

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT
Molloy, Herman and Harvison Young JJ.

BETWEEN:)
)
MARIA ANNA PAVON) Jackie Esmonde, for the Appellant
)
Appellant)
)
-- and --)
)
DIRECTOR OF THE ONTARIO) Mimi Singh, for the Respondent
DISABILITY SUPPORT PROGRAM)
)
Respondent)
)
)
) HEARD: June 7, 2013

MOLLOY J.:

REASONS FOR DECISION

A. INTRODUCTION

[1] This is an appeal by Maria Anna Pavon from a decision of the Social Benefits Tribunal (“the Tribunal”) dated August 4, 2011, which dismissed her appeal from a decision of the Director of the Ontario Disability Support Program (“the Director”). The Tribunal held that the statutory time period for appealing the Director’s decision had expired, relying on the Ontario Divisional Court decision in *Walsh v. Ontario (Disability Support Program)*.¹

¹ *Walsh v. Ontario, (Disability Support Program)*, 2011 ONSC 1526, [2011] O.J. No. 1056; subsequently upheld by the Court of Appeal, 2012 ONCA 463, 294 O.A.C. 174 [*Walsh*]. (Subsequent references to *Walsh* will be to the Court of Appeal decision.)

[2] For the reasons that follow, I find that the Tribunal misinterpreted both the applicable legislation and the decision in *Walsh*. Ms Pavon's appeal was brought within the time prescribed for appealing and should have been heard by the Tribunal.

B. THE STATUTORY SCHEME

[3] In Ontario, persons with disabilities who meet prescribed legislative requirements are entitled to receive Ontario Disability Support Program ("ODSP") benefits under the *Ontario Disability Support Program Act, 1997* ("the Act").² The stated purpose of the Act as set out in s. 1 is to establish a program that "provides income and employment supports" to eligible persons with disabilities and "effectively serves persons with disabilities who need assistance" while recognizing that "government, communities, families and individuals share responsibility for providing such supports". The program is also intended to operate in a manner that is accountable to the taxpayers of Ontario.

[4] The Director of the ODSP is charged with the administration of the program under the Act and has considerable decision-making responsibility with respect to benefits, which may be delegated.³ In particular, the Director has the power under s. 16 of the Act to determine that there has been an overpayment and the amount of the overpayment. The Director's decision, once it is final, is enforceable in the same manner as an Order made by the Superior Court of Ontario. Section 16 of the Act states:

16. (1) The Director may give a recipient notice in writing of a decision determining that an overpayment exists and, if the Director does, the notice shall set out the amount of the overpayment and the prescribed information concerning the decision.

(2) A decision determining that an overpayment exists shall be final and enforceable against the recipient as if it were an order of the Superior Court of Justice if,

(a) notice of it has been given under subsection (1);

(b) the time for commencing an appeal to the Tribunal has expired; and

(c) no appeal has been commenced.

[5] There is a comprehensive scheme for appeals under the Act. Essentially, there must first be a request for an internal review, after which an appeal lies to the Social Benefits Tribunal and from there to the Divisional Court on a question of law. There are time requirements for commencing such steps.

² S.O. 1997, c. 25.

³ *Ibid*, Part IV.

[6] Before appealing to the Tribunal, an applicant is required to request an internal review by the Director. Section 22 of the Act provides:

22. (1) No appeal may be commenced unless an internal review has been requested.

(2) The request for internal review must be made within the prescribed time.

(3) If the applicant or recipient requests an internal review, the review shall be completed in the prescribed manner and within the prescribed period.

[7] The time prescribed by regulation for requesting an internal review is 30 days from the day the decision is received or is deemed to have been received (three days after mailing).⁴ However, the Director has authority to extend that time under s. 58(3) of the Regulation, which states:

58. (3) The Director may hold an internal review even if it was not requested within the prescribed time if the Director is satisfied that the applicant or recipient was unable to request an internal review within that time because of circumstances beyond his or her control.

[8] The internal review is required under the Regulation to be completed within ten days after receipt of the request.⁵ The person who conducts the internal review cannot be the person who made the initial decision under delegation from the Director.⁶

[9] Section 60(2) of the Regulation stipulates what the internal review decision must contain, as follows:

60. (2) The decision made on an internal review shall include,

(a) the Director's original decision;

(b) a statement of whether the Director's decision is confirmed, set aside or varied;

(c) reasons for the decision on internal review; and

(d) the effective date of the decision on internal review.

[10] The point at which the Director's decision is considered to be "final" for purposes of calculating the time for appeal is set out in s. 20(3) of the Act, as follows:

⁴ O. Reg. 222/98, s. 58(1) ("Regulation").

⁵ *Ibid*, s. 59(1).

⁶ *Ibid*, s. 59(2).

20. (3) A Director's decision that may be appealed is final,

(a) when the prescribed time for requesting internal review expires, if no internal review is requested within that time; or

(b) on the earliest of the day the prescribed time for completing the internal review expires, the day the results of the completed internal review are received and the day the results of the completed internal review are deemed to be received under section 50, if an internal review has been requested.

[11] An appeal lies to the Tribunal from the Director's decision. The time for appealing to the Tribunal is dealt with under s. 23(2) of the Act and ss. 61(1) and (2) of the Regulation. The time limitations themselves are in the Regulation, which provides:

61. (1) For the purpose of subsection 23 (1) of the Act, the prescribed time for appealing a decision of the Director is 30 days from the day the Director's decision is final under clause 20 (3) (b) of the Act.

(2) No appeal to the Tribunal shall be commenced more than one year after the date of the Director's decision.

[12] There are also provisions in the Act itself dealing with the time for appeal to the Tribunal. This includes (in s. 23(2)), a power in the Tribunal to extend the time for appeal if there are "apparent grounds" for an appeal and "reasonable grounds" for an extension. Section 23 states:

23. (1) An applicant or recipient may appeal a decision of the Director within the prescribed period after an internal review by filing a notice of appeal that shall include reasons for requesting the appeal.

(2) The Tribunal may extend the time for appealing a decision if it is satisfied that there are apparent grounds for an appeal and that there are reasonable grounds for applying for the extension.

(3) An appeal to the Tribunal shall be commenced and conducted in accordance with the regulations.

[13] It is the juxtaposition among these various time limits for appealing to the Tribunal, and whether that time may be extended, that gives rise to the issue now before the Court.

C. BACKGROUND FACTS

[14] Ms Pavon is a person with a disability and a long-time recipient of disability benefits paid under the ODSP. In 2005, Ms Pavon's husband was seriously injured in the workplace and began collecting Workplace Safety and Insurance Board ("WSIB") benefits. There is a dispute as to whether and when this situation was drawn to the attention of ODSP. However, if it had been addressed at the outset, it would have resulted in a reduction of Ms Pavon's ODSP benefits.

[15] On February 9, 2009, the Director assessed Ms Pavon with an overpayment in the amount of \$36,668.74 for the period between October 2005 and October 2008.

[16] Around the time of the assessment decision, Ms Pavon was experiencing significant health issues. She did not submit a request for internal review of the February 9, 2009 decision until March 23, 2010.⁷ In her review request, Ms Pavon pointed to the fact that she had repeatedly drawn her husband's WSIB benefits to the attention of the ODSP staff to no avail. She submitted that the overpayment was the result of ODSP's own administrative error and that the Director should exercise his discretion to declare the overpayment uncollectable. Given that more than 30 days had elapsed since the 2009 assessment decision, she also requested an extension of time based on her health and personal issues at the time.

[17] The Director must have accepted that Ms Pavon was unable to request an internal review within the time required, because an internal review was undertaken. The review decision was issued on April 20, 2010, upholding the original decision of the Director, requiring repayment of an overpayment of \$36,668.74.

[18] Ms. Pavon filed a written notice of appeal with the Tribunal on April 6, 2010. This was prior to receipt of the internal review decision, but within 30 days of the ten day time period stipulated for completion of the internal review (as contemplated under s. 20(3)(b) of the Act).

D. THE DECISION OF THE TRIBUNAL

[19] Before the Tribunal, the Director took the position that Ms Pavon's appeal was out of time because it was delivered more than one year after the Director's original decision had become final, relying on s. 61(2) of the Regulation and the Divisional Court's decision in *Walsh*.

[20] The Tribunal dealt with this as a preliminary issue going to jurisdiction. The Tribunal concluded that this Court's decision in *Walsh* was dispositive, citing in particular para. 5 thereof, as follows:

Even if the Board made no error in its interpretation of the statutory and regulatory provisions relating to the period in which an internal review may be requested, we are of the view that subs. 61(2) of the Regulation provides an overriding prescription that ends one year after the Director's decision is made, whenever the decision is considered final and whenever it becomes effective. This one-year limit applies whether or not the requirements for requesting an internal review are complied with.

⁷ Although nothing turns on this discrepancy, the March 23, 2010 filing date is when Ms. Pavon asserts she made her request. However, the Director's internal review decision indicates the request was received by the Director on April 12, 2010.

[21] The Tribunal further held that it had no power to extend the time for Ms Pavon's appeal under s. 23(2) of the Act because of the one-year bar in s. 61(2) of the Regulation, again based on its understanding of the impact of the *Walsh* decision.

[22] In the result, the Tribunal dismissed the appeal for lack of jurisdiction, by decision dated August 4, 2011. On November 7, 2011, in response to a reconsideration decision, the Tribunal upheld its original decision that there was no jurisdiction to hear the appeal.

E. THE ISSUES ON THIS APPEAL

[23] Under s. 31(1) of the Act, an appeal lies to the Divisional Court from a decision of the Tribunal on a question of law.

[24] Two issues of law are raised in this appeal:

- (1) Does the one-year timeline for appeal under s. 61(2) of the Regulation start to run from the date of the Director's original decision, or from the date of the Director's internal review decision?
- (2) In the alternative, does the Tribunal have the power under s. 23(2) of the Act to extend the time for appeal beyond one year from the date of the Director's original decision?

[25] The appellant submits that the one-year limitation period only begins to run at the point in time when the Director's internal review decision is final. That decision was made in April 2010, and Ms Pavon's appeal to the Tribunal was made after her request for an internal review had been submitted but before the Director's decision was even received. Therefore it was clearly within the one-year limitation period.

[26] Contrary to the position taken by the Director before the Tribunal, counsel for the Director now concedes that Ms Pavon's appeal was filed within the required time, and that the one year time frame under s. 61(2) runs from the date of the internal review decision.

[27] Notwithstanding the agreement of counsel on this point, it is a point of law and one considered by the Tribunal as going to its jurisdiction. Therefore, the legal issue cannot simply be resolved on consent; it must be determined by this Court.

[28] In the alternative, the appellant argues that the Tribunal has a remedial jurisdiction under s. 23(2) of the Act to extend the time for appeal. However, on this issue the Director maintains its position that the Tribunal's power to extend the time applies only to the period within 30 days and one year, and cannot operate to extend the one-year time limit in s. 61(2) of the Regulation.

[29] For the reasons that follow, I find that Ms Pavon's appeal was filed within the required time and that the Tribunal's decision to the contrary is both unreasonable and incorrect. Given that result, it is not necessary to decide the alternative issue with respect to the extent of the Tribunal's power to grant extensions under s. 23(2) of the Act, in light of s. 61(2) of the Regulation, and I decline to do so.

F. THE STANDARD OF REVIEW

[30] Both parties submit that the applicable standard of review is correctness. There is considerable jurisprudence to that effect.⁸ At issue is the operation of various statutory limitation periods and the proper interpretation of a decision of this Court and the Court of Appeal as to those statutory provisions. The Tribunal referred to these issues as being jurisdictional.

[31] It is not entirely clear to me that this issue is one of “true jurisdiction” as that term has been interpreted by the Supreme Court of Canada in *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*.⁹ Likewise, it may be that the prior case law with respect to the correctness standard for this Tribunal needs to be re-evaluated in light of the Supreme Court’s decision in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*,¹⁰ particularly with respect to this Tribunal’s interpretation of its home statute.

[32] However, as the issue has not been fully argued, I make no finding on the standard of review. The applicable standard does not change the result here. Whether a reasonableness standard or correctness standard is applied, the Tribunal’s decision as to the appeal being out of time under s. 61(2) simply cannot stand.

G. THE DECISION IN WALSH

[33] The Tribunal’s decision in this case flowed from its interpretation of the Divisional Court’s decision in *Walsh*, which was subsequently upheld by the Court of Appeal. Because of the pivotal role of the *Walsh* case, it is useful to examine the Court of Appeal decision in some detail, both for what it decided and for what it did not decide.

[34] Diane Walsh had numerous mental and physical disabilities and had been receiving ODSP benefits for many years. In 2005, the Director began a routine update of Ms Walsh’s file and made numerous requests that she attend for an interview, which she failed to do. As a result, in September 2005, her benefits were suspended. In July 2007, after receiving legal advice, Ms Walsh asked the Director to extend the time for an internal review. The Director refused. On August 7, 2007, Ms Walsh appealed to the Tribunal from the Director’s September 2005 decision suspending her benefits.

[35] The Tribunal held that the deadline for an internal review under the Act was “ambiguous.” The Tribunal reasoned that the Director’s decision became effective when it was “received” and that to “receive” the decision, the appellant must be able to understand it, which

⁸ *Ontario Disability Support Program v. Favrod*, 2006 CanLII 4898 (ON S.C.D.C.) at para. 10, [2006] O.J. No. 653 at para. 10; *Ontario Disability Support Program v. Tranchemontagne*, 95 O.R. (3d) 327, 2009 CanLII 18295 at paras. 27-29 and 34, subsequently affirmed by the Court of Appeal, 2010 ONCA 593, 102 O.R. (3d) 97.

⁹ 2011 SCC 62, [2011] 3 SCR 708.

¹⁰ 2011 SCC 61, [2011] 3 S.C.R. 654.

she was not able to do until she received legal advice. Upon obtaining that advice, she applied for an internal review before ten days had elapsed. Therefore, the Tribunal found that she had complied with the relevant time period for seeking an internal review. The Tribunal also found that the Director had failed to properly accommodate Ms Walsh's disabilities prior to rendering the decision to suspend her benefits. It ordered her benefits be reinstated.

[36] The Director appealed to the Divisional Court, which quashed the Tribunal's decision. On further appeal, the Court of Appeal upheld the decision of the Divisional Court.

[37] The Court of Appeal held that the Tribunal acted without jurisdiction. The Court referred to s. 23(1) of the Act, which stipulates that an applicant can only appeal to the Tribunal "after an internal review". There had been no internal review because the Director had refused to extend the time for requesting the internal review. Further, the Director's decision refusing such an extension is one of the decisions from which an appeal to the Tribunal is prohibited.¹¹ The Court of Appeal also held, at para. 55, that the Tribunal did not have the jurisdiction to extend the time to appeal because there can be no appeal from a "prescribed" decision of the Director (in the *Walsh* case, refusing to extend the time for the internal review).

[38] The Court of Appeal found no ambiguity in the language of s. 61(2) of the Regulation, which states: "No appeal to the Tribunal shall be commenced more than one year after the date of the Director's decision." The only eligible Director's decision was the one suspending benefits. Since the appeal to the Tribunal was commenced more than one year after that decision of the Director, the Tribunal was without jurisdiction to hear it.

[39] The reasons of the Court of Appeal are summarized as follows at para. 58:

The unavoidable result is that the Divisional Court was correct in deciding this case as it did. Ms. Walsh could not appeal the Director's decision to suspend her benefits without requesting an internal review within the prescribed time. She did not request an internal review within the prescribed time and the Director declined to extend the time period to do so. That decision was not appealable. The failure to make a timely request for an internal review left Ms. Walsh without a right of appeal of the Director's decision to suspend her benefits. The Tribunal therefore lacked jurisdiction to hear Ms. Walsh's appeal from the decision to suspend her benefits. As an aside, it also lacked jurisdiction to entertain an appeal of the Director's decision not to extend the time for the internal review.

[40] Finally, the Court of Appeal noted the importance of a legislative scheme that provided for fair and expeditious review and decision-making, and which therefore required some degree of certainty around the timelines for internal reviews. The Court concluded, at para. 78:

¹¹ *Walsh*, at para. 52, citing s. 21(2) of the Act and s. 57(1) of the Regulation.

The Act seeks to compensate for any perceived unfairness arising from the timelines in two ways: the right to re-apply; and the Director's ability to extend the time under s. 58(3) of the Regulation for requesting internal review.

[41] It is important to recognize what the Court of Appeal did not decide in *Walsh*.

[42] The Court of Appeal made no decision as to the applicability of human rights or *Canadian Charter of Rights and Freedoms* principles on the interpretation or application of these provisions, because none were raised by way of notice or evidence. The Court stated, at para. 41:

Notably, [Ms Walsh's] appeal did not provide notice to the Tribunal of any human rights issue or a challenge under the *Human Rights Code* as provided for by the Tribunal's rules of practice. Furthermore, no evidence supporting such claims was put before the Tribunal.

[43] The Court of Appeal also did not decide how the appeal timelines would operate in a case where there had been an internal review by the Director. In particular, because there was no internal review in the *Walsh* decision, the Court of Appeal did not decide whether the one-year time period in s. 61(2) of the Regulation is triggered by the initial decision of the Director, or from the subsequent decision after an internal review.

H. ANALYSIS

General principles of interpretation

[44] The *Ontario Disability Support Program Act, 1997* is remedial, social benefit legislation. The approach to interpreting its provisions is well-settled. The words used must be "read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of [the legislature]."¹² The underlying object of the Act as well as the intention of the legislature is to provide for the basic needs and shelter of persons with disabilities. It must therefore be interpreted "in a broad and generous manner with any ambiguity resolved in favour of the claimant, recipient or dependent."¹³

[45] Further, given that by definition the very persons the statute is designed to support are persons with disabilities, I consider it axiomatic that the Act must be interpreted in a manner that does not discriminate on the basis of disability and in a manner that recognizes the right of persons with disabilities to reasonable accommodation. Where more than one interpretation of a

¹² *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 21, 36 O.R. (3d) 418; *Walsh* at para.36; *Ontario (Disability Support Program v. Ansell*, 2011 ONCA 309 at para. 25, 333 D.L.R. (4th) 489.

¹³ *Walsh*, at para. 47.

provision is possible, the court should adopt the interpretation that accords with human rights and *Charter* values, rather than one that would undermine them.¹⁴

[46] Many disabilities have an impact on whether a person is able to respond in a timely way to various details of life. Sometimes the nature of that disability will require some accommodation for that person to respond to events or communications even where there are statutory restrictions mandating a prompt response. Some statutes explicitly recognize the need for such accommodation. For example, the Ontario *Limitations Act* provides that the limitation period does not run for persons who are “incapable of commencing a proceeding in respect of the claim because of his or her physical, mental or psychological condition”.¹⁵

[47] Where there is no express accommodation for disability in a limitation provision, courts have read it in in order to avoid violating the equality guarantees under s. 15 of the *Charter*. For example, the Newfoundland Court of Appeal in *Snow v. Kashyap* found that a two-year statutory limitation period for bringing a professional negligence claim against a doctor violated the equality rights of the brain-damaged plaintiff, requiring a constitutional exemption.¹⁶ Marshall J.A. stated the principle eloquently at para. 70:

Moreover, this violation is not justifiable under s. 1. Assuming that the statutory purpose of creating the limitation period is aimed at the attainment of [a] desirable social objective, it is unnecessary for the purpose of achieving that objective to foreclose from maintaining an action a person whose personal disability deprives him or her of the capacity to assert the claim. To the contrary *the injustice of barring a claim before an individual's handicap caused by his or her impaired mental faculties has been sufficiently offset might be viewed as the antithesis of the values espoused in a modern free and democratic society.* [Emphasis added.]

[48] For the most part, the interpretation of statutes in a manner consistent with *Charter* values does not involve a full constitutional challenge. Rather, the court strives to give meaning to the statutory language that is consistent with the words used and the intention of the statute, but at the same time consistent with recognizing equality rights. It is only where those two objectives are in conflict that it is necessary to consider the constitutionality of the legislation. In this case, there is no suggestion that the statutory provisions at issue are unconstitutional. However, the “broad and generous” interpretation that is mandated for this type of remedial legislation must also take into account *Charter* values. A strict limitation period that allows for no individual accommodation can be as insurmountable an obstacle to equality for persons with some types of disabilities, as a flight of stairs is for a person using a wheelchair.

¹⁴ *R. v. Zundel*, [1992] 2 S.C.R. 731, [1992] S.C.J. No. 70 at para. 59; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416.

¹⁵ *Limitations Act, 2002*, S.O. 2002, c. 24, Schedule B, ss. 7(1), 15(4).

¹⁶ 125 Nfld & PEIR 182, 1995 CanLII 9829 at para. 70; see also *Speerin v. North Bay (City)*, 5 O.R. (3d) 492, [1991] O.J. No. 1902 (Gen. Div.) at para. 19.

The Tribunal Misinterpreted the Statute

[49] The question in this case is whether the time for appealing the Director's decision runs from the initial decision of the Director, or from the internal review decision. The initial hurdle that must be cleared is s. 23(1) of the Act which provides that an applicant may appeal a decision of the Director to the Tribunal "within the prescribed time after an internal review". It is clear that there can be no appeal to the Tribunal without an internal review being requested within the time required, or without the extension of that time by the Director.¹⁷ However, there was an internal review in this case, so that requirement is satisfied.

[50] The "prescribed time" as stated in the Regulation at s. 61(1) is "30 days from the day the Director's decision is final" under s. 20(3)(b) of the Act. This provision is also not an obstacle to Ms Pavon's claim because the Director extended the time for delivery of the request for an internal review. Whichever date is taken as the date upon which the Director's decision became final, the applicant was within it, as was accepted by the Tribunal.

[51] Where the Tribunal found an obstacle was in s. 61(2) of the Regulation, which states that "[n]o appeal to the Tribunal shall be commenced more than one year after the date of the Director's decision." The appeal was filed on April 6, 2010. If the date of the Director's decision is taken to be the original decision (February 9, 2009), then the appeal was not commenced within the one year period set out in s. 61(2). This was the interpretation taken by the Tribunal. However, if the date of the Director's decision is taken to be the date upon which the internal review was completed (or alternatively, ten days after the internal review was requested), then the appeal was commenced well within the one year period prescribed in s. 61(2).

[52] In my view, the Tribunal placed an unreasonable restriction on s. 61(2) by applying it to the original decision of the Director. Read in context, there is nothing about the words "Director's decision" that would require it to be read as meaning the Director's original decision. Section 61(1), the immediately preceding subsection, imposes a 30-day time limit which clearly starts from the date of receipt of the internal review decision. It makes sense that the same words in the two subsections should be read in the same way, *i.e.* as applying to the decision after the internal review, where there has been one. I note that the expression "Director's original decision" is referred to elsewhere in the legislation (*e.g.* s. 60(2)(a))¹⁸. If s. 61(2) was meant to refer only to the original decision, one would expect the legislation to state that specifically.

[53] Further, it must be remembered that the decision after the internal review may be quite different from the original decision. A request for an internal review involving a small discrepancy and modest assessment for overpayment might result in a more substantial assessment for overpayment. It hardly seems appropriate that the applicant would lose an appeal

¹⁷ *Walsh*, at para. 58; Act, s. 22(1).

¹⁸ Section 60(2) provides: "The decision made on an internal review shall include, (a) the Director's original decision."

right if the Director fails to complete the internal review in a timely way, with the result that more than one year has passed from the date of the original decision. In that situation, whether the time lag is because of the Director, or because the Director saw fit to extend the time for the applicant to ask for a review, the claimant will have lost any opportunity to appeal what may be a substantial wrong arising from the internal review.

[54] The Director maintains substantial power. Where the applicant has been responsible for the delay and does not establish an appropriate basis for extending the time for an internal review, the Director may refuse to extend the time, and the Director's decision in that regard is not subject to appeal. The Director can therefore insulate its own decision from appeal where the applicant has delayed. It cannot have been the intention of the legislature to also give the Director the power to foreclose any right of appeal where the applicant has made a timely request for review and the Director delays past the one year limitation period. Although the applicant has the right to appeal before the internal review decision is delivered, surely it is reasonable for the applicant to wait until seeing the decision before taking that step. To hold otherwise would be to convert the right or opportunity to launch a preemptive appeal into an obligation to do so where the one year time limit is approaching.

[55] The potential harshness of the 30-day prescribed time in s. 58(1) of the Regulation for seeking an internal review of the Director's decision is ameliorated by the discretion, vested in the Director under s. 58(3) to extend the time if he or she is satisfied that the applicant was "unable to request an internal review within that time because of circumstances beyond his or her control."

[56] In this case, the Director was satisfied that Ms Pavon was unable to initiate her review request because of circumstances beyond her control. Notwithstanding this, the Tribunal chose an interpretation of s. 61(2) that would deprive her of a statutory right of appeal from that decision. If that were the only reasonable interpretation of the expression "Director's decision" that was possible under the legislation, one might be driven to it (subject to issues of constitutionality). However, the alternate interpretation, which is to apply the one-year period to the date of the internal review decision, is not only a reasonable interpretation, but one that is the most reasonable based on the context and language of the Act and in keeping with legislative intent. Further, it is an interpretation that respects the constitutional equality right to be accommodated. Where such an interpretation is possible and indeed, compelling, it is unreasonable to choose an alternate interpretation that defeats the intention of the legislation as well as *Charter* equality values.

[57] In my view, the Tribunal's interpretation of s. 61(2) was incorrect. Further, even if deference is required in respect of the Tribunal's interpretation of its home statute, the decision is

not reasonable. It is, in short, not a reasonable outcome, as contemplated in *Dunsmuir v. New Brunswick*.¹⁹

The Tribunal Misinterpreted Walsh

[58] It would appear that the Tribunal believed it was required to take this view of s. 61(2) because of the Divisional Court's decision in *Walsh*. As I mentioned above, the Court of Appeal upheld the decision of the Divisional Court. Of course, the Tribunal did not have the benefit of the Court of Appeal's decision in *Walsh* as it was released subsequent to the Tribunal's decision. The reasoning of the Court of Appeal is more fulsome than that of the Divisional Court, and it may be the case that if the Tribunal had the benefit of that fuller analysis, it would not have erred as it did.

[59] The Court of Appeal in *Walsh* did not address the issue that was before the Tribunal in this case. In *Walsh*, the Court of Appeal noted a number of times that there had been no internal review. Further, although there had been a request for a review, the Director had refused to extend the time, which was a decision from which no appeal can be taken. Therefore, in *Walsh* there was only one decision of the Director to which the one-year limitation period in s. 61(2) could possibly apply. The Court of Appeal said nothing about what the words "Director's decision" meant, because it was not relevant to anything it had to decide.

[60] Further, to the extent that *Walsh* has any bearing on this issue at all, it supports the interpretation I have adopted. The Court of Appeal emphasized that Ms. Walsh lost her right of appeal, not just because she did not make a timely request for an internal review, but also because the Director refused to extend the time to enable her to do so. At para. 58, the Court held:

Ms. Walsh could not appeal the Director's decision to suspend her benefits without requesting an internal review within the prescribed time. She did not request an internal review within the prescribed time *and the Director declined to extend the time period to do so*. That decision was not appealable. The failure to make a timely request for an internal review left Ms. Walsh without a right of appeal of the Director's decision to suspend her benefits. [Emphasis added.]

The necessary implication, in my view, is that if the time for the internal review had been extended, the situation with respect to Ms Walsh's right to appeal to the Tribunal would have been quite different.

[61] That same implication also arises from para. 78 of the Court of Appeal decision. The Court recognized that there could be perceived unfairness caused by s. 61(2), but stated that this is compensated for by the right to re-apply for benefits (which does not apply to Ms. Pavon as

¹⁹ 2008 SCC 9, [2008] 1 S.C.R. 190.

her case involved overpayment rather than entitlement) and by “the Director’s ability to extend the time under s. 58(3) of the Regulation for requesting internal review.” In Ms. Pavon’s case, the Director did extend the time for the internal review. However, that provides no compensation for the harshness of the one-year time limit in s. 61(2) unless the internal review process has the effect of re-starting the limitation period. Unless the one-year limitation period runs from the date of the review decision, the Director’s recognition that Ms Pavon was unable to comply with the time requirement for requesting a review would create no benefit beyond the review itself. Ms Pavon would have lost her right to appeal to the Tribunal, and ultimately to this Court. Thus, to give proper effect to the intention of the legislative scheme, as found by the Court of Appeal, the Tribunal in this case should have interpreted s. 61(2) as referring to the Director’s review decision, rather than the original decision.

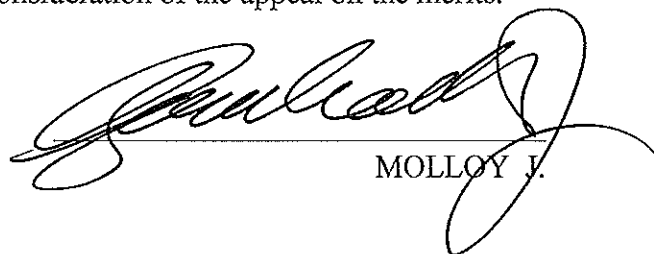
[62] The Tribunal’s interpretation of the *Walsh* decision was both incorrect and unreasonable, and led it to a wholly unreasonable interpretation of the legislation itself.

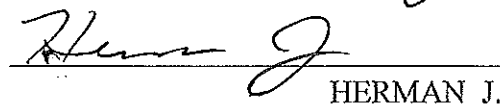
I. CONCLUSION AND ORDER

[63] The Tribunal had jurisdiction to consider Ms Pavon’s appeal from the Director’s decision. Its decisions to the contrary dated August 4, 2011, and November 7, 2011, (upon reconsideration) are therefore quashed.

[64] Given that result, it is not necessary for this Court to consider the proper interpretation of the Tribunal’s jurisdiction to itself extend the time for an appeal.

[65] This matter is remitted to the Tribunal for its consideration of the appeal on the merits.


MOLLOY J.


HERMAN J.


HARVISON YOUNG J.

CITATION: Pavon v. Ontario (Disability Support Program), ODSP, 2013 ONSC 4309
DIVISIONAL COURT FILE NO.: 553/11
DATE: 20130621

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Molloy, Herman and Harvison Young JJ.

BETWEEN:

MARIA ANNA PAVON

Appellant

– and –

DIRECTOR OF THE ONTARIO DISABILITY
SUPPORT PROGRAM

Respondent

REASONS FOR DECISION

**Molloy J.,
Herman J.
Harvison Young J.**

Released: June 21, 2013