SUPREME COURT OF YUKON

Citation: *Yukon v. O.G.*, 2014 YKSC 52

Date: 20141024
S.C. No. 14-AP004
Registry: Whitehorse

Between:

GOVERNMENT OF YUKON

Petitioner

And

O.G.
and
LICENSED PRACTICAL NURSES ADVISORY COMMITTEE

Respondents

Before: Madam Justice C.L. Kenny

Appearances:

Karen Wenckebach	Counsel for the Petitioner
Michael A. Reynolds	Counsel for the Respondent, Licensed Practical Nurses Advisory Committee
O.G.	Appearing on her own behalf

REASONS FOR JUDGMENT

INTRODUCTION

[1] The Respondent, O.G., ("O.G.") is a licensed practical nurse ("LPN") in the Yukon who was employed by the Petitioner, Government of Yukon ("Yukon"). Yukon became concerned that O.G. was unsafe in providing medications, and placed restrictions on her employment. Yukon finally sent a letter to the registrar of licensed practical nurses reporting that O.G. had been placed on restrictions because she was unsafe when providing medication. The advisory committee rejected the complaint on the basis that it was frivolous.

APPLICATION

[2] Yukon brings this application for judicial review of the decision of the advisory committee.

LEGISLATION

[3] This matter is governed by the *Licensed Practical Nurses Act*, R.S.Y. 2002, c. 138, amended by S.Y. 2009, c. 19, s. 52, (the "*LPNA*") and the *Licensed Practical Nurses Regulation,* O.I.C. 2010/113, (the "LPNR").

[4] Pursuant to s. 21(1) of the LPNR, an employer has a duty to report certain employment related sanctions it imposes on licensed practical nurses provided the sanctions are based on a belief, held on reasonable and probable grounds, that the nurse is unfit to continue to practice; the actions of the nurse constitute unprofessional conduct or professional incompetence or indicate incapacity; or, the continued practice of the nurse might constitute a danger to persons in their care. The report is to be treated as a complaint under the *LPNA*.

[5] When the registrar receives a complaint, the registrar must refer it to the advisory committee (s. 8(2) *LPNA*). The advisory committee has no investigative powers; they can only reject a complaint as being frivolous, or refer the complaint to a committee of inquiry if there are reasonable grounds for the complaint (s. 8(3) *LPNA*). The committee of inquiry investigates and conducts hearings regarding the complaints that it receives.

ISSUE

[6] The main issue in this review is what is the standard of proof required in order for the advisory committee to refer a complaint to a committee of inquiry.

Position of the Licensed Practical Nurses Advisory Committee (“advisory committee”)

[7] The advisory committee decided that Yukon did not establish reasonable grounds for the complaint and it was therefore frivolous. They left the door open for reconsideration of the complaint if there was additional information available.

[8] The advisory committee is of the view that they were within their jurisdiction and mandate in making the decision that they did. They did not find reasonable grounds for the complaint on the information contained in the report and therefore, under s. 8(3) of the *LPNA*, they found that the complaint must be frivolous. There are no other options available under the *LPNA*.

[9] The advisory committee relies on *Mugesera v. Canada*, [2005] S.C.J. No. 39, for the standard of proof required for “reasonable grounds” in administrative law. In that decision the court found that reasonable grounds to believe requires something more than mere suspicion but less than the applicable standard of proof in civil matters of proof on a balance of probabilities. In matters of fact, reasonable grounds will exist where there is an objective basis for the belief based on compelling and credible information. The advisory committee says that they did not find an objective basis for the complaint based on compelling and credible information on the information provided and therefore there was no basis on which to send the complaint to a committee of inquiry.

[10] Counsel for the advisory committee says that the committee starts with the higher standard. If there are “reasonable grounds” for the complaint, then it will be referred to a committee of inquiry. If there are no “reasonable grounds”, then it will not

be referred on. Since they only have two choices, they “deem” the complaint to be frivolous if it does not meet the “reasonable grounds” test. To do otherwise would leave the complaint in limbo and the advisory committee without jurisdiction.

[11] The advisory committee was also concerned about consequences to one’s career which may result from an inquiry and therefore felt that they have a duty to review the evidence carefully before they find that reasonable grounds are established. In this case, they say they reviewed the evidence in support of the complaint very carefully and determined that reasonable grounds were not established. They acknowledge however that they are a gatekeeper only and have no powers of investigation or inquiry.

Position of the Government of Yukon

[12] As a preliminary matter the parties agree that Yukon does have standing to bring this application for judicial review and that the standard of review is reasonableness since the issue is one of interpretation of the *LPNA* and LPNR.

[13] In going to the heart of the question of what standard of proof the advisory committee should use when determining whether to refer a complaint to a committee of inquiry, Yukon says that the standard of proof is whether a complaint is frivolous. Under s. 8 of the *LPNA*, the advisory committee must reject a complaint if it is “frivolous” defined as “obviously unsustainable”, “devoid of all merit”, the “lack of any threshold basis on which to put forward an argument” and “no arguable case” (*Mercier v. Nova Scotia (Police Complaints Commissioner)*, 2014 NSSC 79, at paras. 25, 28, and 29). If it is not frivolous, it should be referred to a committee of inquiry.

[14] Unfortunately, argues Yukon, the *LPNA* sets up another standard of proof - that of “reasonable grounds”. Section 8(3) of the *LPNA* leaves a hole in the standard of proof by referring to two different standards. Here, the advisory committee says they could not find reasonable grounds to refer the complaint to a committee of inquiry and therefore, the complaint must be frivolous. Yukon says that interpretation of the section is backwards. If a complaint is not found to be frivolous, it must be referred to a committee of inquiry.

[15] The advisory committee is simply a gatekeeper. They have no investigative powers. There is nothing in the legislation that details what information must be provided in a complaint nor is evidence required in a complaint from an employer. If the determination is whether a complaint is frivolous, then the threshold is low - the employer need only explain that it has terminated or suspended or placed restrictions on an employee and generally the reasons for doing so. A report of an employer is set out in s. 21(1) of the LPNR and that section indicates the basis for the report. It need not be in writing.

[16] In contrast, s. 21(3) of the LPNR requires another LPN who believes a LPN should not practice or have their practice restricted to set out the reasons for their belief in writing. Individuals who are not employers or other LPNs may also make a complaint under s. 8(1) of the *LPNA* but nothing is specified as to what information they must provide and what they must believe.

[17] Yukon is limited in the information they can provide by the *Access to Information and Protection of Privacy Act*, R.S.Y. 2002, c. 1, (“*ATIPP*”). This legislation is paramount to the *LPNA* and therefore all information provided by Yukon to the advisory committee

must be in accordance with *ATIPP*. Yukon cannot provide any personal information about the employee, the employee's employment history or the employee's patients. Blacking out patient information in such a small jurisdiction where there are very few LPNs, where Yukon employs approximately two-thirds of all registered LPNs and where the advisory committee is composed mostly of LPNs, would be unlikely to protect the identification of the patients involved, as the LPNs often rotate through various facilities. There are exceptions in the *ATIPP* for the provision of personal information however, Yukon argues that none of those apply in this situation.

[18] In summary, Yukon argues, if the advisory committee denies complaints from employers where there is only minimal information, and on most occasions Yukon will only be able to provide minimal information given the requirements of the *ATIPP*, then in most cases, the complaints will be rejected. This cannot be what was intended by the legislation. It would run contrary to the very intention of the legislation which is to ensure the appropriate standards of competence of all LPNs. Yukon asks the Court to find that under the *LPNA* and LPNR, the information which the employer must provide is the LPNs name, the fact that they were terminated, suspended or had their practice restricted and in broad terms, the basis on which the employer believes the LPN fell below the standard required of LPNs. In this case, Yukon provided that information and such information was sufficient to find that the complaint was not frivolous and should therefore be referred to a committee of inquiry. The advisory committee was therefore unreasonable in reaching the decision that they did and the matter should be remitted to the advisory committee for redetermination.

DECISION

[19] Section 21(1) of the LPNR is clear. The employer has a duty to report an LPN where they revoke, suspend, or impose conditions on the employment of an LPN if they believe, on reasonable and probable grounds, that:

- the registrant is unfit to continue to practice;
- the actions of the registrant constitute unprofessional conduct or professional incompetence or indicate incapacity; or
- the continued practice of the registrant might constitute a danger to persons in their care.

[20] Such a report is a complaint under the *LPNA*.

[21] When the complaint is received by the advisory committee, they may only act as a gatekeeper. They must determine whether the complaint is frivolous. If not, they must send the complaint to a committee of inquiry. Although s. 8(3)(b) of the *LPNA* says that the advisory committee must refer the complaint to a committee of inquiry *if there are reasonable grounds for the complaint* (emphasis added), it cannot be that the legislation intended, that if there were not reasonable grounds for the complaint, then it must be frivolous. In fact, that is not how the section is worded. The advisory committee must reject the complaint if it is frivolous. If it is not frivolous, it is then referred to an inquiry committee. To do otherwise leaves a hole in the legislation where a complaint is found not to be frivolous, as defined in the case law, yet the advisory committee finds they do not have reasonable grounds, as defined in the case law, to refer the complaint to a committee of inquiry. The complaint would then go nowhere. That cannot be the

intention of the legislation. The intention must be to reject complaints that are frivolous and then to investigate those that are not.

[22] I agree with Yukon therefore, that the standard of proof in determining whether a complaint should be sent to a committee of inquiry is whether a complaint is frivolous. If one were to take the position advocated by the advisory committee, that they look at s. 8(3)(b) of the *LPNA* first, to determine whether there are reasonable grounds, then there is no purpose for s. 8(3)(a). All wording in a statute must have a purpose.

[23] The wording of s. 8(3) is problematic and causes confusion and uncertainty for those mandated to carry out their duties under that section. As written, it sets out two different standards of proof for the one question of whether to send the complaint to a committee of inquiry. I have found that the standard of proof is whether or not a complaint is frivolous. Should the legislature determine that is not the intended standard, amendments will need to be made to the legislation to clarify that intent.

[24] There is then the question of what information is required for the advisory committee to consider in making their determination. In the case of an employer, as here, s. 21(1) of the LPNR sets out what must be reported and the grounds of belief. The employer is limited in the information they can provide by the *ATIPP*.

[25] In this case, the employer provided the name of the LPN, that she was unsafe in providing medications, that she had been put on a mentorship program for 8 weeks to assist her in this regard, and that at the end of that program, the employer had determined she could not work safely in a role responsible for medication management. In addition to that information, the advisory committee knows that the employer believes, on reasonable and probable grounds, that the LPN is unfit to continue to

practice or the actions of the LPN constitute unprofessional conduct or professional incompetence or incapacity or that the continued practice of the LPN might constitute a danger to persons in care. They know that because the LPNR says that the employer must believe this before they make a report under s. 21.

[26] Counsel for the advisory committee says that the employer's beliefs are just that; their beliefs. It is not anything that the advisory committee can rely on in determining whether there are reasonable grounds to refer the matter on to an inquiry committee.

[27] I disagree. The standard of "reasonable and probable grounds" in s. 21(1) of the LPNR is a higher standard than "reasonable grounds" in s. 8(3)(b) of the *LPNA.* It should cause the advisory committee some concern when an employer, as opposed to a member of the public, makes a complaint based on these beliefs.

[28] Each case must be determined on its own merits and so this Court is reluctant to set out what information must be provided in a complaint to the registrar by an employer. The employer is clearly bound by *ATIPP* and will, in each case, need to determine how much information they can provide in their complaint to comply with *ATIPP* while at the same time providing enough information for the advisory committee to properly evaluate the complaint according to the standard of proof required.

[29] As a gatekeeper, knowing all of the above information, the advisory committee must determine whether the complaint is frivolous as defined by the case law. The decision of the advisory committee was unreasonable in finding that the complaint was frivolous. The complaint is to be remitted to the advisory committee for redetermination.

KENNY J.