Noteworthy Decision Summary

Decision: A1606855 **Panel:** Warren Hoole **Decision Date:** February 6, 2017

Item #8.3 of the Manual of Rules of Practice and Procedure – Application for a stay of Board decision – Serious harm.

This decision is noteworthy in its analysis of the criteria to be considered in an application for a stay of a decision of the Workers' Compensation Board, operating as WorkSafeBC (Board), and in particular for its analysis of what constitutes serious harm within the meaning of the rule in item #8.3 of the *Manual of Rules of Practice and Procedure* (MRPP).

The Board determined that the employer had engaged in discriminatory action against two workers (a married couple), contrary to section 151 of the *Workers Compensation Act* (Act). In two remedy decisions, the Board ordered the employer to pay worker A approximately $32,000, and worker B approximately $27,000. The employer appealed both decisions to WCAT, and requested a stay of the remedy portion of the Board's decisions.

Following the decision in *WCAT-2007-00272*, the panel found the criteria set out in item #8.3 of the MRPP are similar to those set out in *RJR-Macdonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, (1994) 111 D.L.R. (4th) 385, which are:

1. Whether the appeal, on its face, appears to have merit;
2. Whether the applicant would like suffer serious harm if the stay were not granted;
3. Which party would likely suffer greater harm or prejudice from granting or denying a stay; and
4. In the context of occupational health and safety, whether granting a stay would likely endanger worker safety.

The panel also adopted the reasoning in *WCAT 2011-00198* and *WCAT-2015-01599*, concluding that WCAT's authority to order a stay includes the authority to order a partial stay.

The panel found the appeal, on its face, appeared to have merit insofar as the employer had provided sufficient grounds in its notice of appeal that, it believed, raised an arguable case that the Board erred in finding the employer liable for discriminatory action.

The panel stated that whether or not the employer could "afford" to the pay the remedy was of little relevance to whether it would suffer irreparable harm for the purposes of the stay analysis. It is not the magnitude of the harm potentially suffered but the nature of the harm that must be irreparable. Irreparable harm is harm that either cannot be quantified in monetary terms or which cannot be cured, usually because the party suffering the harm cannot recover from the other party. Noting that the workers had limited assets and a number of debts that required immediate payment, the panel concluded that the employer would likely have great difficulty in recovering the payment if its appeal succeeded.

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The panel acknowledged that the workers would also suffer harm if the stay was granted, and concluded that a partial stay would achieve an appropriate balance. The panel ordered the employer to immediately pay a specified portion of each remedy, and that the balance of the remedies would be stayed pending the outcome of the appeals.

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DECISION OF THE WORKERS' COMPENSATION APPEAL TRIBUNAL

Introduction

[1] In March 2016, the Workers' Compensation Board (Board)[1] determined that the employer had engaged in discriminatory action against two workers (a married couple), contrary to section 151 of the *Workers Compensation Act* (Act).

[2] By way of two remedy decisions, both dated August 30, 2016, the Board ordered that the employer, amongst other things, pay the wife approximately $32,000 and the husband approximately $27,500.

[3] The employer has appealed the Board's decisions to the Workers' Compensation Appeal Tribunal (WCAT). As a preliminary matter, the employer now requests a stay of the remedy portion of the Board's decisions.

[4] Item #8.3.1 of the WCAT's *Manual of Rules of Practice and Procedure* (MRPP) indicates that: "[a]n application for a stay will generally be dealt with as a preliminary matter on the basis of written submissions."

[5] None of the parties indicated that an oral hearing was necessary to resolve the employer's applications. I am therefore satisfied that the matter may be fairly decided in light of the evidence already on file and the written submissions of the employer and the workers.

Issue(s)

[6] Should the employer be granted a stay of the Board's August 30, 2016 remedy decisions?

Jurisdiction

[7] Section 244 of the Act provides the WCAT with the discretion to issue a stay.

WCAT Practice and Procedure

[8] Item #8.3 of the MRPP sets out the following rule in relation to stay applications:

> **RULE: A stay is an extraordinary remedy. WCAT will not process a stay application unless the applicant has completed a notice of appeal within the time limit to appeal which meets the requirements of s. 242(2) (item 5). When determining whether to issue a stay, panels will consider:**
> **(a) whether the appeal, on its face, appears to have merit;**

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> **(b) whether the applicant would likely suffer serious harm if the stay were not granted (for example, loss of a business);**
> **(c) which party would likely suffer greater harm or prejudice from granting or denying a stay; and**
> **(d) in the context of occupational health and safety, whether granting a stay would likely endanger worker safety.**
> This list is not exhaustive, and other factors may be taken into account.
>
> [bold in original to indicate rule]

[9] In *WCAT-2007-00272*, dated January 25, 2007, a WCAT panel provided the following helpful summary of the nature and purpose of the criteria contained in an earlier, but materially unchanged, version of the MRPP as it related to stay applications:

> The four tests in…the MRPP are similar to those set out in the Supreme Court of Canada decision *RJR-Macdonald Inc. v. Canada (Attorney-General),* [1994] 1 S.C.R. 311, (1994) 111 D.L.R. (4th) 385. The Court emphasized the principle that a stay of proceedings is an extraordinary remedy.

[10] I also note another panel's finding in *WCAT-2011-00198*, dated January 25, 2011, and *WCAT 2015-01599*, dated May 22, 2015, to the effect that the WCAT's authority to order a stay includes the authority to order a partial stay. I agree with the reasoning in those decisions and adopt it as my own.

Reasons and Findings

[11] I find that the employer is entitled to a partial stay of the remedy portion of the Board's August 30 2016 decisions for the reasons set out below.

Apparent Merit

[12] I agree that the employer's appeal raises a serious question to be tried, or, in the words of the MRPP, the appeal appears on its face to have merit, assuming the facts alleged are true. As stated at paragraph 49 of *RJR-Macdonald*, *supra*, the threshold for satisfying this criterion is a low one.

[13] In essence, the question is whether the appeal is not merely "frivolous" or "vexatious." The requirement for merit is not the same as requiring a likelihood of success and instead only requires an "arguable case," which I consider is present here.

[14] The employer has provided sufficient grounds in its notice of appeal that, if believed, raises at least an arguable case that the Board erred in finding the employer liable for discriminatory action. If the employer is successful in this regard, the remedy portion of the Board's decision would obviously be vacated.

[15] I emphasize that I make no finding as to the truth, or otherwise, of the employer's allegations that the workers engaged in theft and other improper activity and that such activity was the sole reason for their termination. However, I accept that, if proven on appeal, the employer's

argument has a reasonable prospect of permitting the employer to succeed in its appeal. The employer therefore provides an arguable case. I understand that the workers strongly disagree with the employer's position and raise their own allegations of misconduct against the employer; however, that does not persuade me that the employer's appeal is frivolous or vexatious. Rather, the overall nature of the submissions before me demonstrates a real question to be tried regarding the credibility and actions of all parties.

[16] This factor therefore weighs in favour of the employer's stay request.

Irreparable Harm

[17] The employer says that it will suffer irreparable harm because of the risk of a "dry judgment" in the event it succeeds in its appeal. In other words, the employer may find it is unable to recover funds paid to the workers because the workers lack sufficient, or any, exigible assets.

[18] The employer advises me that it secured a Residential Tenancy Branch order against the workers in the sum of $3,230 and that the workers have been unwilling or unable to pay the employer that amount. The employer says this demonstrates the workers' likely inability to repay the much larger amounts at issue in the current appeals. It follows, according to the employer, that it will suffer irreparable harm because it will not likely be able, as a practical matter, to recover the remedy monies in the event the employer wins its appeals.

[19] For their part, the workers say they attempted to repay the Residential Tenancy Branch order by way of $50 monthly instalments; however, the employer refused to accept that arrangement. The workers therefore dispute the employer's concerns about their financial ability to repay the remedy awards. In any event, the workers say that the employer, or its principal, is wealthy and will not be unduly prejudiced by payment forthwith of the remedy awards in question.

[20] I do not find the workers' submission particularly persuasive. Whether or not the employer can "afford" to pay the remedy is of little relevance to whether it will suffer "irreparable harm" for the purposes of the stay analysis. Indeed, as pointed out in *Western Forest Products Inc. v. Capital (Regional District)*, 2009 BCCA 80, it is not the magnitude of the harm suffered or potentially suffered, rather it is the nature of the harm that must be irreparable. In this regard, the court held, at paragraph 24:

> **24** Turning to irreparable harm, "'irreparable' refers to the nature of the harm suffered rather than its magnitude. It is harm that either cannot be quantified in monetary terms or which **cannot be cured, usually because one party cannot collect damages from the other**": *RJR - MacDonald Inc.* at 341.
>
> [my emphasis]

[21] Here, the workers submissions effectively concede that they have limited assets and a number of debts owing that require immediate repayment. I infer from this that the workers may well spend a significant portion of the remedy award if I deny the employer's stay applications. I similarly infer that the workers have limited resources that will make repayment challenging or even impossible.

[22] Further, I agree with the employer that the workers compensation system offers greater advantages to workers than to employers in recovering debts due from the other. Most notably, the Board will levy increasingly severe administrative penalties on an employer who does not comply with an order to pay a damages remedy to a worker. The reverse does not apply; consequently, there is little likelihood that the employer will be able to shirk its duty to pay the workers in the event its appeals fail.

[23] However, I must also take into account that the workers have won a judgment and that they are suffering harm due to the loss of their employment. They have been suffering from the consequences of this loss for many months already. It appears to me that the complex issues raised in the appeals will require an oral hearing to resolve, likely involving several witnesses and taking some time. It therefore seems to me that the appeals will not be resolved in the near term. This in turn means that, if I allow the employer's stay applications, the workers will continue to suffer financial hardship for a further lengthy period of time, despite having "won" at the Board level of decision-making. The mere addition of a small amount of interest at the WCAT level will do little to ameliorate this unfairness.

[24] Overall, I find that both parties may suffer harm; however, I consider that the employer's exposure is slightly greater as I consider there to be a significant risk of total non-recovery of the remedy awards in the event the employer's appeals succeed.

Balance of Convenience

[25] The employer essentially reiterates its earlier submissions that it will likely not recover the remedy and that the appeals will proceed in a timely manner such that the worker will receive their remedies without delay in the event the appeals are unsuccessful. The employer therefore suggests that the balance of convenience is in its favour.

[26] As already noted above, I disagree that the appeal will be concluded shortly and I note that the original liability decision was issued by the Board almost a year ago. The workers have been separated from their employment and its associated remuneration for a lengthy period and will likely remain so for a significant period. I therefore do not see the balance of convenience factor as favouring either the employer or the workers – both will be inconvenienced equally.

Worker Safety

[27] This factor does not appear to be implicated here. The Board remedy orders, whether complied with our not, do not affect the employer's workplace or other workers as I see no persuasive evidence that the contravention in question is of an ongoing nature. I therefore do not consider this factor to be relevant and it does not weigh against the employer's stay request.

Other Relevant Circumstances

[28] I see no other circumstances relevant to the stay request.

[29] Weighing all of the above, I conclude that, notwithstanding the "extraordinary nature" of a stay, the most reasonably outcome is to find the employer entitled to a partial stay of the remedy order set out in the Board's August 30, 2016 decisions.

[30] A partial stay reflects a fair balancing of the factors described above. I therefore find that the employer need pay only about half of the remedy order to the wife and husband. I consider that the Residential Tenancy Branch order should be deducted from that half, as well as a rough approximation of statutory deductions. For the wife, I summarily set at $12,000 the amount that the employer must pay immediately. The remaining portion of the August 30, 2016 remedy order in favour of the wife need not be paid pending resolution of the employer's appeal.

[31] For the husband, I summarily set at $10,500 the amount that the employer must pay immediately. The remaining portion of the August 30, 2016 remedy order in favour of the husband need not be paid pending resolution of the employer's appeal.

[32] As a result, I allow in part the employer's application for a stay.

Conclusion

[33] I allow in part the employer's applications for a stay of the Board's August 30, 2016 remedy orders. I order that the employer shall immediately pay the wife $12,000 and the husband $10,500. I further order that the remainder of the Board's August 30, 2016 remedy orders be stayed pending the outcome of the employer's appeals. If the employer fails to comply with my orders to pay, its appeals may be subject to summary dismissal pursuant to subsection 246(5) of the Act.

[34] The appeals will be returned to the WCAT Registry for further handling. In the event that the parties wish to consider mediation and settlement of this dispute, I advise them that the WCAT provides free mediation services on request.

Warren Hoole
Vice Chair

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