SUPREME COURT OF YUKON

Citation: *White v. Chau*, 2012 YKSC 45

Date: 20120606
S.C. No. 10-A0059
Registry: Whitehorse

Between:

Kathrina (Kate) Ineze White

Petitioner

And

Dr. Huy Chau and Yukon Workers' Compensation Health and Safety Board Appeal Panel

Respondents

Before: Mr. Justice F.W. Cole

Appearances:

Susan Roothman	Counsel for the Petitioner
Nigel L. Trevethan and Lara Zee	Counsel for the Respondent Dr. Chau
Bruce L. Willis	Counsel for the Respondent Workers' Compensation Health and Safety Board Appeal Panel

REASONS FOR JUDGMENT

[1] This is a judicial review of the Yukon Workers' Compensation Health and Safety Board Appeal Panel (the "Appeal Panel").

[2] The petitioner Kathrina (Kate) Ineze White (the "petitioner") is a plaintiff in a medical negligence action advanced against Dr. Huy Chau ("Dr. Chau"), Supreme Court Action No. 07-A0127 Whitehorse Registry (the "Action").

[3] Dr. Chau is a physician licensed to practice in the Yukon Territory and at all material times his medical practice was incorporated and registered with the Yukon Workers' Compensation, Health and Safety Board (the "YWCHSB"). Dr. Chau was an

employee of his professional corporation as well as its principal and sole director and was working in his capacity as an employee physician at all material times.

[4] On April 14, 2007, the petitioner slipped and injured her right foot while working as a manager/server at the Midnight Sun Cafe. She sought treatment three days later at the emergency department of the Whitehorse General Hospital where she was seen by Dr. Chau who diagnosed a right first metatarsal fracture and applied a cast to the petitioner's foot.

[5] On April 22, 2007, the petitioner returned to the Whitehorse General Hospital and Dr. Chau removed and reapplied the cast. The petitioner returned again on April 24, 2007, with complaints of continuing pain and at that time Dr. Chau removed the cast and prescribed a back slab/walking boot for two weeks. On April 27, 2007, the petitioner saw Dr. Himmelsbach at the Whitehorse General Hospital who diagnosed a deep vein thrombosis ("DVT") in her right leg and initiated treatment.

[6] On May 23, 2007, the YWCHSB deemed that the petitioner's injury was work-related and that consequently the petitioner was entitled to receive compensation and benefits. On May 24, 2007, the petitioner signed an assignment of compensation form allowing her to collect wages from her employer who would be repaid the loss of earning benefits directly from the YWCHSB.

[7] On April 27, 2009, Dr. Chau sought a declaration that the right of action by the petitioner against him should be removed pursuant to s. 50(5) of the *Workers' Compensation Act*, S.Y. 2008, c. 12 (the "2008 Act") as at all material times the petitioner was a worker within the meaning of the 2008 Act, her injury or disability arose out of and in the course of her employment, and at all material times Dr. Chau was a worker within the meaning of the 2008 Act and any action or conduct of Dr. Chau which

caused the alleged breach of duty of care arose out of and in the course of his employment within the scope of the 2008 Act.

[8] The Appeal Panel held in favour of Dr. Chau and the petitioner now applies for a declaration that:

1. The Appeal Panel erred in law by deciding that the 2008 Act applied to a determination pursuant to s. 50(3) of the relevant Act for a matter arising under the *Workers' Compensation Act*, R.S.Y., 2002, c. 23 (the "2002 Act");
2. The Appeal Panel erred in law by deciding that it only had to decide whether Dr. Chau was a worker and that it did not need to deal with whether Dr. Chau caused or contributed to the petitioner's original injury;
3. The Appeal Panel erred in law by deliberately ignoring the full ambit of s. 50(3) of the 2008 Act in its determination;
4. The Appeal Panel erred in law by finding that the petitioner's right of action in Supreme Court Action 07-A0127 against Dr. Chau is removed under s. 50(5) of the 2008 Act; and
5. The Appeal Panel acted outside its jurisdiction in varying its decision of June 8, 2010, on July 20, 2010.

WHAT STANDARD OF REVIEW SHOULD APPLY?

[9] There are really three decisions made by the Appeal Panel that the petitioner is questioning:

1. Whether it is the 2002 or the 2008 Act that applies;
2. Whether the right of action advanced by the petitioner against Dr. Chau was removed pursuant to s. 50(5) of the 2008 Act; and

3. The ability of the Appeal Panel to vary their decision to correct a section number from s. 50(2) to s. 50(3).

[10] The petitioner says the correct standard of review for all three issues is correctness; Dr. Chau and the Appeal Panel agree that Issue 3 is one of correctness, but argue that for Issues 1 and 2 the standard is reasonableness.

[11] In *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9 [*Dunsmuir*], McLachlin C.J. writing for the majority stated at para. 54:

> Guidance with regard to the questions that will be reviewed on a reasonableness standard can be found in the existing case law. Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity: *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at para. 48; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 39. Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context: *Toronto (City) v. C.U.P.E.*, at para. 72. Adjudication in labour law remains a good example of the relevance of this approach. The case law has moved away considerably from the strict position evidenced in *McLeod v. Egan*, [1975] 1 S.C.R. 517, where it was held that an administrative decision maker will always risk having its interpretation of an external statute set aside upon judicial review.

[12] In *Nolan v. Kerry (Canada) Inc.*, [2009] 2 S.C.R. 678, 2009 SCC 39 in referring to the *Dunsmuir* decision, the majority of the Court held at paras. 34-35:

> [34] The inference to be drawn from paras. 54 and 59 of *Dunsmuir* is that courts should usually defer when the tribunal is interpreting its own statute and will only exceptionally apply a correctness standard when interpretation of that statute raises a broad question of the tribunal's authority.
>
> [35] Here there is no question that the Tribunal has the statutory authority to enquire into the matter of costs; the

> issue involves the Tribunal interpreting its constating statute to determine the parameters of the costs order it may make. The question of costs is one that is incidental to the broad power of the Tribunal to review decisions of the Superintendent in the context of the regulation of pensions. It is one over which the Court should adopt a deferential standard of review to the Tribunal's decision.

[13] Also in *Dunsmuir*, the Court described a two-step process at para. 62:

> In summary, the process of judicial review involves two steps. 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.

[14] In *O'Donnell (Re)*, 2008 YKCA 9 [*O'Donnell*], the Yukon Territory Court of Appeal considered the appropriate standard of review to be afforded to the decisions made under the Worker's Compensation scheme of the Yukon.

[15] In *O'Donnell*, an employee of the Government of the Yukon sought Worker's Compensation benefits after she was suspended for alleged mismanagement of her files. She claimed that she was injured mentally and physically as a result of her suspension and subsequent dismissal. An adjudicator awarded her compensation; the employer unsuccessfully appealed that decision to a hearing officer, then to the Workman's Compensation Appeal Tribunal which concluded the employee did not suffer a work-related disability. On judicial review the chambers judge 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. 20), which ought to have been reviewed on the standard of reasonableness. However, the judge also decided what he described as "pure legal questions" on a correctness standard (para. 26). This was rejected by the Court of Appeal, who at para. 42 stated:

> 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).

[16] At para. 60, the Court stated:

> 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.

[17] I therefore conclude that the proper standard to be applied for Issues 1 and 2 is one of reasonableness.

Issue 1: Whether the 2002 or 2008 Act applies.

DOES THE 2008 ACT APPLY?

[18] The petitioner says that the Act in force at the time of the petitioner's injury was the 2002 Act because the issue is the entitlement of the petitioner to compensation.

[19] The difference between the two Acts is that the 2002 Act refers to "disability" and the 2008 Act refers to "work-related injury".

[20] Where a previous *Workers' Compensation Act* is repealed, the normal rule of interpretation is to use the most current Act. The only exception is the transition part of the *Workers' Compensation Act*, found in s. 127 of the 2008 Act, which directs that the entitlement of a worker to compensation is determined pursuant to the *Workers' Compensation Act* in force at the time of the worker's injury.

[21] The Appeal Panel found at page 8:

> This panel is not dealing with an entitlement issue in making this determination and therefore IN-03, “Transition Policy” and the 2008 Act apply.

[22] I would agree with the petitioner if the issue was whether or not the petitioner was entitled to compensation under the Worker’s Compensation scheme. That, however, was not the issue that was before the Appeal Panel. The petitioner’s claim had already been accepted and monies had been paid as a result of her work-related injury. I therefore conclude that the decision of the Appeal Panel was reasonable in all the circumstances.

Issue 2: Whether or not the action advanced by the Petitioner against Dr. Chau was removed pursuant to s. 50(2) of the Act

[23] The petitioner quotes the Appeal Panel’s reasons in which they specifically refer to s. 50(2) of the 2008 Act as a basis of deciding that the petitioner does not have a cause of action against Dr. Chau. The petitioner says they applied the wrong subsection of the Act and that this is an error in substance of the law and not an inadvertent error or a typo. I am of the view that the Appeal Panel did in fact err when they relied upon s. 50(2) of the 2008 Act. However, that leads us to the third issue.

Issue 3: Did the Appeal Panel act outside its jurisdiction in varying the decision of June 8, 2010 on July 20, 2012?

[24] The June 8, 2010 decision under “Conclusions” states:

> The Panel finds that Ms. White is a worker, who suffered a work-related injury arising out of her employment with her employer and by reason of section 50(2) of the 2008 Act, does not have a cause of Action against Dr. Chau since he also is a worker. The Panel does not need to deal with whether Dr. Chau caused or contributed to the injury under section 50(3) because of the findings that were made under section 50(2) of the 2008 Act.

[25] On July 20, 2012, that paragraph was changed and the new paragraph reads as follows:

> The Panel finds Ms. White is a worker, who suffered a work-related injury arising out of her employment with her employer and by reason of section 50(3) of the 2008 Act, does not have a cause of Action against Dr. Chau since he also is a worker.

[26] The substantive change is that s. 50(2) was replaced with s. 50(3) and the last sentence was deleted in the July 20, 2010 decision.

[27] Section 105(5) of the 2008 Act says the board of directors has the authority to examine, inquire into, and hear any matter that it has dealt with previously and had the power to vary or rescind any decision or order previously made by it.

[28] Section 106 of the 2008 Act extends these powers to the Appeal Panel:

> 106(1) Matters required to be determined by the members of the board of directors under paragraph 100(1)(g) shall be heard by an appeal panel by the board of directors which shall be established by the chair and shall consist of
>
> (a) the chair or alternate chair, who shall be presiding officer of the panel;
>
> (b) one member representative of employers; and
>
> (c) one member representative of workers
>
> (2) When a matter is referred to an appeal panel under subsection (1), the appeal panel has all the powers and authority of the board of directors and may confirm, vary, or reverse the decision appealed from.

[29] In *Yukon (Workers' Compensation Appeal Tribunal) (Re)*, 2006 YKSC 4, the Court held that the Workers' Compensation Appeal Tribunal did not exceed its jurisdiction by remaining seized of a matter after it had rendered a decision, as the legislature allowed the tribunal to reopen any matter.

[30] Mr. Justice Gower, after reviewing the statutory provisions allowing the tribunal to "at any time ... reopen ... any matter that it has dealt with previously", reviewed the principles of *functus officio* and at para. 27 concluded:

> The Act clearly indicates in s. 25(6) that the Appeal Tribunal may "at any time ... reopen ... any matter that it has dealt with previously". Further, on doing so, the Tribunal may confirm, reverse, rescind, or vary its previous order. Thus, in my respectful opinion, the principle of *functus officio* has been displaced by the legislation of this case and the Board's argument on this point must also fail.

[31] In the submissions of both Dr. Chau and the petitioner to the Appeal Panel, there was no suggestion whatsoever that s. 50(2) of the Act applied. What the Appeal Panel did was to vary the record to reflect the submissions provided to them and to correct what is more analogous to a typographical error or a slip. To prevent the Appeal Panel from correcting this obvious slip would lead to the ridiculous result of having the parties apply for a judicial review or some other remedy which would be a waste of time and money for all concerned.

[32] I have considered all the arguments of the parties and I am satisfied that the Appeal Panel was correct when it held it had jurisdiction to make necessary corrections to the reasons for judgment on July 20, 2010.

Cole J.