

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT
Mew, Nishikawa and O’Brien JJ

BETWEEN:)	
)	
BENJAMIN’S PARK MEMORIAL)	<i>A. Sanche and M. Dvorkina</i> , for the
CHAPEL INC., THE BENJAMIN)	Applicants
FOUNDATION AND MICHAEL)	
BENJAMIN)	
)	
)	
Applicants)	
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– and –)	
)	
BEREAVEMENT AUTHORITY OF)	<i>B. LeBlanc and A. Hountalas</i> , for the
ONTARIO)	Respondent
)	
)	
Respondent)	
)	HEARD: at Toronto by videoconference on
)	May 23, 2023

O’BRIEN J.

REASONS FOR DECISION

Overview

[1] This is an application for judicial review of two decisions of the Bereavement Authority of Ontario (“BAO”), which is the regulator governing bereavement services in Ontario. The BAO made the impugned decisions in response to a complaint from a consumer, Raziel Zisman, in the wake of the tragic death of his son in January 2022.

[2] Following his son’s death, Mr. Zisman contacted the Applicant, Mr. Benjamin, and engaged Benjamin’s Park Memorial Chapel Inc. (the “Chapel”) for the provision of funeral and burial services. After attending a Zoom meeting with Mr. Benjamin, Mr. Zisman signed two contracts, including one for the services of the Benjamin Foundation (the “Foundation”). Mr. Zisman’s complaint centred on the allegation that the Foundation, which received memorial donations on behalf of the Zisman family, improperly retained 10% of the donations as an administrative fee.

[3] The BAO conducted an investigation and issued two decisions in response to the complaint. The first decision dated July 28, 2022, directed the Chapel to, among other things, release all donations including the retained 10% fee to Mr. Zisman’s charities of choice. The BAO registrar was of the view that the administrative fee was not sufficiently transparent to the consumer nor to a potential donor. In response to submissions from the Applicants that the BAO did not have jurisdiction over the Foundation, the registrar took the position that the Chapel and Mr. Benjamin had offered and promoted the services of collecting donations through the Foundation. As a result, the registrar deemed the service to be a “licensed service” as defined in the *Funeral, Burial and Cremation Services Act, 2002* (the “*FBCSA*”) and within the BAO’s jurisdiction to regulate.

[4] The following day, the registrar released a second decision directing the Chapel to return all administrative fees collected in respect of various charitable donations made between January 1, 2016 to July 2022.

[5] The registrar who made the impugned decisions has since left the BAO. Shortly after this application was initiated, the BAO conceded that it did not have jurisdiction to require licensees to refund money or pay compensation. Its position therefore is that this court should quash the decisions and remit them back to the newly appointed registrar to be disposed of in accordance with the *FBCSA*.

[6] The Applicants do not agree with the BAO’s proposed outcome. They submit that the BAO cannot be trusted to render a fair, unbiased, and statute-based decision. They rely in part on the BAO having already exceeded its jurisdiction. They also state the BAO has engaged in what they describe as a “media campaign” to publicly buttress its own decisions and paint the Applicants in a negative light. They submit that the BAO’s conduct raises a reasonable apprehension of bias.

[7] The Applicants also take issue with the BAO’s view of the facts and the conclusion that the services related to the Foundation constituted “licensed services” under the *FBCSA*. Given the BAO’s conduct, the Applicants ask this court to make its own determination that the services provided by the Foundation are not licensed services and not subject to further action by the BAO.

[8] For the reasons that follow, the application is allowed, the decisions are quashed, and the matter is remitted to the BAO in its entirety for reconsideration.

Issue

[9] The primary issue for this court is whether the matter should be remitted to the BAO and, if so, whether it should be remitted in whole or only on the issue of remedy.

Fresh Evidence

[10] The Applicants sought to admit, as fresh evidence, an affidavit of counsel reporting on conversations with BAO staff and summarizing and attaching media coverage. The BAO agreed that the fresh evidence was admissible but denied that it demonstrated bias. The court therefore admitted the evidence. I have considered the evidence in determining the application, although I have put minimal weight on the hearsay statements regarding conversations with BAO staff.

Standard of Review

[11] The parties agree that the standard of review is reasonableness.

Analysis

[12] Although I have some concerns about the BAO's conduct in discussing its decisions in the media, I do not need to determine whether this conduct raised a reasonable apprehension of bias. Regardless of whether the BAO's conduct met that standard, there is a new decision-maker now in place. As set out below, I am satisfied that it is appropriate to remit the matter to be decided by the new registrar.

[13] After rendering the two decisions, the BAO made public comments to several media outlets about the decisions and this proceeding. For example, a BAO spokesperson made comments to the media describing the requirement that the Applicants return funds going back six years, the term the BAO later conceded it did not have jurisdiction to make. The spokesperson described potential consequences to the Applicants should they fail to comply with the decisions, such as a suspension or revocation of their licence. He stated that the BAO "felt the general public should know about Benjamin's track record and decided to ramp up the stakes."

[14] This conduct raises some concern about the approach the former registrar might have taken to the Applicants, should the decisions have been remitted to him by this court. I note that I do not consider the other impugned conduct raised by the Applicants, such as the BAO's changes to its website, to be objectionable.

[15] However, I do not need to determine whether the BAO's statements to the media meet the high threshold to demonstrate a reasonable apprehension of bias. Generally, where a court grants judicial review and quashes a decision, the appropriate remedy is to remit the matter to the decision-maker for reconsideration. The exceptions to this approach include where it becomes evident to the court that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose. Courts may also consider rendering the decision themselves where there are concerns about delay, fairness to the parties, or there is urgency in providing a resolution to the dispute: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at paras. 141-142; *Canadian Broadcasting Corporation v. Ferrier*, 2019 ONCA 1025, at paras. 77-80.

[16] Even if the BAO's conduct under the administration of the former registrar raised a reasonable apprehension of bias, which I need not decide, there is a different decision-maker, in the form of a new registrar, now in place. The outcome upon remitting the matter to this new decision-maker is far from inevitable. The BAO has demonstrated in a very concrete manner its willingness to approach this matter with an open mind. It has conceded that the reconsidered decision must necessarily have a different result since, at a minimum, the remedy must be varied. It also takes the position that the matter should be remitted in its entirety. Given the new decision-maker, together with the BAO's new approach, it is appropriate in this case to order the usual remedy of remitting the matter to the administrative decision-maker.

[17] Although neither party took the position that the matter should be remitted on the issue of remedy alone, the court considered this possible outcome. While the Applicants' primary position was that the court should make its own determination of the complaint, it also claimed in its written materials that it was denied procedural fairness in the investigative process. This raises the question of whether an appropriate record will be before the new registrar. Further, the necessary implication of the Applicants' position that the previous registrar demonstrated a reasonable apprehension of bias is that, if the matter were to be remitted, it should be remitted on all issues.

[18] The BAO proposed that the matter be sent back on all issues to be considered on a more complete record. It took this position, in part, because of the Applicants' written submission that they were denied natural justice. The BAO acknowledges that there could have been a fuller record before the registrar, especially on the issue of whether the services in issue were "licensed services." The BAO also submits that the remedy was intimately tied to the findings and, therefore, the entire matter should be remitted for a new decision.

[19] In my opinion, given the BAO's concessions, sufficient questions have been raised about the record that the matter should be remitted to the BAO in its entirety for reconsideration.

[20] Finally, in view of my conclusions, I do not need to determine whether the decisions of the BAO were unreasonable in their treatment of the facts or in the interpretation of "licensed service," as submitted by the Applicants. The BAO, under a new decision-maker, will need to consider these issues afresh on a new record.

Disposition

[21] The application therefore is allowed, and the matter is remitted in its entirety to the BAO for reconsideration.

[22] The BAO was fully successful in the position it took on this application, having stated that the former registrar lacked jurisdiction and that the matter should be remitted. I am also aware that the BAO made an offer to settle the matter. The BAO therefore is entitled to its costs. However, given that the BAO's conduct gave rise to the litigation, I consider it appropriate to reduce the costs award from the amount the BAO claimed. The Applicants therefore shall pay costs to the BAO in the amount of \$20,000 all-inclusive within 30 days.

O'Brien J.

I agree

Mew J.

I agree

Nishikawa J.

Released: June 1, 2023

CITATION: Benjamin's Park Memorial Chapel v. Bereavement Authority of Ontario, 2023 ONSC 3281
DIVISIONAL COURT FILE NO.: 475/22
DATE: 20230601

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Mew, Nishikawa and O'Brien JJ

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THE BENJAMIN FOUNDATION AND MICHAEL
BENJAMIN

APPLICANTS

– AND –

BEREAVEMENT AUTHORITY OF ONTARIO

RESPONDENT

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O'BRIEN, J

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