SUPREME COURT OF YUKON

Citation: *Malanchuk v. Fairley*, 2012 YKSC 20

Date: 20120320
S.C. No. 11-AP010
Registry: Whitehorse

Between:

Jody Malanchuk

Petitioner

And

Anna Mae Fairley carrying on business as LA Lounge, Rumors Pub Ltd., The Yukon Workers' Compensation Health and Safety Board and the Appeal Tribunal established pursuant s. 62 of the Workers' Compensation Act, R.S.Y. 2008 c.12, as amended.

Respondents

Before: Mr. Justice R.S. Veale

Appearances:

Daniel S. Shier	Counsel for Jody Malanchuk
Bruce Willis, Q.C.	Counsel for Workers' Compensation Health and Safety Board
Kyle Carruthers	Counsel for Workers' Compensation Appeal Tribunal

REASONS FOR JUDGMENT

INTRODUCTION

[1] Ms. Malanchuk was injured on November 1, 1997, and filed a claim with the Yukon Compensation Workers' Health and Safety Board ("the Board"). On November 28, 1997, an adjudicator decided (the "1997 decision") that she was not a worker covered by the *Workers' Compensation Act,* S.Y. 1992, c.16 (the "1992 *Act*")

[2] On October 4, 2010, Ms. Malanchuk advised the Board that she had new medical information. She filed a notice of review of the 1997 decision denying her coverage on March 21, 2011. The Workers' Compensation Appeal Tribunal ("Appeal Tribunal") decided on July 21, 2011 that the notice of review was filed after the expiry of the limitation period, and they had no jurisdiction to hear it.

[3] Ms. Malanchuk applies for judicial review of the Appeal Tribunal's decision primarily on the ground that the Tribunal erred by not applying the common law principle of discoverability to her appeal, which was filed some nine months after the expiry of the statutory limitation period for requesting a review or an appeal. Notably, there was no appeal limitation period prior to the enactment of the current *Workers' Compensation Act*, R.S.Y. 2008, c. 12 (the "2008 *Act*"). The current legislation creates a 24-month limitation period for appeals generally and sets a firm July 1, 2010 deadline for appealing decisions rendered prior to the in-force date of July 1, 2008. It is this July 2010 date that catches Ms. Malanchuk's 1997 decision.

[4] Counsel for the Board has standing, pursuant to s. 55 of the 2008 *Act,* to raise issues pertaining to jurisdiction or to clarify the record, both of which are in play in this judicial review. Section 59(2) of the 2008 *Act* gives the Appeal Tribunal standing but only where the Board or the Appeal Tribunal brings an application to the court. The role of counsel for the Appeal Tribunal was minimal in this application. The issue of standing of the Appeal Tribunal in appeals from its decisions may be heard on another day.

BACKGROUND

[5] On November 1, 1997, Ms. Malanchuk sustained a serious injury while working as a dancer at a lounge in Whitehorse. Ms. Malanchuk filed a Worker's Report of

Injury/Illness on November 22, 1997, describing that she fell six feet onto her head and that she saw Dr. O'Keefe at the Whitehorse General Hospital. Dr. O'Keefe filed the Doctor's First Report providing a diagnosis of "fracture c-spine spinous process".

[6] On November 28, 1997, the adjudicator determined that Ms. Malanchuk was "not deemed to be a worker as defined by the *Act*". Ms. Malanchuk does not recall ever receiving the decision.

[7] On November 1, 1997, the 1992 *Act* was in effect and it did not contain any specific time period for appealing a decision to a hearing officer or the Appeal Tribunal.

[8] As alluded to above, on May 15, 2008, the 1992 *Act* was amended to provide the following:

> ***Limitation period for appeals and reviews***
>
> 52(1) A notice of review or appeal respecting a decision referred to in sections 15, 53, 54 and 59 must be filed within, and not after, 24 months of the date that the decision was made.
>
> (2) For all decisions referred to in sections 15, 53 and 54 made prior to July 1, 2008, the notice of review or appeal must be filed prior to July 1, 2010.

[9] Ms. Malanchuk's first contact with the Board since the 1997 decision was on October 4, 2010, when she indicated to a Board staff person that she would like to "re-open her claim".

[10] On March 21, 2011, Ms. Malanchuk filed a request for review by a Hearing Officer seeking a review of the 1997 decision. A Hearing Officer decided that Ms. Malanchuk's limitation period for a review had expired and he therefore had no jurisdiction to review the 1997 decision.

[11] On March 28, 2011, a Deputy Workers' Advocate wrote the Hearing Officer indicating that there were extenuating circumstances that contributed to the delay in Ms. Malanchuk's request for review. The Hearing Officer advised the Deputy Workers' Advocate to appeal his "no jurisdiction" decision to the Appeal Tribunal.

The Appeal Tribunal's Decision

[12] Ms. Malanchuk filed a notice of appeal to the Appeal Tribunal on April 1, 2011. Her reasons for appeal include the following:

> There were extenuating circumstances as a direct result of the accident that contributed to the delay in filing an appeal. I suffered a serious head injury and fracture c-spine. The injuries have affected every aspect of my life since. In addition, this was my first job, I was only 19, and due to the injuries or affect of medications I do not remember seeing or reading the WCB decision letter. I did not know that I had any recourse. It was only in October of 2010 that I was seen by a Neurologist who told me to contact the WCB and pursue the claim.

[13] In addition, the Appeal Tribunal received a 5-page submission from the Workers' Advocate setting out Ms. Malanchuk's personal history, the reasons for the delay in filing her appeal and the fact that the Alberta Workers' Compensation Board has told her that there is no Alberta employer to link her injuries to. The Appeal Tribunal also received a copy of a letter from Dr. Singh dated March 7, 2011, in which he indicated that Ms. Malanchuk likely suffered a concussion grade III from her 1997 fall and thus had a closed head injury.

[14] The July 21, 2011 Appeal Tribunal decision contains all the background and evidence that I have indicated as well as a review of the Advocate's submission. It states the following at para. 9 of the decision:

> The worker and her mother do not recall ever seeing a decision letter from the Board. She did not have knowledge of the decision and did not know of any mechanism for review or appeal. After speaking with a neurologist who recommended she contact YWCHSB, she immediately did so in October of 2010. The advocate's office was also contacted at this time.

[15] After reciting s. 52(1) and (2) of the 2008 *Act*, the Appeal Tribunal concluded at para. 14:

> As the hearing officer noted in his March 21, 2011 decision, the original decision was rendered on November 28, 1997, under s. 11 of the 1992 Workers' Compensation Act; a precursor to s. 15 of the current Act. In order for the decision of November 29, 1997, to be appealed to the hearing officer or the appeal tribunal, the request for appeal must have been filed prior to July 1, 2010. The request for a review by the hearing officer was filed on March 21, 2011; eight months passed the legislative time lines.

[16] In the result, the Appeal Tribunal concluded that the limitation period for filing a notice of review or appeal had expired and that they had no jurisdiction to hear and decide the appeal. The Appeal Tribunal made no reference to the discoverability principle.

ISSUE

[17] The issue at this hearing is whether the common-law discoverability principle applies to the limitation period in s. 52 of the 2008 *Act*. I have determined that this is a question of law and the standard of review is correctness. See *Dunsmuir v. New Brunswick*, 2008 SCC 9.

ANALYSIS

[18] As set out in the Board's outline, the discoverability principle means that a limitation period begins to run when the material facts upon which an action is based

have been discovered or ought to have been discovered by the plaintiff through the exercise of due diligence. The effect of the rule is to postpone the running of the time limit until a reasonable person, exercising reasonable diligence, discovers the facts necessary to bring the action. The discoverability principle is applied to avoid the injustice of having a limitation period expire before a person discovers the injury giving rise to the action.

[19] In my view, the best discussion of the applicability of the discoverability principle is found in the Supreme Court of Canada decision in *Ryan v. Moore*, 2005 SCC 38, from paras. 21 to 24 as follows:

> 21 The debate concerning the use of the discoverability principle in tort actions has been settled by this Court in *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2, *Central Trust* and *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6.
>
> 22 The discoverability principle provides that "a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence": *Central Trust*, at p. 224. In some provinces, the discoverability rule has been codified by statute; in others, it has been deemed redundant because of other remedial provisions.
>
> 23 While discoverability has been qualified in the past as a "general rule" (*Central Trust*, at p. 224; *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549, at [page68] para. 36), it must not be applied systematically without a thorough balancing of competing interests (*Peixeiro*, at para. 34). The rule is an interpretative tool for construing limitation statutes. I agree with the Manitoba Court of Appeal when it writes:
>
> > In my opinion, the judge-made discoverability rule is nothing more than a rule of construction. Whenever a statute requires an action to be commenced within a specified time from the happening of a specific event, the statutory language must be construed. When time runs from "the accrual of the cause of action" or from

> some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained, the judge-made discoverability rule applies. But, when time runs from an event which clearly occurs without regard to the injured party's knowledge, the judge-made discoverability rule may not extend the period the legislature has prescribed. [Emphasis added.]
>
> (*Fehr v. Jacob* (1993), 14 C.C.L.T. (2d) 200, at p. 206)
>
> See also *Peixeiro*, at para. 37; *Snow v. Kashyap* (1995), 125 Nfld. & P.E.I.R. 182 (Nfld. C.A.).
>
> 24 Thus, the Court of Appeal of Newfoundland and Labrador is correct in stating that the rule is "generally" applicable where the commencement of the limitation period is related by the legislation to the arising or accrual of the cause of action. The law does not permit resort to the judge-made discoverability rule when the limitation period is explicitly linked by the governing legislation to a fixed event unrelated to the injured party's knowledge or the basis of the cause of action (see Mew, at p. 55). (my emphasis in para. 24)

[20] Although it may be repetitious, I will attempt to summarize the law on discoverability:

1. The judge-made discoverability principle is a rule of construction that applies whenever an action is to be commenced in a specified time from a specific event which can be construed as occurring only when the injured party has knowledge of the injury sustained.
2. The judge-made discoverability principle may not extend to a limitation period prescribed by the legislature, when that limitation period runs from an event which occurs without regard to the injured party’s knowledge.

[21] In Ms. Malanchuk's circumstances, s. 52 of the *Act* clearly states that the limitation period for filing a notice of review or appeal runs from "the decision", which is a discrete event that takes place without regard to the injured party's knowledge.

[22] The most recent judgment with respect to the application of the discoverability principle is *Engel v. Edmonton (City) Police Service*, 2008 ABCA 152, in which the Court considered whether the principle would apply to the following statutory limitation period contained in the *Police Act*:

> 43(11) The chief of police, with respect to a complaint under subsection (1), or the commission, with respect to a complaint under subsection (2) or section 46(1), shall dismiss any complaint that is made more than one year after the events on which it is based occurred. (my emphasis)

[23] In the case of Mr. Engel's complaint, the misconduct at issue was unauthorized searches of his name on the CPIC information system. In filing his complaint, Mr. Engel indicated that he was not aware of, and could not have become aware of, the alleged misconduct before the expiry of the time limitation. While the Alberta Court of Appeal found there was merit to Mr. Engel's position that s. 43(11) diminishes the ability of victims of surreptitious police conduct to complain about that conduct, the Court of Appeal was not prepared to incorporate the discoverability principle into the limitation. Based on the clear language of the legislature, the Alberta Court of Appeal concluded that it was for the legislature to determine the policy question of whether a longer time period or other approaches to police conduct complaints are appropriate. The Court of Appeal observed that discoverability is a principle that emerges in tort law, and that a legislature may make discoverability a non-factor by legislating a time limitation that runs from an event without regard to the injured party's knowledge.

[24] It must also be observed that Ms. Malanchuk had knowledge of her injuries and filed a claim back in 1997. This claim was rejected in the 1997 decision. It is the fact of "a decision" that determines when the timeline in s. 52 starts to run. Thus, s. 52 is clearly not a provision to which the discoverability principle can be applied as a rule of construction or a judge-made law.

[25] The *Engel* case also considered two principles of statutory construction set out in *Gustavson Drilling (1964) Ltd. v. Canada (Minister of National Revenue – M.N.R.)*, [1977] 1 S.C.R. 271:

1. the general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the *Act*; and
2. a statute should not be given a construction that would impair existing or vested rights as regards to a person or property unless the language requires it.

[26] These rules of construction are embodied in s. 23 of the *Interpretation Act*, R.S.Y. 2002, c. 125:

> *Effect of repeal*
>
> 23(1) When all or part of an enactment is repealed, the repeal or revocation does not
>
> …
>
> (c) affect a right, privilege, obligation, or liability acquired, accrued, accruing, or incurred under the enactment so repealed;

[27] There are two reasons Ms. Malanchuk's right of appeal is not protected by s. 23(1)(c):

1. the words of s. 52(2) of the *Act* clearly indicate the intention of the legislature to operate retrospectively to apply to "all decisions … made prior to July 1, 2008."

2. Ms. Malanchuk's right of appeal at the date of the 2008 amendment was a mere right, as opposed to a right that had been accrued or vested. See *Gustavson Drilling* at p. 283; *Dikranian v. Quebec (Attorney General*), 2005 SCC 73; and *Summit Golf and Country Club v. York (Regional Municipality)*, [2008] O.J. No. 2839 (Div. Ct).

[28] Counsel for Ms. Malanchuk submitted that the medical report of Dr. Singh presented new evidence about the injury described by Dr. O'Keefe in his first report dated November 1, 1997. Counsel submits that this new evidence must be considered both at a review by a Hearing Officer under s. 53 and a hearing by the Appeal Tribunal under s. 54.

[29] With respect to a review by a Hearing Officer, s. 53(5) of the 2008 *Act* requires a reconsideration of "new or additional evidence" presented by the worker. With respect to the Appeal Tribunal, s. 54(3) states:

> Where new or additional evidence is presented, the appeal committee shall refer the new or additional evidence to the hearing officer or panel of hearing officers under section 53, responsible for the decision being reviewed, and request that the decision be reconsidered.
>
> (4) If, after a reconsideration under subsection (3), the decision of the hearing officer or panel of hearing officers does not change, the appeal originally commenced under section 54 shall continue.

[30] Counsel for Ms. Malanchuk submits that the Board's own policy AP-02 entitled "Limitation Periods for Claims Reviews and Appeals" specifically permits new medical

evidence to be brought on a review hearing or appeal. The specific wording in AP-02 is as follows:

> Where a new decision is made on a file, the scope of any appeal or review occurs only on that new decision and not on any previous decisions for which the appeal periods have ended.

[31] The policy goes on to give an example:

> A decision-maker has made a number of decisions about wage loss benefits and medical care for a worker.
>
> Two and one-half years later, after the appeal period on these decision has ended, the worker brings forth new medical information. She believes she needs further medical treatment outside the Territory.
>
> The decision-maker denies the requests for further medical treatment because the treatment is not related to the original injury. This is a new decision. The worker can appeal this latest decision. The only issue at appeal is the acceptance or denial of the request for further medical treatment and not any of the previous decisions on the claim, because the appeal periods for those decisions have expired.

[32] It is trite law to state that a policy pursuant to a statute cannot be in conflict or inconsistent with the statute. In my view, the example given in Policy AP-02 is based upon a positive decision about a worker whose injury is covered under the *Act*. When the entire policy statement is read in context, the time limit of 24 months from the date of the decision is firmly stated and the policy addresses new medical evidence from a worker that is covered under the *Act*. Counsel for Ms. Malanchuk makes this submission not to establish a new medical evidence claim, but rather to buttress his submission that the principle of discoverability should apply to s. 52. In my view, the policy statement confirms the 24 months limitation period and does not assist counsel for Ms. Malanchuk on the discoverability issue.

[33] I conclude that the principle of discoverability does not apply to the limitation period in s. 52 of the *Act* based upon the clear wording of the section and the fact that the limitation period runs from “a decision”, which is unrelated to the claimant’s knowledge of her injury. In this case, Ms. Malanchuk was always aware of her injury, and filed a claim. An adjudicator made a decision on November 28, 1997, and Ms. Malanchuk failed to file an appeal of that decision before July 1, 2010. While Ms. Malanchuk’s plight certainly raises the sympathy of the Court, the Yukon Legislative Assembly did not permit any discretion for “exceptional circumstances” or the application of the principle of discoverability.

[34] Counsel for Ms. Malanchuk made reference to the Decision No. 523/09, 2009 ONWSIAT 620, which incorporated the discoverability principle into the time limit under s. 22 of the *Workplace Safety and Insurance Act* of Ontario. However, s. 22(3) expressly permits the Board to permit claims to be filed after the six-month period expires “… if, in the opinion of the Board, it is just to do so.”

[35] As a final note, counsel for Ms. Malanchuk pointed out that the covering letter from the Appeal Tribunal to Ms. Malanchuk provides information on certain sections of the *Act*, such as s. 65(3) stating that decisions of the Appeal Tribunal are final and conclusive and not open to questions or review in any court. However, the covering letter fails to advise claimants of s. 59(3) which specifically overrides s. 65(3) and permits an application to the Supreme Court for judicial review of a decision of the Appeal Tribunal on a question of law or jurisdiction. The Appeal Tribunal should in fairness also alert claimants to s. 59(3).

CONCLUSION

[36] In conclusion, Ms. Malanchuk's application for judicial review of the Appeal Tribunal's decision based on the principle of discoverability is dismissed.

VEALE J.