

CITATION: Ontario (Disability Support Program) v. Surdivall 2012 ONSC 1851
DIVISIONAL COURT FILE NO.: 207/11
DATE: 20120330

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

JENNINGS, SWINTON and HARVISON YOUNG JJ.

BETWEEN :

DIRECTOR OF THE ONTARIO
DISABILITY SUPPORT PROGRAM

Appellant

)
)
) *Mimi N. Singh*
) for the Appellant
)
)

- and -

GLYNN SURDIVALL

Respondent

)
) *Jackie Esmonde*
) for the Respondent
)
)

) **HEARD at Toronto:** December 21, 2011

THE COURT:

Overview

[1] The Director of the Ontario Disability Support Program (the "Director") appeals the decision of the Social Benefits Tribunal (the "Tribunal") dated March 25, 2011, which held that the Director correctly assessed Mr. Surdivall with an overpayment of \$3,050 for the period August 2009 to May 31, 2010, and ordered the Director to proceed to recover half of the overpayment at the rate of \$10 per month.

Factual Background

[2] Mr. Surdivall was a recipient of disability benefits under the *Ontario Disability Support Program Act 1997*, S.O. 1997, c.25 (the "Act") from 2002 until he turned 65 years of age in July 2010, when he began receiving Canada Pension Plan and Old Age Security benefits. The overpayment of \$3,050 in ODSP benefits arose because, as the Director found, Mr. Surdivall had failed to notify the Director that his monthly rent had been reduced from \$444 to \$139 for the period mentioned. In August 2009, Mr. Surdivall had obtained less expensive housing from

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Toronto Community Housing Corporation at a rent of \$139 per month. However, he continued to live in shared accommodation until May 2010 and continued to receive a housing allowance calculated on rent of \$444 per month.

[3] Mr. Surdivall appealed to the Tribunal, which held that the Director correctly assessed the overpayment of \$3,050, and affirmed the decision of the Director, because Mr. Surdivall had received additional shelter allowance that he was not entitled to receive.

[4] However, even though it denied Mr. Surdivall's appeal, the Tribunal went on to order the Director to collect half of the overpayment, because it was of the opinion that the Director should exercise some discretion in the collection of the overpayment. The Tribunal noted that Mr. Surdivall would experience financial hardship if he had to repay the whole amount, as he is on a fixed income. Therefore, the Tribunal ordered the Director to proceed to collect half of the overpayment at the rate of \$10.00 per month.

The Present Appeal

[5] Pursuant to s.31(1) of the Act, an appeal from the Tribunal's decision lies to this Court on a question of law.

[6] The Director submits that the Tribunal erred in law and exceeded its jurisdiction by reducing the amount of the overpayment that can be recovered by the Director to one half of its assessed amount and further, restricting the Director's ability to collect the remaining balance.

[7] The parties agree, and we accept their agreement, that the standard of review is correctness.

The Statutory Framework

[8] Section 1 of the Act provides that the Act's purpose is to establish a program that provides income support to eligible persons with disabilities and remains accountable to the taxpayers of Ontario.

[9] To maintain the integrity of the program, recipients of support are required to provide information regarding any new or changed circumstances, and the failure to do so can give rise to an overpayment. That is what happened in this case.

[10] Pursuant to s. 14(1) of the Act, an overpayment is determined to exist where an amount has been provided to a recipient in excess of the amount to which the recipient was entitled. Section 14(2.1) of the Act provides that an overpayment under the Act is a debt due to the Crown in right of Ontario.

[11] Subsection 14(4) states that an overpayment "may be recovered by one or more of reduction of income support under section 15, notice under section 16 or a proceeding under section 17".

[12] Section 15 allows the Director to recover the amount of an overpayment from a recipient's benefits by deducting up to the amount prescribed by the regulations (see s. 51 of O. Reg. 222/98).

[13] Pursuant to s. 16, the Director may give a recipient notice of overpayment in writing. The decision that there has been an overpayment becomes final and enforceable as if it were an order of the Superior Court if notice has been given and no appeal is commenced within the time limit for an appeal (s. 16(2)). Pursuant to s. 16(3), if a decision is appealed and an overpayment is determined, the decision of the Tribunal is final and enforceable as if it were a court order.

[14] Section 17 provides that the Director may recover an overpayment as a debt due to the Crown in a court of competent jurisdiction, whether or not notice was given under s. 16.

[15] Subsection 21(1) provides that any decision of the Director "affecting eligibility for or the amount of income support" may be appealed to the Tribunal. Section 29(3) of the Act provides that the Tribunal shall not make a decision in an appeal that the Director would not have authority to make.

Analysis

[16] By the time the appeal reached the Tribunal, Mr. Surdivall was no longer in receipt of ODSP benefits, so this is not a case where the quantum of deduction from income support benefits is at issue. The question here is whether the Director had the authority to effectively forgive 50% of the overpayment which, as is noted, is a debt owing to the Crown.

[17] The Tribunal concluded that the Director had discretion in the collection of the overpayment.

[18] There is nothing in the statute which grants the Director the jurisdiction to forgive any part of the overpayment. Indeed, as the overpayment is a Crown debt, it would be virtually inconceivable that, given the requirements of accountability and transparency in dealing with public funds, any such power would be granted to the Director. Indeed, the *Financial Administration Act*, R.S.O. 1990, c. F.12 provides in s. 5(1) that, subject to any other Act, it is the Minister of Finance who may determine whether a debt due to the Crown is uncollectable or whether it should be collected.

[19] The Director's sole jurisdiction with respect to overpayments under the ODSP legislation is the manner in which the Director is to proceed to collect the overpayment. See the Act, ss.14, 15, 16 and 17.

[20] Obviously, if the Director has no discretion to compromise on a Crown debt, the Tribunal has no such jurisdiction. Indeed, in an appeal under s. 16(3) of the Act, the task of the Tribunal is to determine whether or not there is an overpayment. In the present case, it found that there was an overpayment. In accordance with s. 16(3), the decision is enforceable as if it were a court order.

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[21] Both parties have made reference to the decision of the Supreme Court of Canada in *Attorney General of Canada v. Mavi*, 2011 SCC 30, which dealt with the enforcement of undertakings signed by the sponsors of relatives under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. The amount that a sponsor is required to pay under the terms of the undertaking is a debt due to the Crown in right of Canada or in right of the province in certain circumstances. The Supreme Court of Canada held that the legislative scheme confers discretion on government decision-makers with respect to the collection of the debt, allowing them to limit enforcement to the amount agreed upon with the sponsor (at para. 59). However, the Court made it clear that the government decision-makers under that scheme had no power to write off the debt (at paras. 59 and 79).

[22] Even if the Director has discretion to postpone repayment of an overpayment, there is nothing in the legislative scheme under the ODSPA that suggests the Director has the power to forgive a debt to the Crown. The Tribunal's order preventing the Director from recovering half the overpayment is, effectively, a write-off of half the debt. Neither the Director nor the Tribunal had authority to make such an order (see *Ontario (Ministry of Community and Social Services, Income Maintenance Branch)* (1990), 75 D.L.R. (4th) 564 (Ont. Div. Ct.) at p. 6 (Quicklaw version)).

[23] The Crown's powers with respect to debt collection can be restricted by legislation. For example, ss. 15(2) and 18(3) of the Act provide that where the Director recovers the amount of an overpayment by deducting it from a recipient's income support, the amount shall not exceed the amount prescribed by regulation unless the recipient agrees. Thus, under those provisions, the Director has a discretion as to how much to deduct from income support. However, those provisions have no bearing on this appeal, because the respondent was no longer a recipient of benefits at the time of his appeal to the Tribunal.

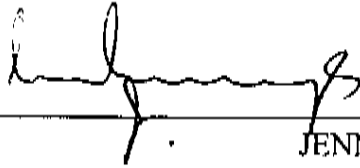
[24] We were told during argument that a practice has arisen whereby the Tribunal, believing that a discretion exists, has occasionally issued orders that the Director modify the amount of overpayments to be collected. We were further advised that on occasion the Director has requested that the Tribunal order a modification. If such a practice has developed, we can find no justification for it in the enabling legislation, unless a deduction from benefits is in issue under ss. 15(2) and 18(3).

[25] Lacking statutory authority to direct the Crown to forgive its debt and limiting the collection that it can make in a case like the present one, the Tribunal erred in law and exceeded its jurisdiction. Its order must be quashed insofar as it relates to imposing limitations on the Director's ability to collect the overpayment.

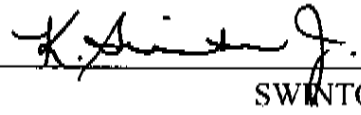
Conclusion

[26] Accordingly, the appeal is allowed and that part of the Tribunal's order restricting the recovery of the overpayment is set aside.


[27] Neither party seeks costs and none are ordered.



JENNINGS J.



SWINTON J.



HARVISON YOUNG J.

RELEASED: MAR 30 2012

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REASONS FOR JUDGMENT

THE COURT

RELEASED: March 30, 2012