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IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20120509
Docket: S108151
Registry: Vancouver

Between:

Adrianna Lee Browne, Debra Lee Browne and Insurance Corporation of British Columbia

Petitioners

And

Workers' Compensation Appeal Tribunal, David William Aldridge, Paul Anhorn, Stanley Lorne Bernacki, John Junior Charlie, Mario Douglas Ficarini, William John Grierson, Christine Leicester, Robin Jesse Moore, Adam Nicholas Moss, Michael Price, Ernest Joseph Proulx, Burke Schulz, Michael Tataryn, Bradley Allan Wood, Guildawood Holdings Inc., Sunshine Eggs Inc. and Zaitamyn Poultry Inc.

Respondents

Before: The Honourable Mr. Justice Leask

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:	R. C. Brun, Q.C.
Counsel for the Respondent, WCAT:	J. T. Lovell
Counsel for the Respondents, Guildawood et al:	D. Letkemann
Counsel for the Respondents, Aldridge et al:	V. A. Ishkanian
Place and Date of Trial/Hearing:	Vancouver, B.C. May 9, 2012
Place and Date of Judgment:	Vancouver B.C. May 9, 2012

INTRODUCTION

[1] THE COURT: This is a petition to the Court in which the petitioners, Adrianna Browne, Debra Browne, and the Insurance Corporation of British Columbia, seek judicial review of 14 decisions of the Workers' Compensation Appeal Tribunal. All 14 decisions relate to the same events.

[2] The decisions are determinations made under s. 257 of the *Workers Compensation Act*, which authorizes WCAT upon request by the Court or a party to certain civil actions to determine any matter that is relevant to the action and within the jurisdiction of the Workers' Compensation Board under the *Act* and to certify that determination to the Court.

[3] ICBC requested WCAT to make determinations under s. 257 in respect of 19 civil actions including the 14 which are now the subject of this petition. In a single set of reasons dated October 13, 2010, WCAT made determinations in respect of all actions.

[4] There are 14 plaintiffs, each of whom sues Adrianna Lee Browne and Debra Lee Browne for damages arising from a single vehicle motor vehicle accident on November 17, 2006. Adrianna Browne was driving a pickup truck owned by her mother, Debra Browne, in which the plaintiffs were passengers. The plaintiffs' injuries are said to have been caused when the truck went off the road at Knutsford, British Columbia, and rolled down an embankment.

[5] In each action in which they are named as defendants, the Browne's have named Guildawood Holdings Inc., Sunshine Eggs Inc., and Zaitamyn Poultry Inc. as third parties. The Browne's say that Adrianna Browne and the plaintiffs were working for the third parties at a poultry farm owned or operated by the third parties on November 17, 2006. After the work was finished, Adrianna Browne started to drive herself and the plaintiffs back to Kamloops from the farm in Knutsford.

[6] WCAT determined that at the time the cause of action arose:

each of the plaintiffs was a worker within the meaning of Part 1 of the *Workers Compensation Act*;

the injuries suffered by each of the plaintiffs arose out of and in the course of his or her employment within the scope of Part 1 of that *Act*;

each of the third parties was an employer engaged in an industry within the meaning of Part 1 of the *Act*;

Adrianna Browne was a worker within the meaning of Part 1 of the *Act*;

any action or conduct of Adrianna Browne, which caused the alleged breach of duty of care, did not arise out of and in the course of her employment within the scope of Part 1 of the *Act*;

Debra Browne was a worker within the meaning of Part 1 of the *Act* in relation to her employment as a bank manager;

Debra Browne was not a worker within the meaning of Part 1 of the *Act* in relation to the events which occurred on November 16 and 17, 2006, involving her provision of consent or authorization to Adrianna Browne. She used Debra Browne's vehicle to transport workers to and from the farm; and

any action or conduct of Debra Browne, which caused the alleged breach of duty of care, did not arise out of and in the course of her employment within the scope of Part 1 of the *Act*.

[7] The issues presented to the Court for determination in this matter are:

was the decision of WCAT that concluded that Adrianna Lee Browne's alleged breach of duty of care did not arise out of and in the course of her employment a patently unreasonable decision; and

was the WCAT determination that Debra Lee Browne was not acting in the course of her employment a breach of national justice.

FACTS

[8] On November 17, 2006, Adrianna Lee Browne was driving a truck loaded with 14 passengers who had been hired to work one or two days to perform a chicken cull. Her grandfather, Fred Goossen, was employed by Sunshine Eggs Inc. as the general manager of a chicken farm. The 14 workers were picked up from a shelter, the New Life Mission in Kamloops, BC, and were provided with transportation to the farm in Knutsford, BC.

[9] They were returning to the shelter after working three hours from approximately 8:00 P.M. until 11:00 P.M. The vehicle driven by Ms. Browne went off the road and rolled down an embankment allegedly resulting in injuries to the

plaintiffs. The registered owner of the truck was the driver's mother, Debra Lee Browne.

[10] A convenient summary of the background facts is set out in the September 19, 2007 inspection report issued to Sunshine Eggs Inc. by the Board:

> Incident: On November 17, 2006, at approximately 11:20 P.M., a vehicle carrying 15 workers, including the driver, left the road at 3042 Long Lake Road, Knutsford, BC, and rolled down an embankment causing multiple injuries to the occupants.
>
> Factual information – Employer: The employer is Sunshine Eggs Inc. who operates an egg farming plant in Knutsford, BC. Once a year when the egg laying hens are exhausted, the old stock is culled and replaced with new stock. This task is normally completed over two days by a temporary workforce.
>
> Sequence of events: On November 17, 2006, at approximately 7:00 P.M., the general manager, Fred Goossen, and a young driver, his granddaughter, Ms. Browne, drove two vehicles and picked up approximately 30 workers and transported them to the egg farm. The general manager made three trips using a Ford Windstar van, and the young driver made one trip using a Ford Club Cab pickup truck with a canopy on the back. Six workers including the young driver were in the cab of the truck, and approximately nine workers were carried in the bed of the truck under the canopy. There was some loose equipment in the truck bed under the canopy including a trailer hitch and a battery charger. From 8:00 P.M. until 11:00 P.M., workers caught and culled chickens at the farm. Some of the workers were paid $30 each for the three hours worked, and the others that were expected to work a day shift on November 18, 2006, were told they would be paid the next day. At approximately 11:10 P.M. the driver left the egg farm with 14 other workers. Six workers, including the young driver, were in the cab of the truck, and nine workers were carried in the truck bed under the canopy.

[11] The WCAT panel considered that that summary from the report was consistent with the direct evidence that was provided to the panel.

LAW

[12] All parties before the court were in agreement that the standard of review applicable on this petition was the patently unreasonable standard.

[13] The *Administrative Tribunals Act*, SBC 2004, Chapter 45, s. 58(2) says this:

> In a judicial review proceeding relating to expert tribunals under s-s. (1) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable.

[14] An exercise of discretion is patently unreasonable if it does not meet the following criteria described in s. 58(3) of the *Administrative Tribunals Act.*

> For the purposes of s-s. (2)(a), a discretionary decision is patently unreasonable if the discretion
>
> (a) is exercised arbitrarily or in bad faith,
>
> (b) is exercised for an improper purpose,
>
> (c) is based entirely or predominantly on irrelevant factors, or
>
> (d) fails to take statutory requirements into account.

[15] Section 245.1 of the *Workers Compensation Act* provides that s. 58 of the *Administrative Tribunals Act* applies to WCAT.

[16] The standard of review of patently unreasonable existed in the common law before *Dunsmuir v. New Brunswick,* 2008 SCC 9, [2008] 1 SCR 190. "Patently unreasonable" was explained in slightly different terms by the Supreme Court of Canada in different decisions.

First, of a patently unreasonable decision:

"Its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review." *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 SCR 227 (at 237).

Second:

A finding based on no evidence is patently unreasonable, but "a court should not intervene where the evidence is simply insufficient." *Toronto Board of Education v. Ontario Secondary School Teachers' Federation, District 15,* [1997] 1 SCR 487 (at para. 44).

Third:

A "mere error of law is to be distinguished from one resulting from a patently unreasonable interpretation of a provision" and this "kind of error amounts to a fraud on the law or a deliberate refusal to comply with it." *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Labour Relations Board)*, [1984] 2 SCR 412 (at 420).

Fourth:

"If the decision the board reached acting within its jurisdiction is not clearly irrational, that is to say evidently not in accordance with reason, then it cannot be said that there was a loss of jurisdiction." *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 SCR 941 (at 963).

And fifth:

A "patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective" and a "decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand." *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 SCR 247 (at para. 52).

Sixth:

A "definition of patently unreasonable is difficult but it may be said that the result must border on the absurd." *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, 2004 SCC 23, [2004] 1 SCR 609.

Another Supreme Court of Canada decision that deals with the question of defining patent unreasonability is *Canada (Director of Investigation and Research), v. Southam Inc.*, [1997] 1 SCR 748, where Mr. Justice Iacobucci for the Court said (para.57):

> The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect then the decision is unreasonable but not patently unreasonable.

[17] I now want to refer to some BC decisions. In *Franzke v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2011 BCSC 1145, Madam Justice Ross held (at para 76):

> The privative clause specifically covers s. 257 certifications. Therefore, the appropriate standard of review for WCAT's findings of fact and law in respect of s. 257 certifications is patent unreasonableness.

[18] And she quoted a number of other BC decisions to support that proposition.

[19] In *Jozipovic v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2011 BCSC 329, Madam Justice Bruce concluded (at para. 49):

> A high degree of deference is required when the court is reviewing WCAT decisions that involve issues of fact or mixed fact and law within the tribunal's exclusive jurisdiction. However, as Holmes J. says in *Viking* "patently unreasonable is at the upper end of the reasonable spectrum but still must be defensible in respect of the facts and law.

[20] The application of the patent unreasonableness test was addressed by Madam Justice Holmes in *Viking Logistics Ltd. v. British Columbia (Workers' Compensation Board)*, 2010 BCSC 1340 (at para. 58 et seq.):

> In my view, the *Dunsmuir* description of the common law's broad reasonableness standards bears on the manner in which the court will interpret and apply the statutory patently unreasonableness standard.
>
> From this perspective, "patently unreasonable" in s. 58(2)(a) of the *Administrative Tribunals Act* stands at the far end of a spectrum of "reasonableness" requiring the greatest deference to the decision under review.

> The "patently unreasonable" standard in s. 58(2)(a) requires the tribunal's decision have rational support. The decision must also, since *Dunsmuir*, fall within a range of outcomes defensible in respect of the facts and the law. To assess whether the decision is defensible in respect to the facts and the law will require some inquiry into the decision-making process, but the extent of that inquiry will turn on the degree of deference to be afforded in the particular circumstances. This is in part because deference amounts to respecting an outcome without second-guessing the reasoning that reached it. In a sense, this was always the approach to the "patently unreasonable" standard, which deferred from the "reasonableness" standard largely in degree and by demanding less of the tribunal's reasons.
>
> In the inquiry in this case, the WCAT's decision should enjoy the high degree of deference that the legislator clearly intended.
>
> In sum, "patently unreasonable" in s. 58(2)(a) of the *Administrative Tribunals Act*, is not to be simply replaced by "reasonable," because such a substitution would disregard the legislator's clear intent that the decision under review receive great deference. Standing at the upper end of the "reasonableness" spectrum, the "patently unreasonable" standard in s. 58(2)(a) nonetheless requires that the decision under review be defensible in respect of the facts and the law. It is in the inquiry into whether the decision is so "defensible" that the decision will enjoy the high degree of deference the legislator intended.

[21] In *Jensen v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2010 BCSC 266, the Court held (at para. 80):

> In summary, a patently unreasonable decision is one that does not accord with reason or is clearly irrational. It is not for the court on judicial review to re-weigh the evidence; second guess the conclusions drawn from the evidence considered; substitute different findings of fact or inferences drawn from those facts; or conclude that the evidence is insufficient to support the result. Only if there is no evidence to support the findings, or the decision is "openly, clearly, evidently unreasonable," can it be said to be patently unreasonable.

POSITIONS OF THE PARTIES

A. The Petitioners

[22] The petitioners say that the determination under review was reached on a misunderstanding of the evidence, or in the alternative, the decision is openly clearly and evidently unreasonable. The petitioners also say that the evidence and the law, if viewed reasonably, are incapable of supporting WCAT's findings. The determinations that Adrianna Browne was not acting in the course of her employment do not accord with reason and are irrational.

[23] In the petitioners' submission, based in part on policy # 18.20, once the vehicle driven by Adrianna Browne is deemed a crew bus by the WCAT, it is deemed an extension of the employer's premises. Therefore, Adrianna Browne was on the employer's premises when the accident occurred. She was doing the employer's bidding at the time. She was being paid for a service on the same basis as the plaintiffs in that they were paid to do the chicken cull but were not paid while travelling.

[24] The petitioners' submit, based on the *Jensen* case, that it does not accord with reason or is clearly irrational and, therefore, patently unreasonable that the WCAT should determine that the vehicle in which the plaintiffs were riding was a crew bus, and that all of the passengers of the crew bus were in the course of their employment at the time of the incident, with the clear exception of Adrianna Browne, the driver of the crew bus. The employer here asked Ms. Browne, a worker, to perform an essential aspect of the work process. The petitioners submit Adrianna Browne was the employer's agent when the accident occurred.

B. The Employer

[25] In their written material, the employer said they took no position on the main issue of the petition. But as I understood the oral submissions, they supported the petitioners' point of view before me.

C. The Respondent Worker

[26] The respondent workers took this position: The finding of fact that Adrianna Browne voluntarily transported the workers is based on the evidence that was before WCAT and that was thoroughly argued by the parties. It was within WCAT's exclusive jurisdiction to determine this fact and since there is evidence to support it, it cannot be patently unreasonable.

D. The Tribunal

[27] Tribunal counsel was prepared to argue that the panel's decision was not patently unreasonable, but in light of the Court of Appeal decision in *Henthorne v.*

British Columbia Ferry Services Inc., 2011 BCCA 476, the Court declined to hear that argument in the circumstances of this case.

ANALYSIS

[28] I am satisfied that in this case, the key is the proper interpretation of policy #21.00 of WCAT:

> There is a dilemma that is always inherent in workers' compensation. The difficulty of course, is that the activities of workers are not neatly divisible into two clear categories: their employment functions and their personal lives. There's a broad area of intersection and overlap between work and personal affairs and somewhere in that broad area, the perimeter of workers' compensation must be met. In the marginal cases, it is impossible to do better than weigh the employment features of the situation in balance with the personal features and reach a conclusion which can never be devoid of intuitive judgment about which should be treated as predominant.

[29] It was the petitioners' forceful submission that the panel erred by not considering and examining the examples recited in policy # 21.00, and that a failure to consider those examples was a patently unreasonable error by the panel.

[30] The actual reasoning of the panel about this topic appears at paras. 66 and 67 of the reasons for decision :

> On balance, I consider that the personal features were predominant in relation to Annie's actions in driving the plaintiffs. The plaintiff was not being paid for this activity, and Annie, Debra, and Goossen viewed this activity as one which was being done as a favour with reference to the family business. I am not bound by that characterization. However, I consider that the weight of the evidence points to Annie having performed this activity as a favour to a relative (incidental to the family relationship), rather than as an activity which was incidental to her employment at the farm on the evening of November 17, 2006.
>
> I appreciate that there is a seeming contradiction between my conclusion that the plaintiffs were being transported in an employer's crew bus (as an unpaid part of their employment), and my conclusion that Annie's unpaid actions in driving the crew bus were not part of her employment. I do not consider, however, that the status of Annie and the plaintiffs must necessarily be the same. The fact that Goossen arranged for the services of a volunteer to provide the transportation does not detract from the fact that this transportation was arranged for the plaintiffs. Significantly, the plaintiffs were only motivated by employment considerations in riding to the farm in the truck, whereas, Annie was predominantly motivated by family considerations in terms of driving the truck to provide transportation to the other workers. If

> Annie had declined to provide transportation to the workers, due to the restrictions on her licence, I consider it likely that Goossen would simply have made alternative arrangements (such as by asking another relative or friend for a favour, or by hiring someone) and it would have remained open to Annie to drive to the farm without any passengers for the purpose of performing three hours of paid work.

[31] I am satisfied that there is a basis in the evidence for the panel's decision on this issue. For this reason, I am unable to conclude that the panel's decision was patently unreasonable. In reaching this conclusion, I am mindful that this decision has been made by an expert tribunal dealing with an issue that squarely falls within its expertise. Such a decision calls for the highest degree of deference from the Court. In according the panel that degree of deference I have declined to reweigh the evidence or to allow myself to consider what conclusion I would have reached if confronted with this issue without the benefit of the panel's reasoning and conclusions.

[32] As to the natural justice issue: In the light of the conclusion I have come to on the principal issue raised by the petition, it does not seem necessary to consider the natural justice issue raised by the petitioners. As I am not varying the outcome of the WCAT hearing, my views on the natural justice argument would serve no useful purpose for the parties.

Peter Leask, J.

Leask J.