IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Workers' Compensation Act (Re) and O'Donnell,* 2004 YKSC 51

Date: 20040719
Docket No.:03-A0155
Registry: Whitehorse

IN THE MATTER OF THE WORKERS' COMPENSATION ACT R.S.Y. 2002, ch. 231

and

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW IN RESPECT OF CERTAIN ACTIONS OF THE WORKERS' COMPENSATION HEALTH & SAFETY BOARD

by

CHAROLETTE O'DONNELL and THE WORKERS' ADVOCATE ON BEHALF OF CHAROLETTE O'DONNELL

Petitioners

Before: Mr. Justice R.S. Veale

Appearances:

Richard A. Buchan	For the Petitioners
Bruce L. Willis	For the Workers' Compensation Health and Safety Board
Penelope Gawn	For the Government of Yukon

REASONS FOR JUDGMENT

INTRODUCTION

[1] The workers' advocate, on behalf of the worker Charolette O'Donnell, has applied for judicial review of a decision of the appeal tribunal pursuant to section 25(11) of the *Workers' Compensation Act*, R.S.Y., 2002 c. 231 (the Act). The appeal tribunal decided

to disclose the entire file of the worker to her employer, in this case the Government of Yukon, at a hearing to determine whether the worker has suffered work-related disability.

THE FACTS

[2] On October 25, 2002, an adjudicator employed by the Workers' Compensation Health and Safety Board (the board) found that Charolette O'Donnell suffered a work related disability.

[3] The employer appealed the decision of the adjudicator on March 28, 2003. Both before and after the appeal was filed, the employer requested the board to produce "all the relevant information that was before the decision-maker with respect to this claim".

[4] On July 2, 2003, counsel for the employer received a package of documents from board counsel based upon an agreement between board counsel and the workers' advocate as to which documents were relevant. Some documents contained blacked-out portions. It is common ground between the parties that a significant number of documents from the worker's file remained undisclosed. The worker's advocate has categorized the undisclosed documents as follows:

- financial information relating to the worker's earnings, banking arrangements, financial obligations, rate of compensation, etc.

- administrative matters such as hearing arrangements, holiday schedules of adjudicators and psychologist, involvement of Workers' Advocate office, scheduling of meetings and appointments, etc.

- the worker's personal medical information unconnected with her work-related disability,

- fax cover memos, correspondence and notes pertaining to procedural and administrative issues, including the document disclosure issue,

- documents created after the employer's March 28, 2003, request for disclosure, including those related to the document disclosure issue.

[5] On July 16, 2003, a board hearing officer reviewed the decision of the board adjudicator. At that hearing, the employer continued to request full disclosure of the worker's claim file.

[6] In a decision dated August 11, 2003, the hearing officer confirmed the decision of the adjudicator. The hearing officer also correctly noted that the "Act does not extend jurisdiction over disclosure issues to a hearing officer".

[7] The employer appealed the decision of the hearing officer to the appeal tribunal. On December 4, 2003, the appeal tribunal commenced its hearing.

[8] I will use the words "appeal tribunal", although it is actually an appeal committee of the appeal tribunal that conducts the hearing. The decision of the appeal committee is deemed to be a decision of the appeal tribunal.

[9] The first issue heard was the disclosure request of the employer for several hundred pages of documents not yet disclosed. At the same time, four documents had been submitted to the president of the board for a ruling on relevancy. The president

ruled the documents were relevant in a decision dated December 4, 2003. That ruling is not under review.

[10] The appeal tribunal requested further written submission from the workers' advocate on relevancy of the remaining undisclosed worker's documents. The appeal tribunal decided in Decision #63 dated January 16, 2004, that "the entire record is relevant to an issue under appeal" and should be disclosed to the employer.

[11] The worker applies for judicial review of the decision of the appeal tribunal on the ground that it has erred in law.

[12] I have not reviewed the documents in question as this is not an appeal of the decision of the appeal tribunal but an application for judicial review alleging an error in law pursuant to section 25(11) of the Act.

ISSUES

[13] The following issues will be considered:

1. Should the standard of review be correctness, reasonableness or patent unreasonableness?

2. Did the appeal tribunal err in its statement of the law of relevancy in Decision #63?

[14] A further issue was raised but can be dealt with summarily. Counsel for the workers' advocate submitted that a decision on relevant information by the president of the board was required under section 27(4) before the appeal board could make its

ruling. There is no doubt that the employer could have asked for a ruling from the president before raising the matter of full document disclosure before the appeal tribunal. Indeed, there may be an advantage in having the issues narrowed by the president's decision. However, section 27(5) makes it clear that the appeal board can determine what information is relevant once an appeal hearing commences. There is no requirement that the appeal board must await a decision of the president of the board or that the president's decision must occur first.

THE LEGISLATION

[15] The appeal tribunal is an independent body from the board. It consists of two members representing employers, two members representing workers and a chair. No member of the appeal tribunal shall be at the same time a member of the board or an employee or agent of the board. Members of the appeal tribunal can only be removed for cause. The appeal tribunal makes its own rules and procedures for the conduct of its own affairs and hearings.

[16] In this case, an appeal committee of three persons has been struck. It consists of the chair who is non-voting, a member representing employers and a member representing workers. The appeal committee has commenced a hearing under section 21(1) of the Act to review the decision of the hearing officer.

[17] The Act requires the appeal committee to follow certain directions under section 21(2):

> 21(2) When considering an appeal, the appeal committee shall

> (a) give the worker, a dependant of a deceased worker, or the worker's employer the right to be heard and an opportunity to present new or additional evidence;
>
> (b) consider the entire record of the claim in the board's possession; and
>
> (c) consider further evidence that it considers necessary to make a decision.

[18] Section 24(3) states that "… the appeal committee is bound by the Act, the regulations, and all policies of the board."

[19] Section 24(4) states:

> (4) The board shall provide the appeal committee with the worker's record and all relevant policies and the committee shall consider that information and any other evidence or information it considers relevant in rendering its decision.

[20] Section 24(8) provides that:

> (8) If the members of the board consider that an appeal committee has not properly applied the policies established by the board, or has failed to comply with the provisions of the Act or the regulations, the members of the board may, in writing and with reasons, direct the appeal committee to rehear the appeal and give fair and reasonable consideration to those policies and provisions.

[21] This is not an application to determine whether the policy in question is consistent with the Act as a worker has no standing under the Act to trigger such a rehearing. Thus, I will not make reference to the policy in question although the appeal committee included it in the law and policy section of Decision #63.

[22] The decisions of the appeal tribunal are protected by a privative clause except for an application for judicial review on an error of law or jurisdiction. The specific sections are as follows:

> 25(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.
>
> …
>
> (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. *S.Y. 1999, c.23, s.11.*

[23] The section of the Act that governs the disclosure of a worker's file is the following:

> Access to claim file
>
> 27(1) A worker, or the dependant of a deceased worker, may, at the offices of the board, examine and copy all information in the possession of the board in respect of their claim but shall not use the information otherwise than for the purpose of procedures before the board or the appeal tribunal unless permitted by the board.
>
> (2) An employer who is a party to a review under section 20 or an appeal under section 21 may, on request to the board, examine and copy any information in the board's possession that the board considers relevant to an issue at the review or the appeal but shall not

> use the information for any purpose other than for a review under section 20 or an appeal under section 21.
>
> (3) If an employer has made a request under subsection (2) the board shall immediately notify the worker or the dependants of a deceased worker of the information the board considers relevant and permit written objections to be made within a period of time determined by the board and release the information that has not been objected to by the worker.
>
> (4) If an objection has been made under subsection (3), the information objected to shall be provided to the president of the board, or the acting president, for final determination of whether the information should be provided to the employer.
>
> (5) No appeal lies against a decision made under subsection (4). The decision is final except when the appeal committee, during the hearing of the appeal, determines the information to be relevant to an issue under appeal, in which case the employer shall be provided with the information.

Decision #63

[24] The appeal tribunal made the decision to disclose the complete file of the worker. It did so after commencing its hearing to ensure that the employer would have the relevant information for the hearing.

[25] What follows is the portion of Decision #63 entitled “Decision Respecting Disclosure”:

> (8) The AC met on January the 8 and 14, 2004 to review the submission of the WA respecting the relevancy of documents on file to the issues under appeal. It is incumbent on us to balance the legitimate need of the employer to full disclosure of the file against the privacy rights of the injured worker.

(9) It is well established that a fundamental principle of natural justice demands that a party to a proceeding must know the case it has to meet. To satisfy that requirement requires the full disclosure of the file in possession of the board less any document that is private in nature or has a prejudicial effect to the worker that outweighs the probative value of that document.

(10) Not only must justice be done, it must also be seen to be done. We conclude that legislature intended to protect a worker's legitimate privacy rights with respect to their personal information. We also conclude that the legislature did not intend to deny an appellant's right to know the case they have to meet. The rules of natural justice are fundamental concepts that cannot be abrogated without bringing justice into disrepute.

(11) We have not found any information on file that the disclosure of which would violate the worker's privacy rights. This finding includes apparently inconsequential documents such as fax transmission cover sheets and financial documents. The ongoing administration of the claim is relevant to the issues under appeal given the board's finding that the worker has suffered a work related injury and is being compensated accordingly.

(12) Pursuant to section 27(5) of the *Act*, we find the entire record is relevant to an issue under appeal and the board will supply that information to the employer. This order includes information received on this file up to the date of commencement of the hearing.

Issue 1: Should the standard of review be correctness, reasonableness or patent unreasonableness?

[26] In judicial review applications, there are three possible standards of review. When the "correctness" standard is applied, the reviewing court shows no deference to the tribunal below. The only question is whether it is correct or not.

[27] The standard of “patent unreasonableness” stands at the other end of the spectrum. This standard gives a high degree of judicial deference to the tribunal and is most commonly applied when the decisions of the tribunal are protected by a full privative clause. A privative clause protects the tribunal from court review of its decision. The purpose of this standard of review is to ensure that the courts do not substitute their interpretation of a legislative provision for tribunals with special expertise (see *Domtar Inc.* v. *Quebec (Commission d’appel en matière de lesions professionelles)*, [1993] 2 S.C.R. 756).

[28] The standard of “reasonableness” is often used in statutory appeal contexts where there are indications both “for” and “against” deference (see Frank A.V. Falzon, *Standard of Review on Judicial Review or Appeal*, Canadian Institute for the Administration of Justice, 2002 Regional Roundtable). In the case of *Canada (Director of Investigation and Research)* v. *Southam Inc.*, [1997] 1 S.C.R. 748 at paragraph 56, it was put this way:

> An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it.

[29] And further at paragraph 60, the court stated the “clearly wrong” test is close to the standard of unreasonable and added:

> It is true that many things are wrong that are not unreasonable; but when “clearly” is added to “wrong”, the meaning is brought much nearer to that of “unreasonable”.

[30] The four factors to be considered in determining the appropriate standard of review are set out in *Pushpanathan* v. *Canada*, [1998] 1 S.C.R. 982:

1. the presence or absence of a privative clause;
2. the expertise of the tribunal;
3. the purpose of the governing legislation as a whole and the provisions creating the tribunal and its role; and
4. the nature of the problem, whether it's a question of fact, mixed fact and law, or law.

1. Privative Clause

[31] The Act in question has a full privative clause protecting the decisions of the appeal tribunal. However, it also has a specific exception in section 25(11) permitting a worker or employer to apply for judicial review if there has been an error in law or in jurisdiction. This suggests that the patent unreasonableness standard of review would not be required on issues of law and jurisdiction.

[32] It is also of interest to note that the president of the board makes the final determination of what information should be given to the employer while the claim proceeds through the adjudicator and hearing officer. The decision of the president is without appeal until it reaches the appeal tribunal which can make its own decision on the information it considers to be relevant.

2. Expertise of the Tribunal

[33] Counsel did not specifically address this factor. I can take judicial notice of the fact that members of the appeal tribunal representing workers and employers have

backgrounds that would assist them in decision-making. However, the appeal tribunal members are part-time appointments as opposed to full-time with the result that they do not have the same opportunity to develop on-the-job experience as a full-time tribunal. The members, to my knowledge, have no legal expertise, although they have access to legal counsel.

3. The Purpose of the Tribunal and its Role

[34] The purpose of the appeal tribunal is to provide an independent review of the decisions of the adjudicator and hearing officer, who are both employees of the board. This gives both the worker and the employer confidence that there is ultimately a completely independent review of the worker's claim. The appeal tribunal makes its own rules and procedures.

[35] Although the appeal tribunal is bound by the Act, the regulations and all policies of the board, the appeal tribunal is not required to slavishly follow board policy. On the contrary, it "shall consider that information and any other evidence or information it considers relevant in rendering its decision". Thus, the appeal tribunal must review the policies of the board and satisfy itself that they are consistent with the Act and applicable to the facts before it (see *Northern Transportation Co.* v. *Northwest Territories (Workers' Compensation Board)*, [1998] N.W.T.J. No. 3 (S.C.) at paragraphs 29 and 36).

[36] The Act provides a remedy to the board. It can direct the appeal committee to rehear an appeal and "give fair and reasonable consideration to those policies and

provisions”. However, the appeal tribunal remains independent in the reconsideration it gives to a board policy, subject only to a court ultimately determining whether the policy is consistent with the Act.

[37] I conclude, under this factor, that the legislation was designed to create an independent appeal tribunal, but subject to oversight by the court in matters of law, jurisdiction and whether board policies are consistent with the Act.

4. The Nature of the Problem

[38] The specific question to be addressed is whether particular documents on the worker’s claim file will be disclosed to the employer. The Act has a specific section, section 93(1), to ensure confidentiality of a worker’s claim file when it is dealt with by board staff, members of the board and members of the appeal tribunal.

[39] However, the question for the appeal tribunal in section 27(5) of the Act, is to determine whether the information on the worker’s file is “relevant to an issue under appeal”. This requires an understanding of the issue in question and the law of relevancy.

[40] The decision of the appeal tribunal must identify the precise issue before it and the information in the worker’s file. Then the appeal tribunal must state the correct legal test of relevancy to be applied. Finally, the appeal board applies the legal test to determine if the information on the worker’s file is relevant to the issue or issues before the appeal board.

The Standard to Apply

[41] In considering the four factors, I am of the view that a standard of reasonableness should be applied to Decision #63. Although the appeal tribunal has no special expertise in matters of law, the statute empowers the tribunal to make decisions on the relevancy of documents on a worker's claim file. The Act did not permit an appeal of the decision of the appeal board but rather a judicial review indicating that some deference should be given to appeal board decisions. I also note that even when statutes provide a full right of appeal on matters of law and jurisdiction, courts have applied the standard of reasonableness (see *Akita Drilling Ltd.* v. *Alberta (Workers' Compensation Appeals Commission)* [2003] A.J. No. 1562, 2003 ABQB 1030.

Issue 2: Did the appeal tribunal err in its statement of the law of relevancy in Decision #63?

[42] This issue requires a determination of whether Decision #63 is unreasonable or clearly wrong.

[43] As the Act does not contain a provision that the appeal tribunal is not bound by the common law rules of evidence, I am going to assume that the meaning of "relevant" in section 27 is the same in an appeal tribunal hearing as it is in a court. That is implied as well in section 25(11) which permits judicial review on matters of law.

[44] Relevance is not a legal concept but one of experience and common sense. It is the connection between one fact and another which makes it possible to infer the existence of one from the other (see *R*. v. *Cloutier*, [1979] 2 S.C.R. 709). Stated more understandably, "relevant evidence" means evidence that has any tendency to prove a fact in issue in a proceeding (see *Law Reform Commission of Canada: Report on*

Evidence, Carswell, 1982). A fact will be relevant not only where it relates directly to the fact in issue, but also where it proves or renders probable the past, present or future existence (or non-existence) of any fact in issue (see Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 1998 Butterworths at 25, paragraph 2.38). This aspect of relevancy is sometimes referred to as logical relevancy to distinguish it from legal relevancy. Legal relevancy is based on the concept that some evidence may be excluded if the probative value of the evidence is outweighed by its prejudicial effect (see *R.* v. *Mohan*, [1994] 2 S.C.R 9). Prejudicial effect may be something that is time consuming or misleading to an extent greater than its probative value.

[45] In the context of section 27 of the Act, an employer is entitled to receive the information on a claim file that is relevant to any issue at a review or appeal. Hence, the determination of relevancy by the appeal tribunal requires an assessment of the issue or the facts in dispute and the connection that information on the claim file has to that issue or factual dispute.

[46] That is my first concern with Decision #63. It did not state with any precision the issue or factual dispute before the tribunal as a reference point for a determination of relevant information on the worker’s claim file. It may have made the appropriate determination in its own decision-making process. The reasons simply do not disclose it.

[47] Secondly, Decision #63 does not disclose the nature of the information or documents on the worker’s claim file. It is impossible for the worker, employer or this court to review the reasons to determine if an error was made by the appeal tribunal with respect to any particular document. In saying this, I do not suggest that each document

needs to be identified individually in the Decision where a large number of documents are involved. The information could be attached as a schedule or referred to in categories.

[48] These two concerns standing alone might not form an error in law in the same way that they would not be a freestanding ground of appeal in the criminal law context (see *R.* v. *Braich*, [2002] 1 S.C.R. 903, [2002] S.C.J. No 29 at paragraphs 31 and 41).

[49] However, there are other concerns that go to the issue of an error in law. Paragraph 8 of the decision states that “It is incumbent on us to balance the legitimate need of the employer to full disclosure of the file against the privacy rights of the injured worker”. This, in my view, misconstrues the task of the appeal board under section 27(5) of the Act. The task of the appeal board is not to balance the privacy rights of the worker with the employer’s need for full disclosure. The task of the appeal board is to determine if information on the worker’s claim file is relevant to the issue under appeal, whether or not it might be considered to be “private”.

[50] Similarly, in paragraph 9, the appeal board states natural justice demands “full disclosure” of the claim file “less any document that is private in nature …”. Again, this misconstrues the task of the appeal board under section 27(5) because a document or information that is “private in nature” may be relevant to an issue before the appeal board. The goal of full disclosure is limited by the concept of relevancy, not privacy.

[51] Again, in paragraph 10, the appeal board concludes that the legislature intended to protect a worker’s legitimate privacy right. That may be accurate in the context of

employers, board staff, members of the board and members of the appeal board maintaining confidentiality of claim files. However, it misconstrues the task of the appeal board under section 27(5) of the Act.

[52] Again, in paragraph 11, the appeal board states that it did not find “any information on the file that the disclosure of which would violate the worker’s privacy rights”. With respect, the privacy right of the worker is not the focus of section 27(5).

[53] The appeal board concluded by stating in paragraph 12 that “we find the entire record is relevant to an issue under appeal”. However, in light of the appeal board’s characterization of the test as a balance between full disclosure and the worker’s privacy rights, I have considerable doubt that the appeal board applied the proper test of relevancy.

[54] The test for relevancy is whether the information or documents in the worker’s claim file have a tendency to prove or render probable a fact in issue on the finding that the worker had a work related disability.

[55] I conclude that Decision #63 should be quashed as being an error in law and unreasonable. I order that the matter of disclosure of relevant information to the employer be returned to the appeal board for rehearing by the same appeal committee on the proper test of relevancy.

[56] The parties may speak to costs if necessary.

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VEALE J.