COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***Workers' Compensation Act (Re) and O'Donnell***, 2008 YKCA 9

Date: 20080709
Docket: CA06-YU576

In the matter of the *Workers' Compensation Act* R.S.Y. 2002, c. 231

and

In the matter of an application for judicial review in respect of decision #106 of the Workers' Compensation Appeal Tribunal

by

Charolette O'Donnell and the Workers' Advocate on behalf of Charolette O'Donnell

Respondents
(Petitioners)

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Tysoe

Z. Brown	Counsel for the Appellant, Government of Yukon
D.L. Fendrick	Counsel for the Respondent, Workers' Compensation Appeal Tribunal
R.A. Buchan	Counsel for the Respondent, Charolette O'Donnell and the Workers' Advocate on behalf of Charolette O'Donnell
Place and Date of Hearing:	Whitehorse, Yukon Territory 27 May 2008
Place and Date of Judgment:	Whitehorse, Yukon Territory 9 July 2008

Written Reasons by:
The Honourable Madam Justice Kirkpatrick

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Tysoe

Reasons for Judgment of the Honourable Madam Justice Kirkpatrick:

[1] The appellant, Government of Yukon (the "employer"), appeals from the order of the Supreme Court of the Yukon Territory, entered 31 May 2007, which quashed the 21 December 2005 decision of the Workers' Compensation Appeal Tribunal (the "Tribunal") and remitted the matter to the Tribunal for reconsideration.

[2] This appeal essentially concerns the standard of review by which the Tribunal's decision was scrutinized and whether the chambers judge accorded the Tribunal due deference.

BACKGROUND

[3] The background facts are not disputed.

[4] Ms. O'Donnell was employed by the Government of Yukon in 1988 and was, in 2002, a benefit entitlement clerk at the Workers' Compensation Health and Safety Board (the "Board"). In January 2002, she accepted a term position in another jurisdiction. During her absence, certain of her files were independently reviewed. She was immediately suspended from her Board position when she returned to work at the Board on 5 August 2002. She was dismissed from her employment on 13 August 2002.

[5] On 7 August 2002, two days after her suspension, Ms. O'Donnell submitted a compensation claim to the Board. The form she submitted in support of her claim stated that she had been injured on 5 August 2002. She described her injury as "mental & physical (entire body)".

[6] In a form that accompanied her claim, Ms. O'Donnell's locum doctor described her subjective complaints as including: difficulty sleeping, early waking; low energy; very low mood; loss of appetite; agitation; and poor concentration. He diagnosed her as having an "adjustment disorder" related to her suspension. That diagnosis was confirmed by a psychologist on 15 October 2002.

[7] On 25 October 2002, a claims adjudicator awarded compensation benefits to Ms. O'Donnell and noted that her adjustment disorder was expected, by definition, to resolve within six months.

[8] The employer unsuccessfully appealed the decision of the claims adjudicator to a hearing officer in August 2003. The employer then appealed to the Tribunal.

[9] While the compensation claim moved through administrative channels, Ms. O'Donnell grieved her dismissal. She and the employer resolved her employment termination issues pursuant to the process provided under the collective agreement. The employer's outline of argument in the Supreme Court submitted that workers' compensation legislation was never intended to cover contractual obligations in relation to dismissal of an employee (relying on ***Logan v. Nova Scotia (Workers' Compensation Board)***, 2006 NSCA 88, 246 N.S.R. (2d) 147, 271 D.L.R. (4th) 120 at para. 46). The employer argued that Ms. O'Donnell's claim was consequently outside the Yukon workers' compensation scheme.

[10] The issue of the Tribunal's jurisdiction to deal with Ms. O'Donnell's compensation claim was not fully developed before the Tribunal or the Supreme Court and the chambers judge did not address the issue. The parties to this appeal

have proceeded on the assumption that the Tribunal had jurisdiction. In light of the parties' positions, I need not address the point and leave it to be considered in a case in which it has been fully developed.

[11] On 26 November 2004, the employer requested that the Tribunal order an independent medical examination, pursuant to s. 19 of the ***Workers' Compensation Act***, R.S.Y. 2002, c. 231 (the "***Act***"). A psychiatrist, Dr. Paul Darlington, was appointed in consultation with Ms. O'Donnell's workers' advocate. His report was delivered to the parties in June 2005.

[12] The hearing before the Tribunal was held in November 2005. At that date, Ms. O'Donnell continued to claim that she was unable to work due to a disability caused by the disciplinary process in August 2002. She provided the Tribunal with reports from her family physicians, psychologists and other professionals covering the period 2002 to 2005. Those reports indicated that she suffered from: depression; anxiety; low self-esteem; low self-confidence in the job market; emotional lability; difficulty being in public places; and feelings of shame attached to being fired. Dr. Heredia, a psychiatrist, reported that Ms. O'Donnell suffered from a major depressive disorder that had become chronic and required continued intervention. Several reports indicated that Ms. O'Donnell's condition was exacerbated by the prolonged appeal process.

[13] The independent medical examiner, Dr. Darlington, provided a 32 page report, which, among other things, addressed four questions posed by the Tribunal:

(a) Was the worker incapacitated by a medical condition arising from the worker's termination on August 13, 2002?

(b) If the worker was incapacitated from the workplace incident, is that incapacity properly referred to as an Adjustment Disorder?

(c) What is the anticipated period of recovery for a person afflicted with this type of disorder? What might hinder this worker's recovery?

(d) Is this worker capable of performing duties of her previous occupation or any occupation?

[14] Dr. Darlington concluded that Ms. O'Donnell did not have a physical or non-volitional psychiatric condition that precluded her immediate return to the workforce in general. Dr. Darlington found no physical or psychiatric explanation "as to why to date Ms. O'Donnell has not re-entered the workforce, and/or made greater efforts" to attempt to re-enter the workforce.

[15] Dr. Darlington elaborated on his opinion as to Ms. O'Donnell's disability. He stated that although Ms. O'Donnell appeared to be "currently at least significantly partially disabled", as a result of non-volitional psychiatric sickness, disease or disorder, from her own occupation, she was not disabled from all occupations.

[16] Dr. Darlington also stated that Ms. O'Donnell's reluctance to return to the workforce cannot be deemed a medically disabling condition. He thought her reluctance was of conscious derivation. Dr. Darlington found her current presentation to be the result of her long-standing personality characteristics, workplace issues, and secondary gain. Dr. Darlington stated that Ms. O'Donnell wished to be perceived as disabled or significantly impaired, but that such a wish cannot be considered to be a disabling condition.

[17] The Tribunal rendered a 38 page decision (Decision #106) on 21 December 2005 in which it painstakingly reviewed: all of the evidence; the sections of the ***Workers' Compensation Act***, S.Y. 1992, c. 16, as amended, considered by the hearing officer; the 2002 ***Act***, which was considered or applied by the Tribunal; the Board policies applied or considered by the Tribunal; and the positions of the employer and the worker.

[18] In the decision, the Tribunal noted a number of instances from which it may be inferred that the Tribunal considered Ms. O'Donnell's self-reports of anxiety and depression (the foundation of her claim) with scepticism. For example, Ms. O'Donnell reported to her psychologist that she experienced anxiety when picking up her compensation cheques. The Tribunal noted that, in fact, her cheques were paid by direct deposit. Ms. O'Donnell also complained that the Board had not encouraged her rehabilitation when, in fact, she had met with a rehabilitation counsellor on four occasions and had been provided counselling, massage therapy and medication.

[19] The Tribunal ultimately concluded:

> (176) This committee has expended considerable time and effort in determining whether the worker's (stress) adjustment disorder was work-related as defined by the *Act*. Clearly, the worker has experienced many stressful events, both in the workplace and in her personal life, all of which may have played a causative role. Workplace interactions and other employment related events such as disciplinary action, layoffs or terminations are a part of normal employment practices and therefore should not be considered compensable.
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> [...]

> (178) Dr. Darlington reports that there are secondary gain issues "likely at hand" in this case. They are a wish for attention and affection, to avoid work responsibilities, to be taken care of, lifestyle choices, increased leisure time, to receive monetary gain, possibly to enact early retirement, to be with a child, to receive education and/or training at reduced personal financial expense, and other factors. Dr. Darlington notes that "the greater the potential of secondary gain benefits, including monetary or otherwise, the greater the degree of secondary gain influence". We agree.
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> (179) We recognize that the worker has suffered anxiety due to her termination. We agree that anyone who is terminated after 14 years with the same employer could suffer a great deal of anxiety, but this does not make "anxiety" a compensable injury.

The Tribunal thus decided that Ms. O'Donnell did not suffer a work-related disability and was not entitled to compensation benefits due to an "adjustment disorder".

[20] Ms. O'Donnell brought an application for judicial review of the Tribunal's decision in the Supreme Court. The chambers judge, in reasons indexed as 2007 YKSC 07, described the principal issue as "whether the Appeal Tribunal committed a reviewable error in deciding that the worker did not suffer a work-related disability" (para. 2). However, before addressing the principal issue, the chambers judge extricated and decided issues which he described as "pure legal questions".

[21] Before deciding any of the issues, the chambers judge determined the standard of review to be applied to each of them.

[22] The chambers judge's decision was made, and the factums in this appeal were filed, prior to the Supreme Court of Canada's decision in ***Dunsmuir v. New Brunswick***, 2008 SCC 9, 64 C.C.E.L. (3d) 1. Further factums were filed to address the ramifications of the ***Dunsmuir*** decision on this appeal.

[23] The chambers judge applied the "pragmatic and functional" approach to the determination of the standard of review endorsed in ***Pushpanathan v. Canada (Minister of Citizenship and Immigration)***, [1998] 1 S.C.R. 982; ***Dr. Q. v. College of Physicians and Surgeons of British Columbia***, [2003] 1 S.C.R. 226, 2003 SCC 19; and ***Law Society of New Brunswick v. Ryan***, [2003] 1 S.C.R. 247, 2003 SCC 20.

[24] In respect of the "general question" as to whether Ms. O'Donnell suffered a work-related disability, the chambers judge concluded that the question was one of mixed fact and law and was one which called for the application of a standard of review of reasonableness. He then stated, correctly in my view, the proper approach:

> [56] When reviewing a question for reasonableness, I am not to ask myself at any point what the correct or preferred decision would have been: *Ryan*, at para. 50. Rather, I must look at the reasons as a whole and on the basis of a "somewhat probing examination", I am to determine if there is any line of analysis which is tenable in support of the conclusion: *Ryan*, at para. 55; and *Logan*, at para. 36.

[25] However, he continued:

> [57] Notwithstanding that I have classified the first general question as one of mixed law and fact, a number of pure legal questions can be extricated and considered separately as issues of law. I set these out more specifically as sub-issues (a) through (e) in my earlier list of issues. In short, they are:
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> - Did the Appeal Tribunal fail to consider the presumption in s. 6 of the *Act*?
> - Did the Appeal Tribunal fail to specifically consider the presumption in Board Policy CL-42?

- Did the Appeal Tribunal misapply Policy CL-42?
- Did the Appeal Tribunal err by concluding that "Work stressors must involve events that could be considered 'traumatic'"?
- Did the Appeal Tribunal fail to consider the applicability of the Policy on Pre-Existing Conditions?

[26] To those "pure legal questions", the chambers judge applied the correctness standard of review.

[27] The chambers judge then conducted an intensive analysis of each of the extricated legal issues and concluded that the Tribunal had failed to consider or apply, or had misapplied, sections of the ***Act*** and policies of the Board. He then considered the "general question" of whether the Tribunal erred in concluding that Ms. O'Donnell did not suffer a work-related disability. The chambers judge concluded that the Tribunal's findings and reasoning were flawed and unreasonable. He quashed the Tribunal's decision and remitted the matter to the Tribunal for reconsideration.

[28] The essential basis of the employer's appeal is that the chambers judge failed to properly apply the reasonableness standard of review. The employer contends that the chambers judge re-weighed the evidence, doubted the factual findings of the Tribunal, unfairly criticized the Tribunal's reasoning, and generally accorded the Tribunal no deference.

STANDARD OF REVIEW

[29] In ***Dunsmuir***, the Supreme Court of Canada signalled a simplified approach for the determination of the appropriate standard of review.

[30] Bastarache and LeBel JJ., for the majority, summarized the process of judicial review as involving two steps (at para. 62):

> [...] First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[31] The majority identified three factors that will lead to the conclusion that a reasonableness test should be applied (at para. 55):

> (a) a privative clause;
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> (b) a discrete and special administrative scheme in which the decision maker has special expertise; and
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> (c) the nature of the question of law.

About the last factor, the Supreme Court said (at para. 55):

> [...] A question of law that is of "central importance to the legal system ... and outside the ... specialized area of expertise" of the administrative decision maker will always attract a correctness standard ([*Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63] at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.

[32] The parties to this appeal agree that there is no jurisprudence that has determined the degree of deference to be accorded the Tribunal in this case. It is therefore necessary to consider the other factors identified in ***Dunsmuir***. As the Supreme Court stated:

> [64] The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

[33] The Tribunal's jurisdiction is defined in s. 25 of the ***Act***, the relevant subsections of which read:

> 25(1) The appeal tribunal has exclusive jurisdiction to examine, inquire into, hear, and determine all matters arising in respect of an appeal from a decision of the board under subsection 8(1), from a decision of a hearing officer under subsection 20(1), or from a decision of the president under subsection 27(4) and it may confirm, reverse, or vary the decision.
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> (2) Without restricting the generality of subsection (1), the exclusive jurisdiction includes the power to determine, on an appeal pursuant to subsection 8(2) or 21(1)
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> (a) whether a worker's disability was work-related;
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> (b) the duration and degree of a disability;
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> (c) the weekly loss of earnings of a worker resulting from a work-related disability;
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> (d) the average weekly earnings of a worker;
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> (e) whether a person is a member of the family of a worker;

(f) whether a person is a dependant;

(g) whether a person is a worker, and to deem a person to be a worker; and

(h) whether a worker or a dependant is entitled to compensation.

(3) Subject to subsections 24(8) and (13), the acts or decisions of the appeal tribunal on any matter within its jurisdiction are final and conclusive and not open to question or review in any court.

(4) No proceedings by or before the appeal tribunal shall be restrained by injunction, declaration, prohibition, or other process or proceedings in any court or be removed by *certiorari*, judicial review, or otherwise in any court, in respect of any act or decision of the appeal tribunal within its jurisdiction.

[...]

(8) The appeal tribunal has the same powers as the Supreme Court for compelling the attendance of witnesses, examining witnesses under oath, and compelling the production and inspection of books, papers, documents, and objects relevant to the hearing.

(9) The appeal tribunal may cause depositions of witnesses residing in or outside of the Yukon to be taken before any person appointed by it in the same way as the Supreme Court can in civil actions.

[...]

(11) Despite subsections (3) and (4), a worker, a dependant of a deceased worker, or an employer may make an application for judicial review of a decision of the appeal tribunal if there has been an error in law or in jurisdiction.

[34] One of the objects of the ***Act*** is "to provide an appeal procedure that is simple, fair, and accessible, with minimal delays" (s. 1(e)).

[35] A committee of the Tribunal consists of the chair or alternate chair and a representative each of employers and workers (s-s. 24(1)).

[36] The Tribunal had, under s-s. 25(2), exclusive jurisdiction to determine whether Ms. O'Donnell's disability was work-related. The Tribunal asked itself two questions: first, did Ms. O'Donnell suffer a work-related disability?; and second, was there an "adjustment disorder" which constitutes a work-related disability?

[37] Subsection 25(3) protects the Tribunal's decisions on any matter within its jurisdiction from review in any court, except in circumstances where the Tribunal errs in law or in jurisdiction (s-s. 25(11)).

[38] Thus, the privative clause in respect of the Tribunal, while not "full", is nevertheless robust in that it reserves for review only errors of law or jurisdiction.

[39] As the Supreme Court stated in ***Dunsmuir*** at para. 59, "'[j]urisdiction' is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry." There can be no doubt that the Tribunal in this case was acting within its jurisdiction.

[40] The nature of the legislative regime is identified in the preamble to the ***Act*** as "recognizing that the historic principles of workers' compensation, namely the collective liability of employers for workplace disabilities, guaranteed, no fault compensation for disabled workers, immunity of employers and workers from civil suits, should be maintained". The objects of the ***Act*** and the powers of the Tribunal suggest a speedy, efficient and final process that is fair to both employers and workers. From this, it can be taken that the legislature intended that the Tribunal hold relative expertise in the interpretation of the ***Act*** that creates its mandate and in the application of the policies of the Board, which the Tribunal is bound to consider.

[41] Finally, the question at issue, whether Ms. O'Donnell's disability was work-related, is a question of mixed fact and law. In this case, in my view, the legal and factual issues were intertwined and not readily separated (***Dunsmuir*** at para. 53). This case warranted one standard of review, not multiple standards. As a majority of the Supreme Court of Canada stated in ***Lévis (City) v. Fraternité des policiers de Lévis Inc.***, [2007] 1 S.C.R. 591, 2007 SCC 14 at para. 19:

> [...] Since the presence or absence of a privative clause will likely be the same for all aspects of an administrative decision, whether there is a possibility of more than a single standard of review under the pragmatic and functional approach will largely depend on whether there exist questions of different natures and whether those questions engage the decision maker's expertise and the legislative objective in different ways. Of course it may not always be easy or necessary to separate individual questions from the decision taken as a whole. The possibility of multiple standards should not be taken as a licence to parse an administrative decision into myriad parts in order to subject it to heightened scrutiny. However, reviewing courts must be careful not to subsume distinct questions into one broad standard of review. Multiple standards of review should be adopted when there are clearly defined questions that engage different concerns under the pragmatic and functional approach.

[42] In my view, it is questionable whether the "pure legal questions" identified by the chambers judge in this case were in fact all questions of law. What is certain is that they were not readily separated from the general question in issue and were not "of central importance to the legal system and outside the specialized expertise" of the Tribunal (***Dunsmuir*** at para. 55).

[43] Considering all of the relevant factors, there can be no doubt that the appropriate standard of review in this case was one of reasonableness. Indeed, as I have noted, that was the standard chosen by the chambers judge, preferring that

standard over the standard of patent unreasonableness urged by the employer. The issue on this appeal really concerns whether the reasonableness standard was properly applied by the chambers judge.

[44] Because the excised legal issues were first analyzed by the chambers judge, the analysis of them was made without specific regard for the Tribunal's finding that Ms. O'Donnell did not suffer from the alleged psychological injury. The issues of the presumption under s. 6 of the ***Act*** – that a disability is presumed to be work-related if it arises out of or in the course of a worker's employment – and the application of Board policies only became relevant considerations in the event that a disability was established.

[45] As the chambers judge himself noted, when reviewing a decision on the standard of reasonableness, he was obliged to look at the Tribunal's reasons as a whole and subject them to a "somewhat probing examination" to determine whether there is a tenable line of analysis, following the direction in ***Law Society of New Brunswick v. Ryan***. In ***Dunsmuir***, the Supreme Court of Canada explained the reasonableness standard of review as follows:

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with

> whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[46] However, the chambers judge appears to have reversed the analysis. Instead of first deciding whether the decision, subjected to a "somewhat probing" analysis, was reasonable, he performed a surgical analysis of five legal issues, which he said rendered the Tribunal's decision untenable. He then considered whether the general issue to be decided by the Tribunal was reasonable.

[47] On the general question of mixed fact and law – whether the Tribunal erred in finding that Ms. O'Donnell did not suffer a work-related disability – the chambers judge concluded that the Tribunal's findings were unreasonable in two respects: first, with the manner in which it considered the expert evidence of Dr. Darlington; and second, in its conclusion as to the cause of Ms. O'Donnell's anxiety.

[48] As to the expert evidence, it is trite law that the weight to be assigned to expert evidence is a question of fact, which, absent palpable and overriding error, should not be disturbed on appeal or review. In my opinion, no such error was demonstrated in this case.

[49] The chambers judge criticized the questions the Tribunal posed to Dr. Darlington, noting that the first question was whether the worker was incapacitated by a medical condition arising from the worker's termination on August 13, 2002. The chambers judge stated:

> [97] I find that the Appeal Tribunal failed to give proper consideration to Dr. Darlington's opinion that the worker was incapacitated by a psychological condition arising from her employment suspension and

> subsequent termination. That condition initially manifested as an adjustment disorder, but then progressed to become an incapacitating major depressive episode. I further find that Dr. Darlington's opinion was apparently dismissed by the Appeal Tribunal on the spurious assumption that he had been misled by the worker with respect to her self-reported involuntary weight gain of 35 to 40 pounds.

[50] The Tribunal took a different view of the expert evidence. It rejected Dr. Darlington's opinion that Ms. O'Donnell suffered from a major depressive episode, which was diagnosed chiefly on the basis of Ms. O'Donnell's self-reported weight gain. Dr. Darlington wrote:

> In my opinion, largely in part based on [the worker's] self-report of having weight gain of thirty-five to forty pounds in a non-intentional manner such would suggest her major depressive episode was markedly worse at one point and likely she was relatively incapacitated as a result of the major depressive episode. It is noted she has subsequently lost five of the thirty-five to forty pounds suggesting her major depressive episode has significantly improved from what it was.

The Tribunal rejected that diagnosis because of the other evidence before the Tribunal concerning Ms. O'Donnell's credibility and her motivation for making her compensation claim.

[51] The chambers judge placed considerable emphasis on his interpretation of the medical evidence and reports concerning Ms. O'Donnell's weight gain. The chambers judge concluded:

> [94] Taking all of these circumstances into account, I find that the implied inference of the Appeal Tribunal that the worker's weight was more or less constant from 1997 through to 2005 was unreasonable. Nor do I accept the Appeal Tribunal's additional conclusion that the weight gains the worker reported to Dr. Heredia and Dr. Darlington would have been so noticeable to her own physician or to either of her consulting psychologists, that one would expect this fact to be

> recorded by these professionals, which it was not. Rather, it seems equally likely that there was fluctuation in the worker's weight from 1997 on.

With respect, the chambers judge's approach constituted an impermissible re-weighing of the evidence and substitution of his own assessment of it.

[52] Since Dr. Darlington's tentative conclusion of incapacity was rooted in the diagnosis of a major depressive disorder, once the Tribunal rejected that diagnosis, the evidentiary underpinning of incapacity was eliminated.

[53] Once the Tribunal concluded that Ms. O'Donnell did not suffer from a major depressive disorder, the question was reduced to whether she suffered from an adjustment disorder. The adjustment disorder was initially diagnosed by Ms. O'Donnell's family doctor and later confirmed by a psychologist.

[54] However, the Tribunal accepted Dr. Darlington's opinion that the basis upon which the diagnosis of adjustment disorder was made, the "Beck Inventory", was not useful. The Tribunal could see for itself that the diagnosis rested on Ms. O'Donnell's subjective complaints, which the Tribunal rejected on the same basis as it had rejected Ms. O'Donnell's self-reports of weight gain, which underpinned the major depressive disorder. Further, all those complaints were consistent with the reaction any person would experience upon suspension from employment.

[55] This case was essentially fact-driven. It was open to the Tribunal to weigh the expert evidence in the manner it did and conclude that Ms. O'Donnell did not suffer from any incapacity and hence did not have a disability such as to engage the

Act. The Tribunal specifically addressed the issue of work-related disability at para. 154 of the decision:

> (154) The term "disability" is used in determining whether someone is eligible for wage loss reimbursement or retraining, and relates specifically to the worker's capacity to meet the demands of the job. Policy CL-40, "Disability" states:
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> > A. Disability
> > A disability is the limiting, loss or absence of the capacity of an individual to meet occupational demands.
> >
> > B. Assessment
> > Disability is an administrative finding assessed by non-medical means.

[56] Although there is no explicit statement by the Tribunal that Ms. O'Donnell was not incapacitated, it must be inferred from the decision as a whole that incapacity was not established. Once the Tribunal concluded that Ms. O'Donnell was not incapacitated, it was unnecessary for it to consider s. 6 of the ***Act*** and the Board's policies. That it did consider the policies was likely due to the submissions of the parties, which the Tribunal evidently considered necessary to address.

[57] The chambers judge obviously held a different view of the evidence. However, it cannot be said that the Tribunal's assessment of the evidence and its conclusions were not reasonable. It was not for the chambers judge on judicial review of the Tribunal's decision to dissect and re-weigh the evidence and arrive at a different conclusion. At the time the chambers judge decided this case, his task was to subject the Tribunal's decision to a "somewhat probing" examination of the decision and determine if there was a tenable analysis to support it.

[58] The chambers judge criticized the Tribunal's finding that Ms. O'Donnell's anxiety was caused by her reaction to her suspension as unfathomable and absurd. He stated:

> [98] My second area of concern relates to the Appeal Tribunal's reasoning on the causation of the worker's anxiety. Here, I find that the Appeal Tribunal erred at para. 163 of Decision #106 in concluding that "the worker reacted to the suspension ... of her employment and it is her self-reported reaction to the suspension which caused her anxiety" (it also made a similar statement at para. 168). With respect, this conclusion makes no logical sense. The worker's "self-reported reaction to the suspension" included those symptoms noted in Dr. Vaughan's first report, which included:
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> "- difficulty sleeping, early waking
> - [decreased] interest
> - low energy
> - mood 0/10, very low
> - loss appetite
> - agitation
> - poor concentration."
>
> Those symptoms are all consistent with the worker's reaction being one of "anxiety" as an <u>effect</u> of the suspension of her employment. Therefore, I am unable to fathom how the Appeal Tribunal also found that the worker's reaction to the suspension, that is, her anxiety as particularized in Dr. Vaughan's first report, also "<u>caused</u> her anxiety" (my emphasis). The Appeal Tribunal's reasoning here leads to the absurd result that *her anxiety caused her anxiety*.
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> [All emphases in original.]

[59] It must be remembered that the Tribunal members who wrote the decision are not judges or lawyers and cannot be expected to craft their reasons with absolute clarity. While one might wish for greater precision in the language of the decision, the task of the chambers judge was to make sense of it. The principle was well stated in ***Helgesen v. British Columbia (Superintendent of Motor Vehicles)***, 2002 BCSC 1391:

> [29] First, the Court of Appeal recently settled the debate over the applicable standard of review. I should not overturn the decision of the adjudicator unless it was patently unreasonable: *Gordon v. Her Majesty the Queen and The Superintendent of Motor Vehicles,* 2002 BCCA 224 at para. 28. Second, I should not "minutely dissect" the reasons in search of an error which would justify quashing the adjudicator's decision. In other words, I should give some leeway to the language used by the adjudicator, recognizing that he or she is not a lawyer or a judge. See *Johnson v. British Columbia (Superintendent of Motor Vehicles),* [2002] B.C.J. No. 89 (S.C.) at paras. 37 and 38 and cases cited therein, particularly *Larose v. British Columbia (Superintendent of Motor Vehicles),* [2000] B.C.J. No. 482 (S.C.). Third, the adjudicator was not required to give reasons for preferring or rejecting evidence: *Wanless v. Superintendent of Motor Vehicles,* [2000] B.C.J. No. 1542 (S.C.), *Shmyr v. Superintendent of Motor Vehicles,* (Unreported, June 21, 2002), Vancouver Registry No. L021542 (B.C.S.C.) and *Johnson*, referred to above. It is sufficient if the reasoning process is apparent from the decision and there is some evidentiary basis for all essential findings.
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> [Emphasis added.]

[60] In my opinion, the Tribunal's finding that Ms. O'Donnell did not suffer a psychological injury by reason of her suspension and termination was supportable on the evidence. There can be no question that the Tribunal recognized that Ms. O'Donnell was upset and concerned by her employment issues and that they caused her anxiety. However, the question as to whether she suffered a compensable work-related disability was one well within the Tribunal's jurisdiction and expertise. The decision should have been accorded considerable deference. In the end, it was given no deference at all.

[61] Before leaving these reasons, I should comment on the Tribunal's submissions. Counsel for the Tribunal advised us that the Tribunal had not previously appeared in this Court and was uncertain as to the permissible scope of submissions. She sought to make submissions concerning both the standard of

review and the reasonableness of the decision. We confined her submissions to the standard of review. The principle underlying that restriction was expressed in ***Northwestern Utilities Ltd. et al. v. Edmonton*** (1978), [1979] 1 S.C.R. 684 at 709-710:

> It has been the policy in this Court to limit the role of an administrative tribunal whose decision is at issue before the Court, even where the right to appear is given by statute, to an explanatory role with reference to the record before the Board and to the making of representations relating to jurisdiction. [Citations omitted] Where the right to appear and present arguments is granted, an administrative tribunal would be well advised to adhere to the principles enunciated by Aylesworth J.A. in *International Association of Machinists v. Genaire Ltd. and Ontario Labour Relations Board* [(1958), 18 D.L.R. (2d) 588], at pp. 589, 590:
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> > Clearly upon an appeal from the Board, counsel may appear on behalf of the Board and may present argument to the appellate tribunal. We think in all propriety, however, such argument should be addressed not to the merits of the case as between the parties appearing before the Board, but rather to the jurisdiction or lack of jurisdiction of the Board. If argument by counsel for the Board is directed to such matters as we have indicated, the impartiality of the Board will be the better emphasized and its dignity and authority the better preserved, while at the same time the appellate tribunal will have the advantage of any submissions as to jurisdiction which counsel for the Board may see fit to advance.

[62] In summary, I would allow the appeal, restore the Tribunal's decision, and order that each party bear its own costs.

Mackinnon JA.
The Honourable Madam Justice Kirkpatrick

I agree:

Newbury JA
The Honourable Madam Justice Newbury

I agree:

D. Tysoe JA
The Honourable Mr. Justice Tysoe