assistance from the Band is that the student be in good standing with the Band, I find that a reasonable person would believe that the Band Council would have prejudged whether the applicant met this requirement based on its failure to follow the terms of the arbitration decision.

[29] Therefore, I find that the Band Council's letter of November 29, 2005 establishes a reasonable apprehension of bias on the part of the Band Council.

4. Was the Band Council's decision to deny the applicant's application reasonable?

a) Standard of review

[30] The standard of review must be determined by the pragmatic and functional approach. This involves a consideration of four factors: the presence or absence of a privative clause or statutory right of appeal; the expertise of the tribunal relative to that of the reviewing court on the issue in question; the purpose of the legislation in question, as well as the purpose of the particular provision in question; and the nature of the question (*Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19).

[31] There is no privative clause in the Education Policy. Consequently, this factor suggests less deference need be afforded to the Band Council's decision.

[32] The second factor is the relative expertise of the Band Council in determining who is eligible to receive financial assistance under the Education Policy. Under the Education Policy students are not entitled to funding under the Education Policy but the Band will support as many students as possible and students will be selected and funded according to Wahta Mohawks Guidelines (section 2). In the event of an insufficient budget the Band Council will use the selection criteria provided in section 7 to determine which students will receive funding. The relevant requirement in this case is that the applying student be in good financial standing with the Band.

Determining whether a particular student is in good financial standing is a question of fact that requires an investigation into the financial relationship between the student and the Band. Usually such a determination would be within the expertise of the Band Council as it knows its own financial policies and the history of a student's financial relationship with the Band. However, in this case the determination as to whether the applicant was in good financial standing required an analysis of the Arbitrator's decision. The Band Council has no more expertise than the Court in determining whether, according to the binding arbitration decision, and in light of the events following that decision, the debt to the Band remains outstanding. Accordingly, this factor suggest only some deference be given to the Band Council's decision.

[33] According to section 2 of the Education Policy, its purpose is to address issues and to provide fair and equitable access to all those who are eligible for funding. The particular provision of the Education Policy in question here is the provision in the Education Policy that states that only those students in good financial standing with the Band are eligible for funding. The purpose of the provision cannot be said to be polycentric as it does not balance competing interests but rather requires the Band Council to make a factual determination with respect to an individual's eligibility for educational funding. This factor suggests less deference be given to the Band Council's decision.

[34] The final factor is the nature of the question. The question of whether the applicant is in good standing with the Band is one of fact and as such suggests a high degree of deference be given to the Band Council's decision.

[35] Weighing these factors, I conclude that the appropriate standard of review is reasonableness *simpliciter*.

b) Was as the Band Council's decision unreasonable?

[36] On two separate occasions the applicant gave the Band Council a cheque for the owed amount, once before the arbitration and then again after the Arbitrator's decision. The Board refused to process the payment on both occasions. According to the Arbitrator's decision, the debt would be terminated even if the Band Council did not cash the cheque provided the applicant gave the Band Council a cheque for the owed amount. Moreover, even though according to the binding arbitration decision the debt was terminated upon the applicant presenting the Band Council with a cheque, the applicant offered to have the amount she had previously owed deducted from her education living allowance. The Band Council did not reply to this offer. The respondent also put no evidence before the Court to suggest that the applicant does in fact still owe the Band money other than to say the Band never negotiated the applicant's cheque. In my view, in light of the Arbitrator's decision, the Band Council's determination that the applicant was not in good standing with the Band is unreasonable as it does not withstand a somewhat probing examination. It was the Band's decision not to have negotiated the cheque given to repay the Band for the moneys owing to the Band.

[37] The respondent submits that the applicant is also ineligible on the ground that she is not a full-time student. There is no evidence to suggest that this is the reason why the Band denied the applicant's application. This reasoning was presented for the first time in the affidavit of Shirley

Hay. The phone call from the Education Counsellor and the letter to the applicant informing her that her application was denied makes no mention of her student status and I give more weight to these events than to the affidavit of Shirley Hay and conclude that the student status of the applicant is not a reason why she was denied the education living allowance. The issue of whether the applicant was a full time student or a part time student was raised as an after thought.

[38] I am clearly satisfied that the Band's decision that the applicant was not in good standing with the Band was unreasonable. This application for judicial review is allowed.

[39] In the Notice of Application, the applicant sought:

a. a declaration that she is entitled to the payment of the education allowance provided for under the Education Policy beginning from September 2005;
b. a mandatory order requiring that Band Council pay her the education allowance; and
c. her costs in the application.

[40] In her written submissions, the applicant added an alternative order – that the Band be directed to consider her application for financial assistance under the Policy on the basis that she is not indebted to the Band and that she is deemed to be considered a full-time student in her program. In my view, the latter remedy is the most appropriate. The applicant's application for educational assistance is sent back for re-determination with directions that the Band Council is to respect the Arbitrator's decision with respect to the fact that applicant's debt to the Band Council has been extinguished, and that the applicant be considered a full-time student.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the matter is sent back for a new hearing in accordance with the above reasons and on the basis that the applicant is not indebted to the Board and was, at the time, a full-time student, the whole with costs.

"Max M. Teitelbaum"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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