IN THE SUPREME COURT OF YUKON TERRITORY

Citation: King v. Yukon Medical Council, 2003 YKSC 74

Date: 20031219
Docket: 02 AP 0013
Registry: Whitehorse

Between:

Robert King

Appellant

- and -

Yukon Medical Council

Respondent

Reasons for Judgment
of the
Honourable Madam Justice C.L. Kenny

INTRODUCTION

[1] The Appellant, Mr. King, made a written complaint to the Respondent, Yukon Medical Council ("YMC") against Dr. Wilson with respect to the medical treatment he received for a work related accident. The YMC reviewed the complaint and appointed a medical investigator to investigate the complaint. On reviewing the investigator's report, the YMC considered the matter and dismissed the complaint. The Appellant appeals that decision.

BACKGROUND

[2] On Sept. 25, 1992, the Appellant was injured while at work when a large pole hit him in the head. He was taken to the Whitehorse General Hospital and attended to there by Dr. Wilson, the emergency room physician that day. The Appellant was hospitalized for several days and finally discharged on October 6, 1992. He continued on with Dr. Wilson as his treating physician. The Workers' Compensation Board ("WCB") was also involved as the accident happened while Mr. King was at work.

[3] Dr. Wilson prepared a discharge report when Mr. King left the hospital. That report noted a diagnosis of head injury. The report also noted that Mr. King had previously suffered a serious blow to the head as a result of a motorcycle accident in 1980. After that accident, he was in a coma for 3 days and required an open craniotomy.

[4] In November, 1992, the Appellant contacted the WCB about memory loss. They referred him to Dr. Reddoch, a medical consultant. Dr. Reddoch reported that there was no evidence of persisting neurologic defect. He was concerned about depression however, as Mr. King suffered severe depression after the 1980 accident. He anticipated a full recovery but did indicate that if the memory loss persisted, consideration should be had to neuropsychological testing to see if there was permanent damage.

[5] Mr. King continued to have memory problems. He asked the WCB to refer him for a neuropsychological assessment, which was done by Dr. Snyder in Edmonton. Dr. Snyder reported in August of 1994, that Mr. King does have residual neurobehavioral deficits attributed to his brain injury suffered in 1992. He recommended programs for brain injured persons and suggested a CT scan or MRI to document any structural abnormalities. His report went to the WCB as they requested the assessment. Dr. Wilson received a copy. No CT scan or MRI was done at that time.

[6] On receiving Dr. Snyder's report, the WCB sent it to Dr. Schmidt to review. Dr. Schmidt disagreed with the conclusions drawn by Dr. Snyder. He acknowledged that he had never met with Mr. King so he could not comment on how Mr. King presents. He also noted that there were large holes in the history which needed to be filled in. Despite these comments, he goes on to conclude 'I find nothing in Dr. Snyder's report that would support the conclusion that the 1992 accident caused or exacerbated Mr. King's problems. I must of course point out that I can likewise not conclude that the 1992 accident did not cause or exacerbate them."

[7] What followed were years (at least from 1994 - 1999) of discussion, correspondence among employees of the WCB, investigations, an appeal about payment for drugs, and correspondence with other medical personnel. Finally in 1999, a Mr. Rees with the WCB recommended that they proceed full steam ahead to deal with Mr. King's difficulties. Dr. Snyder was contacted again to provide a report and treatment recommendations for Mr. King. He focussed on Mr. King's psychiatric condition stating that it had never been properly investigated and dealt with. He suggested several treatment programs and again said that there should probably be a CT scan or MRI. This report went to the WCB. A copy of this report was not sent to Dr. Wilson.

[8] After receiving this report, Mr. King insisted that an MRI be done. One was requested and the MRI confirmed the diagnosis of a brain injury.

[9] The failure of Dr. Wilson to follow up after receiving Dr. Snyder's first report in 1994 by ordering an MRI is the subject matter of Mr. King's complaint to the YMC. He says that had the MRI been done in 1994, the brain injury would have been diagnosed, he would have received the appropriate treatment and he would not be as seriously brain damaged today as he is. The YMC, upon receipt of the complaint, appointed an investigator under s. 29 of the **Medical Profession Act** R.S.Y.T 1986, c.114 to look into the matter. The investigator, Dr. Henderson, investigated the complaint and provided his report to the YMC. Upon review, the YMC dismissed the complaint. This is the appeal of that decision.

GROUNDS OF APPEAL

[10] The grounds of appeal are as follow:

1) Did the YMC err in exercising its discretion to dismiss the Appellant's complaint and not appoint an Inquiry Committee pursuant to s. 23 of the **Medical Profession Act**.

2) Was the procedure followed by the YMC in investigating the complaint contrary to the **Medical Profession Act**?

3) Was the Appellant owed a duty of procedural fairness?

4) Are the reasons for the YMC communicating its decision to dismiss the Appellant's complaint and not appoint an Inquiry Committee to investigate the complaint inadequate?

[11] Just before this hearing, the Appellant filed a motion seeking leave to introduce "fresh evidence" and alleging bias on the part of the investigator, Dr. Henderson. At the hearing, the YMC filed further argument in response to these issues. Mr. King wanted an opportunity to respond so I adjourned the proceedings to allow for written argument by Mr. King in response to those issues only and leave for rebuttal to YMC if necessary. I received and reviewed those documents. I will deal with those issues first.

FRESH EVIDENCE

[12] The term "fresh evidence" is a misnomer. Mr. King alleges that Dr. Henderson, in his report, failed to include certain documents that were in his WCB file. He alleges that these documents are important and supportive of his claim against Dr. Wilson. He wants the Court to consider these documents as part of his appeal. He requires leave of the Court to introduce this evidence.

[13] Section 33 of the **Medical Profession Act** specifies that appeals are on the record, therefore, Mr. King requires leave to introduce " fresh evidence". What frustrates Mr. King the most is that he does not have a role in this process. There is a lot of information he wants to give to the YMC. The **Act** allows a streamlining of different processes. If it did not do so, then every complaint would go directly to an inquiry. Section 23(5) of the **Act** allows the Council to appoint an investigator to do a summary investigation to determine whether the complaint is frivolous or serious enough to justify the appointment of an inquiry committee. Dr. Henderson reported his findings to the Council. Mr. King says that Dr. Henderson usurped the role of the YMC when he offered his view on whether or not an MRI would have made any difference. Dr. Henderson did not opine in his report on whether the complaint had been proven nor whether the matter should be dismissed or an inquiry called. He did offer an opinion about whether or not the MRI would have affected the treatment but he was very clear that this was his opinion only and that the

Council itself would have to review the facts to decide whether or not they agreed. Those decisions were left to the Council to decide and they did so. I do not grant leave.

[14] Even if I did grant leave, the Appellant has not met the test for introduction of fresh evidence is as set out in ***K.C.*** v ***College of Physical Therapists***, [1999] A.J. No. 973(C.A.) At para. 18

a) The evidence could not, by due diligence, have been adduced at the disciplinary hearing;

b) The evidence is relevant and bears on a decisive issue;

c) The evidence is credible and reasonably capable of belief; and

d) The evidence, if believed, taken with the other evidence, would reasonably be expected to have affected the result.

[15] Even the test cannot be precisely applied here given the nature of these proceedings. The test assumes a hearing process. With respect to the first part of the test, the evidence was in the WCB file and was available at the time to be produced. It was reviewed by Dr. Henderson when reviewing the WCB files and it was given to him again directly by Mr. King. The material, therefore, was available and considered. It did not go to the Council because Dr. Henderson decided it was not relevant to what he was investigating.

[16] The other parts of the "fresh evidence" test are: is it credible, is it relevant, does it bear on a decisive issue, and if believed, would it have affected the result. When looking at these issues, the decision that the Council needs to make is important. They must determine if Dr. Wilson failed to provide the required level of care to Mr. King by failing to have a CT scan or MRI done. The Respondent reviews each document that Mr. King wishes to introduce. I do not intend to review each one individually here. Many of the documents refer to whether or not Mr. King had a head injury. In my review of the material, that is not an issue. Mr. King clearly had a head injury. Some think it occurred for reasons other than the 1992 accident, and questions are raised about its severity and the prognosis for the future. What others may have thought is not the issue. The complaint is against Dr. Wilson and Dr. Wilson was of the view that Mr. King had a brain injury and he treated him accordingly. I understand Mr. King's frustration when others are questioning the extent and the cause of the injury. The summary procedure makes it all the worse for him as he sees documents that he thinks are relevant and finds they have not been put forward to the Council through Dr. Henderson's report. That is why I stress again that the purpose of this process is to assess the care provided by Dr. Wilson.

BIAS

[17] This leads into the allegation of bias as against Dr. Henderson. The parties disagree on the test for bias. I accept as the correct test the statement set out by Grandpre, J. in ***Committee for Justice and Liberty*** v. ***National Energy Board***, [1978] 1 S.C.R. 369. It is whether an

informed person, viewing the matter realistically and practically, and having thought the matter through, would have a reasonable apprehension of bias.

[18] Dr. Henderson is the alternate medical consultant to the WCB in Whitehorse. Mr. King did not know this until later and alleges that as a result of that position Dr. Henderson would be biassed against him. It must be remembered that Dr. Henderson was asked to do this investigation by the YMC, not the WCB. He had no involvement whatsoever in Mr. King's dealings with WCB. He was investigating the standard of care provided to Mr. King by Dr. Wilson, which had nothing to do with WCB. While it may be preferable strictly from an appearance point of view, to choose a doctor with no connection to anyone in the proceedings, that is simply unrealistic in smaller centres such as Whitehorse where there are a limited number of doctors wearing many hats.

[19] I am satisfied, when looking at the question of standard of practice for Dr. Wilson that the test for bias has not been met.

STANDARD OF REVIEW

[20] This appeal is from a decision of a professional regulatory body, the YMC. This Court can interfere with such decisions only when the decision is shown to be patently unreasonable. A four-part pragmatic and functional test has been set out by the Supreme Court of Canada in ***Pushpanathan*** v ***Canada (Minister of Citizenship and Immigration)***, [1998] 1 S.C.R. 982 to determine the level of deference to be accorded an administrative tribunal:

a) the presence or absence of a privative clause;

b) the relative expertise of the tribunal;

c) the relevant statute or statutory scheme;

d) the nature of the issue under review, either one of fact or law.

PRIVATIVE CLAUSE

[21] The **Medical Profession Act** does not contain a privative clause which, if present, would compel the Court to show deference to the decision of the Council. Even without a privative clause the right of appeal in the legislation does not mean that no deference need be shown; the other parts of the test are as important.

EXPERTISE OF THE TRIBUNAL

[22] Expertise of the tribunal on matters squarely within its jurisdiction is one of the most important factors in setting a standard of review. In ***Hammami*** v ***College of Physicians and Surgeons of British Columbia*** (1997), 36 B.C.L.R. (3rd) 17, the Court, in reviewing a decision on whether a physician was competent to practise medicine, made it clear that deference would

normally apply as the Council has significant expertise not found in a judge hearing an appeal. Here, the Council, composed of physicians have to decide if Dr. Wilson met the standard of care owed to his patient, Mr King, in treating him for his brain injury; and in particular, his failure to order a CT scan or MRI. Clearly, the decision as to whether an MRI or CT scan was required in the circumstances can most properly be ascertained by those in the profession rather than a judge.

RELEVANT STATUTE

[23] Where a statutory scheme requires the balancing of many different interests and considerations, then deference to the tribunal should be shown. Here the legislation requires a balancing of the interests of the public and the interests of the profession. The legislature has delegated the regulation of the medical profession to the YMC on the premise that the issues involved in such regulation are more properly reviewed by those who have the knowledge and expertise in the area.

NATURE OF THE ISSUE - FACT OR LAW

[24] Issues primarily of law should be accorded less deference than issues of fact. In this case, the issue is primarily one of fact. It deals with medical standard of care and that is best decided by the Council who were given that power under the legislation. Their decision on whether to dismiss the complaint or to call an inquiry is discretionary (s. 23(1)(b)). Where that discretion is afforded a tribunal, the Courts should be very loath to interfere in the decision. This principle is best articulated in ***Friends of the Old Man River Society*** v. ***Assn. of Professional Engineers, Geologist and Geophysicists of Alberta***, [2001] A.J. No. 568 (C.A.) at para. 37:

> The decision of Council to uphold the termination of an investigation is a discretionary one. In deciding whether or not to proceed with a disciplinary hearing, Council must consider not only the interests of the complainant but also the rights of the investigated person and its responsibility as the governing body of a self-governing profession.

[25] Using the above test to determine the level of deference to be accorded the tribunal, I am satisfied that the level is quite high. The YMC has specialized knowledge and expertise. The Council is composed of other physicians. They are provided with discretion to decide if a complaint should be dismissed or an inquiry called. Having exercised their discretion using their expertise, this Court should not interfere with that decision unless it is patently unreasonable.

DID THE YMC ERR IN EXERCISING ITS DISCRETION TO DISMISS THE APPELLANT'S COMPLAINT AND NOT APPOINT AN INQUIRY COMMITTEE ?

[26] The legislation has given to the YMC the discretion to determine if an inquiry should be held. That decision is made after consideration of all of the facts and material before it. The YMC acts as a screening body. They do not decide if the complaint has been proven. They decide if the complaint should be summarily dismissed, investigated or referred to an inquiry

committee. In making that decision, they need to take into consideration the evidence before them. They need to keep in mind that the standard of proof for professional misconduct is very high. The Respondent argues that, particularly as it relates to medical personnel, the standard of proof comes perilously close to a criminal standard of proof. The Appellant takes issue with that categorization. It is impossible to define for every case, where the line is to be drawn between a civil (balance of probabilities) and criminal (beyond a reasonable doubt) standard of proof. The authorities suggest other words to help define the standard such as strong, clear, cogent, and convincing evidence.

[27] The YMC can dismiss a complaint immediately based on the evidence presented to it, or if that evidence is not sufficient, they may appoint an investigator to gather further evidence. That is what the YMC did here. After receiving that evidence from the investigator, they decided that there was not sufficient evidence to warrant an inquiry. The discretion to make that decision is provided by statute. It is helpful to note what evidence was before the YMC. In preparing his report, Dr. Henderson:

a) met twice with Mr. King, the second time to review all of the documents that Mr. King set out in his "fresh evidence" application;

b) reviewed the WCB file;

c) interviewed the WCB case worker, Mr Rees;

d) spoke with an independent neurologist;

e) interviewed Dr. Reddoch, the WCB medical consultant;

f) reviewed Dr. Wilson's notes and spoke to Dr. Wilson;

g) spoke to and received notes from Dr. Snyder, the neuropsychologist.

[28] Mr. King raises two major concerns. The first one is that it seemed no one believed he had a brain injury until the MRI was done in 2001. As indicated earlier, the evidence does not support that view. Although there were those who doubted the extent and cause of his neurological problems, others accepted that Mr. King suffered from a brain injury. Dr. Wilson diagnosed a brain injury in 1992 and treated Mr. King accordingly. Dr. Snyder confirmed that diagnosis in 1994.

[29] The second issue raised by Mr. King is that if the MRI had been done in 1994, as suggested by Dr. Snyder, it would have confirmed he had a brain injury and he would have received the proper treatment with the result that he would not have been as severely damaged as he is now. The evidence before the YMC was that all the MRI would do is confirm the diagnosis already made. As indicated by Dr. Anazarut, an independent neurologist, to Dr. Henderson, "the MRI gives an anatomical picture of where and what the damage is. Neuropsychological testing gives you the diagnosis and functional impairment."

[30] From all of that information, it is clear that Dr. Wilson diagnosed and treated Mr. King for a brain injury.

WAS THE PROCEDURE FOLLOWED BY THE YMC IN INVESTIGATING THE COMPLAINT CONTRARY TO THE MEDICAL PROFESSION ACT?

[31] The Appellant raises here again the issue about the appointment of Dr. Henderson and the extent of his powers under the **Act**. As indicated earlier, the YMC, on receipt of a complaint can dismiss it outright, appoint an investigator to gather further evidence, or order an inquiry. They chose to appoint an investigator to gather more evidence. On receipt of the report, the YMC can dismiss the complaint, reprimand the member, or direct an inquiry. They decided to dismiss the complaint.

[32] I find the procedure followed by the YMC in their investigation to be proper and in accord with their jurisdiction under the **Act**.

WAS THE APPELLANT OWED A DUTY OF PROCEDURAL FAIRNESS?

[33] Mr. King is of the view that he is entitled to active participation in the process of investigating his complaint. That would be true if there was an inquiry, although his role, even in an inquiry, would simply be as a witness. The process here is an investigation, not an inquiry.

[34] This is an administrative body. In order to properly function, it needs the flexibility to look at each case individually and make a decision as to how to deal with it. For that same reason, the YMC is provided by legislation with a number of options. As a specialized body, they have the expertise to review the evidence and decide which course of action is appropriate.

[35] The Respondent says that in order to determine if there is a duty of fairness, the factors set out by the Supreme Court of Canada in ***Baker*** v. ***Canada (Minister of Immigration)***, [1999] 2 S.C.R. 817 must be considered:

a) The nature of the decision being made.

b) The nature of the statute.

c) The impact of the decision on the individual.

d) The legitimate expectations of the person challenging the decision.

e) The choices of procedure made by the agency itself.

The nature of the decision being made

[36] This was a discretionary decision and therefore the need for procedural fairness would be significantly lower than would be necessary for a decision which was not discretionary.

The nature of the statute

[37] The Statute provides a right of appeal. This allows the Appellant further avenues in the event that he is not satisfied with the decision of the YMC. The duty of procedural fairness, therefore, in this case would be lower than would be the case if the Statute did not provide a right of appeal. The procedure followed by the YMC does not entitle the Appellant to be heard other than as a witness. This is the investigation of a complaint against a doctor. The complainant's role is to provide information to the tribunal supporting his complaint. The procedural fairness in this case goes to the doctor as it is his conduct under review. He is entitled to know the allegations against him and to respond. Any decision of the YMC certainly affects him, his practice, and his reputation.

[38] The Court in ***Friends*** **supra** clearly sets out the role of the complainant in the discipline process:

> The role assigned by the Act to the complainant in the disciplinary process is a relevant consideration. If the investigation of a complaint is not terminated by the Discipline Committee, the Discipline Committee must hold a hearing into the complaint. The investigated person is not given a right to "appeal" that decision to Council. A complainant must be given notice of the time and place of the disciplinary hearing and is entitled to receive notice of the nature of the decision of the Discipline Committee. The Act specifically gives the Association and the investigated person the right to appear and be represented by counsel at the hearing. No such status is given to the complainant. He is merely a witness.
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> ...
>
> The Act makes it clear that the disciplinary process is a matter between the Association and the individual member whose conduct has been questioned. The Act is directed solely to the Association and its members; the rights, duties and responsibilities contained in the Act relate only to them. Under the investigative process contained in Part 5, a complainant is not made a party either to the investigation or the disciplinary process itself. The only parties are the Association and the member whose conduct is under investigation. Council's decision to terminate the investigation of the Engineers could have no detrimental impact on either FOR or Opron. It did not affect their personal or economic rights or obligations. They have no more interest in the conduct of the Engineers than any other member of the public. There is no lis inter partes between FOR and Opron, on the one hand, and the Association or the Engineers, on the other. Judicial review is not available in these circumstances.

The Impact of the Decision on the Individual

[39] The Supreme Court of Canada in ***Knight*** v. ***Indian Head School Division No. 19*** (1990), 69 D.L.R. (4th) 489 indicates that there is a right to procedural fairness if the decision is a significant one and has an important impact on the individual. Cases often considered in this area relate to professional individuals who risk, by virtue of an administrative decision, the loss of their career and ability to earn a livelihood in their profession. In this case the duty of procedural fairness is most significant as it affects Dr. Wilson. He is the party most seriously affected by virtue of decisions of the YMC. Mr. King, on the other hand, has not suffered serious consequences as a result of the decision of the YMC to dismiss the complaint.

Legitimate Expectations of the Person Challenging the Decision

[40] Mr. King expected that he would be significantly involved in the process of the YMC in considering his complaint. While he may have had those expectations, the nature of the procedure and the discretion vested in the YMC does not make them legitimate expectations. Had the YMC not followed the procedure set out in legislation, it would be a different matter.

The Choices of Procedure made by the Agency Itself

[41] As indicated earlier, there is a great deal of discretion provided in the legislation to determine what happens to a complaint. The choices made by the YMC were choices given to it by the Statute and the procedure which they followed was in accordance with those procedures.

[42] There is always a duty of procedural fairness. The level of that duty varies in the circumstances. In the circumstances of this case, that duty of procedural fairness is quite low. Despite that, Mr. King met with Dr. Henderson on two occasions during his investigation and he was in possession of most of the documents reviewed by Dr. Henderson in his investigation.

[43] Mr. King alleges a number of errors in Dr. Henderson's report. He is concerned that he did not have an opportunity to refute and correct these errors prior to the decision of the YMC. I have reviewed the list of errors which Mr. King has recited. I do not propose to discuss them individually. The respondent has categorized the errors as inconsequential and irrelevant. I agree with their categorization of the errors in the context of these proceedings.

Are the Reasons for the YMC Communicating its Decision to Dismiss the Appellant's Complaint and Not Appoint an Inquiry Committee to Investigate the Complaint Inadequate

[44] Mr. King alleges that it is impossible to prepare an appropriate Notice of Intention to Appeal, within the legislated time period, when you don't know the basis for the decision of the tribunal. He has a point, particularly where after the investigation, the complaint is dismissed with no or little explanation to why that decision was made. Mr. King is concerned that without reasons he is unable to know what he must answer by way of his appeal.

[45] In this case the YMC did provide Mr. King with a written decision along with a copy of the investigation report and supplementary report of Dr. Henderson upon which they made their decision. The Supreme Court of Canada in ***Baker* supra**, confirmed that administrative tribunals in circumstances where there is a statutory right of appeal or the decision is significant for the individual, will be required to provide a written explanation for their decision. They went on to conclude, however, in ***Baker*** that provision of the notes of the investigating officer which were used by the senior officer who made the decision to deport the appellant were sufficient to meet the requirement of reasons for the decision. Mr. King is in a similar position here. Having received the investigator's reports he was able to craft grounds of appeal. Although this meets the test of reasons set out in **Baker** it is clearly more difficult to prepare grounds of appeal than it would be if the appellant was responding to a written explanation.

DECISION

[46] The appellant has not made out any of his grounds of appeal and, as such, the appeal is dismissed. There shall be no award of costs to either party.

[47] As an observation, Mr. King's matters have a long and sordid history. He is extremely frustrated at having to fight continually for benefits from WCB. His position is that the WCB refused to accept the fact that he was suffering from a brain injury from a serious accident at work. His concern is supported by documentation on the WCB file. Mr. King was diagnosed and treated for a brain injury by Dr. Wilson right after the accident. He was then sent to Edmonton to meet with Dr. Snyder who confirmed the diagnosis and recommended treatment. Dr. Snyder's report was then sent to a further independent doctor who was unable to either confirm or deny the diagnosis of both Dr. Wilson and Dr. Snyder. His report was therefore of no assistance. This was in about 1994. From my review of all of the materials filed herein, it appears that it was not until approximately 1999 when Mr. Rees took control of this file that matters finally started being dealt with. I make these comments as a recognition of Mr. King's frustration with the refusal of the WCB to acknowledge that he suffered a serious brain injury at work in 1992. His frustration pervades these proceedings and confuses, in his mind, the roles of the WCB and the YMC.

Heard on the 22nd day of September, 2003
Dated at Calgary, Alberta this 19th day of December, 2003

C.L. Kenny

Appearances:

Robert King
Not Represented by Counsel

David Martin
for the Respondent