

In the Court of Appeal for the Northwest Territories

Citation: Workers' Safety and Compensation Commission v Lewis, 2017 NWTCA 7

Date: 20170711
Docket: A-I-AP-2016-000013
Registry: Yellowknife

Between:

Workers' Safety and Compensation Commission

Appellant
(Respondent)

- and -

Wayne Lewis

Respondent
(Applicant)

The Court:

**The Honourable Mr. Justice Jack Watson
The Honourable Mr. Justice Frans Slatter
The Honourable Madam Justice Shannon Smallwood**

Memorandum of Judgment

Appeal from the Decision by
The Honourable Madam Justice K.M. Shaner
Dated on the 14th day of July, 2016
Filed on the 14th day of July, 2016
(2016 NWTSC 46, Docket: S-1-CV-2015 000112)

Memorandum of Judgment

The Court:

[1] The respondent Lewis was injured at work, and was entitled to a monthly pension payable by the appellant Commission. The underlying issue on this appeal is the amount the respondent would be entitled to if his monthly pension were converted into a lump sum payment. On an application for judicial review, the chambers judge set aside the Commission's calculation of the lump sum, and directed a new hearing: *Lewis v Procon Miners Ltd.*, 2016 NWTSC 46.

[2] The respondent had previously received a lump sum payment to retire his mortgage, and the Commission calculated the lump sum value of his residual pension as \$49,657.82. The Commission advised the respondent that the lump sum was arrived at by a formula utilizing two factors: a discount rate and actuarially determined life expectancy. The same actuarial assumptions were used to calculate the mortgage payout and the residual value of his pension. The respondent, who was self-represented at the time, calculated the lump sum value of his residual pension as \$262,453.19. He appealed the calculation to the Workers' Compensation Appeals Tribunal.

[3] During the proceedings, further explanations were provided of how the calculation was made. The Commission advised the Tribunal that it used the *1995-1997 Statistics Canada General Life Mortality Table*, and provided as a further explanation:

The mortality rates are used to determine the future life expectancy of individuals in receipt of a pension award. The population of claimants for the WSCC is much too small to allow for the development of a mortality table based on the Commission's experience. From our experience in carrying out valuations of workers compensation benefits, we have found that general population mortality tables provide a fair representation of the life expectancy for injured workers in aggregate. The actual age and gender for all pension recipients is used in the year-end valuation.

Since 2006, we have tracked the variance between expected mortality and actual deaths of pensioners. Up to the end of 2012, the expected mortality has tracked very close to actual mortality experience. Until there is sufficient evidence that the mortality experience of the NWT and Nunavut has shifted and the use of the 1995-97 table is no longer appropriate, we will continue to use the current mortality rates in the valuation. (emphasis added)

These mortality statistics were combined with the discount rate of 3.5% to arrive at the lump sum value of any pension.

[4] The Tribunal discussed the different approaches in its Decision 13-006:

The Cap factor used by the Commission includes future inflationary adjustments and the expected remaining average lifetime, age and gender of an injured worker. The Appellant [Lewis] provided Statistics Canada data from 2007/2009 showing life expectancy by jurisdiction. Nationally, the Territories have the lowest life expectancy for 65-year-old males. The life expectancy as calculated by the Commission is lower than the projections provided by the Appellant. The Commission's explanation for this is noted in its answer to question 3 above. The Commission sets mortality rates based upon actual mortality experience of individuals in receipt of a pension award. Based upon the Commission's answers, I conclude the continued use of the *1995-1997 Statistics Canada General Life Mortality Table* is because it most closely matches the Commission's actual experience.

It is reasonable for the Commission to use the most accurate source of information. This is important not only for fairness to injured workers, but also as responsible management of the Workers' Protection Fund. It stands to reason information based upon actual experience of the Commission would be more accurate than national or territorial averages.

While this approach disadvantages the Appellant, his pension benefits are based upon the Commission's actual experience and not his place of residence. While there are significant differences in life expectancy between the various provinces and territories, all pensions awarded by the Commission share a common statistical source.

I find the Commission's method of calculating pension conversion rates and its Policy 06.03 are applicable and reasonable to this case. I accept the Commission's calculations as to the remaining amount of the Appellant's pension.

While the Tribunal held that it had jurisdiction to consider the basis upon which the Commission calculated the lump sum value of the residual pension, it found no error.

[5] At this point the respondent Lewis retained counsel to assist him, and also retained an actuary, Mr. Stephen Cheng. When he used the same assumptions as the Commission, Mr. Cheng calculated the residual value of the pension as \$49,576.11, which was \$81.71 less than the Commission's calculations. However, he prepared a report disagreeing with the methodology used by the Commission, and opined that the more appropriate residual lump sum calculation was \$73,038.18. This calculation was based on mortality assumptions and discount rates used by other organizations, such as the Canadian Institute of Actuaries, and the British Columbia personal injury regime.

[6] Specifically, Mr. Cheng was of the view that the discount rate used in British Columbia or by the Canadian Institute of Actuaries was more appropriate than the 3.5% rate used by the Commission. He also favoured later Canada Life Tables over the *1995-1997 Life Mortality Table*. With respect to the Commission's decision (*supra*, para. 3) to keep using those tables so long as they tracked the Commission's actual experience, he stated:

This is a very general statement and the terms used such as "very close" are all relative and not specifically quantified. I am not able to offer an opinion on the validity of their experience studies. One observation is that the WSCC mortality experience is classified by age and gender only and there was no breakdown based on the severity of the injury or disability. Since only experience for the whole group was used and there was no separate experience tracked for "minor" and "severe" disability, it is possible that the higher mortality rates for those with severe injury and disability might have resulted in an overstatement of the assumed mortality rates for those with minor injury and partial disability.

This observation, at best, implies that the general approach of the Commission is acceptable, although different analysts might apply the Commission's historical experience differently, for example by breaking down the sample by degree of disability.

[7] The respondent's counsel, armed with the Cheng report, applied to the Tribunal for a rehearing. The Tribunal rejected this request, holding that it was bound by the Governance Council's policies, and that this application was merely a request that the Tribunal reconsider a more detailed and supported version of the arguments previously made and rejected.

[8] The respondent applied for judicial review of the Tribunal's decision refusing a rehearing. The chambers judge set aside the Tribunal's decision for two reasons: an unreasonable reliance on the Commission's statistical assumptions and the failure to recognize that the Cheng report was important new evidence. The chambers judge ordered the Tribunal to rehear the respondent's application. This appeal followed.

Standard of Review

[9] The parties agree that the standard of review is reasonableness, and that the Tribunal's decision should not have been set aside if it was within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para. 47, [2008] 1 SCR 190. As the chambers judge noted at para. 38, calculating pensions is a complicated subject, and the decisions of pension administrators should not lightly be disturbed: *McMorran v Alberta Pension Services Corp.*, 2014 ABCA 387 at para. 10, 5 Alta LR (6th) 324, 588 AR 22; *Nolan v Kerry (Canada) Inc.*, 2009 SCC 39 at paras. 29-30, [2009] 2 SCR 678.

The Statutory Framework

[10] The *Workers' Compensation Act*, SNWT 2007, c. 21 creates a Governance Council which is empowered to adopt policies for the administration of the *Act*. The Commission has the broad discretion to administer the *Act*, and to determine the benefits payable to individual workers. A worker has a right to appeal a decision of the Commission to the internal Review Committee. A further appeal is then available under s. 126 to the Appeals Tribunal. The Tribunal is authorized by s. 129 of the *Act* to direct that the Commission “. . . supply the Appeals Tribunal with any documents in the possession of the Commission that relate to a matter under appeal”.

[11] The interaction between Governance Council policies and the mandate of the Appeals Tribunal is dealt with in several sections:

126(4) For greater certainty, no decision or policy of the Governance Council is subject to appeal.

130(2) The Appeals Tribunal shall, when making its decision, apply any policy of the Governance Council that applies to the subject matter of the appeal.

Section 131(1)(a) of the *Act* enables the Governance Council to direct that the Appeals Tribunal rehear any appeal if the Governance Council considers that the Appeals Tribunal has failed to “apply properly or reasonably a policy of the Governance Council”.

131. (1) Notwithstanding any other provision of this Act, the Governance Council may, in writing, direct the Appeals Tribunal to rehear all or part of an appeal and to apply a policy of the Governance Council or to comply with this Act or the regulations, if the Governance Council considers that the Appeals Tribunal has failed to

(a) apply properly or reasonably a policy of the Governance Council that the Governance Council considers applicable to the subject matter of the appeal; or

(b) comply with this Act or the regulations.

It is clear that the ability of the Tribunal to depart from the policies set by the Governance Council is very limited.

[12] In this case the Tribunal concluded that it did have the jurisdiction to consider the basis upon which the Commission calculates a pension conversion. This conclusion arose from two prior court decisions: *Northern Transportation Co. v Northwest Territories (Workers' Compensation Board)*, [1998] NWTR 366, 5 Admin LR (3d) 11 and *Braden-Burry*

Expediting Services Ltd. v Northwest Territories (Workers' Compensation Board), 2002 NWTSC 48, 50 Admin LR (3d) 175.

[13] *Northern Transportation* concerned a request for the disclosure of information about the actuarial assumptions used by the Board to calculate employer assessments. The legislation at the time in s. 7.7(2) enabled the Board to direct that the appeals tribunal rehear an appeal and “give fair and reasonable consideration to” the Board’s policies. That can be contrasted with the narrower wording of s. 131, which enables the Governance Council to direct that the Tribunal “properly and reasonably” apply any policy. Because *Northern Transportation* arose from a disclosure application, the jurisdiction of the appeal tribunal was not directly in issue. The Court concluded, however, that the appeal tribunal had the power to decide if and how any given policy should be applied to the particular case. The disclosure request was referred back to the appeals tribunal, which had never been asked to direct disclosure of the underlying actuarial information.

[14] In *Braden-Burry* the employer challenged its industry classification, which affected the rates it had to pay. The Court noted s. 7.7 of the *Act* and the decision in *Northern Transportation* and concluded:

14 The Appeals Tribunal must, to adopt the words in s. 7.7(2), give "fair and reasonable consideration" to a Board policy, but it is still for the Tribunal to decide whether or how the policy applies. This means that it must be open to an appellant to argue, for example, that a policy is arbitrary or that the rationale for the policy is such that it should not be applied in the appellant's particular case. This is not to say that the Tribunal should be asked to re-write a Board policy, but in light of the Tribunal's function as the appeal of last resort under the Act, it cannot be precluded from critically examining or even rejecting the rationale for a policy when deciding a specific appeal.

While the appeals tribunal lacked the ability to directly review a Board policy, the Court concluded that an applicant could still argue that a policy is arbitrary or that the rationale for the policy is such that it should not be applied in the applicant’s particular case.

[15] This appeal concerns the conversion of a periodic pension into a lump sum. The *Act* provides that permanently injured workers will receive a monthly pension. The *Act* does, however, contemplate the conversion of a monthly pension into a lump sum payment:

56. (1) The Commission may convert all or a portion of a pension into a lump sum payment if

(a) the person entitled to the compensation requests the conversion;

(b) the Commission provides the person with the discount rate and other actuarial factors to be used in the conversion; and

(c) the person agrees on the amount of the lump sum. . . .

(4) When converting a pension into a lump sum payment, the Commission shall apply such discount rate and other actuarial factors as the Commission considers appropriate.

The key provisions for the purposes of this appeal are that a) conversion must be requested by the worker, b) the Commission can deny a conversion request if it is not prudent for the worker, c) the worker must agree to the amount of the lump sum, and d) the Commission is given a wide discretion over the actuarial assumptions to be used in calculating the lump sum. If a worker does not agree with the amount of the lump sum, he can continue to receive his monthly pension.

[16] The Governance Council has adopted Policy 06.02 *Pension Conversions and Advances*. It provides that conversions will be done based on a discount factor which is the greater of the rate used by the Commission to calculate long-term pension liabilities, and its long-term risk free real rate of return. The Policy also states that a conversion will be based on “an actuarial life”, although the precise actuarial assumptions are not set out in the policy. The record reveals, however, that the Commission uses the *1995-1997 Statistics Canada General Life Mortality Table*. The record is not clear whether the use of that *Mortality Table* has been sanctioned or directed by the Governance Council.

[17] It follows that, at its highest, the Tribunal can review the Governance Council’s policy on pension conversions if it is 1) arbitrary or 2) the rationale for the policy is such that it should not be applied in the appellant’s particular case. (It was not argued in this appeal that the narrower wording of s. 131 changes the scope of review.) Since the Governance Council has adopted the discount rate in a “policy”, that sets the possible scope of review of that discount rate. While it is clear that the Commission uses the *1995-1997 Statistics Canada General Life Mortality Table*, it is not clear whether that is by direction of the Governance Council (even if not in a formal “policy”), in which event the same narrow level of review would possibly apply. If, however, the Commission has itself adopted the use of those mortality tables because of the discretion given to it in s. 56(4), then the scope of review by the Tribunal may well be wider. In that event the Tribunal would still be entitled to defer to the Commission’s selection of the mortality table if the Tribunal concluded that was in general a reasonable universal approach, and it was reasonable to apply that approach to the applicant’s particular situation.

The Commission’s Statistical Assumptions

[18] The chambers judge’s reasoning in finding the Tribunal’s review of the Commission’s use of statistics to be unreasonable was:

35 In determining the WSCC's use of the 1995-1997 Mortality Tables was reasonable, the Tribunal relied exclusively on the statement from the WSCC that these statistics reflect more closely its own experience, which it said it had been tracking since 2006. This assertion is nothing more than the opinion of the WSCC, with no evidentiary foundation to back it up or against which its validity can be tested. That makes the Tribunal's finding unreasonable.

36 Accepting the WSCC's assertion, without more, also created an unfairness for Mr. Lewis. As a party before the Tribunal, he was owed a duty of fairness, a significant component of which is the right to know and understand the case to be met. Again, without knowing the factual foundation upon which the WSCC based its choice to use the 1995-1997 Mortality Tables and other factors, he could not know, understand or refute the validity of the WSCC's position. The process was unfair and a decision based on an unfair process is necessarily unreasonable.

This approach is not entirely consistent with the applicable standard of review.

[19] It is within the Commission's mandate to administer the Workers' Protection Fund. As noted in *McMorran* at para. 10:

... Significant weight should be placed on the position of the administrator as to whether particular arrangements are consistent with the plan. Whether the plan is established by contract or statute, the administrator is given a mandate to interpret and operate the plan that must be respected by the parties:

- (a) Uniformity and consistency in the interpretation of the plan, and its equal application to all the participants, are of prime importance. The administrator has a role in making submissions on behalf of all of the participants in the plan who are not before the court;
- (b) Where the administrator takes the position that a particular agreement or proposed court order would interfere with the actuarial foundations of the plan, the burden is on the claimants to demonstrate that the administrator's conclusion is unreasonable. Maintaining the long term solvency of the plan is of critical importance to all participants, not just those before the court.
- (c) The onus is also on the claimants to prove that any decision of the administrator on the proper interpretation of the plan is unreasonable.

It is not open to any injured worker, or any expert retained by a worker, to merely second-guess the actuarial assumptions made by the Commission. As counsel for the appellant put it, every worker is not entitled to his or her own discount rate. If the Tribunal directed an entirely new approach to calculating the residual value of the respondent's pension (as suggested by Mr. Cheng) that would have material implications for the entire system and all the other workers in it.

[20] Specifically, it is irrelevant whether the Canadian Institute of Actuaries or the British Columbia personal injury regime use different actuarial assumptions. Neither of them have a legislative mandate to operate the Northwest Territories Workers' Protection Fund. It follows that whether an expert like Mr. Cheng prefers the assumptions made by those other organizations is equally irrelevant. The power of a superior court to review particular decisions of the Commission does not extend to deciding if there were other equally (or perhaps even "more") reasonable actuarial assumptions that could have been used.

[21] In this context, it was not unreasonable for the Commission to rely on statistical evidence about mortality rates and its own institutional experience in setting the lump sum of the respondent's pension. The chambers judge's conclusion that the result was "nothing more than the opinion of the WSCC" overlooks the very mandate of the Commission. As *Dunsmuir* points out, one of the reasons for a deferential standard of review of administrative decisions is the expertise that a tribunal will develop over time:

49 Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime": D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?"(2004), 17 *C.J.A.L.P.* 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

The Commission was not only entitled to rely on its expertise, opinion and experiences, but indeed, it was expected to do so.

[22] Further, it is generally reasonable for a tribunal to rely on statistical information, whether that information is obtained from general public sources (like Statistics Canada), or from its own internal files. That is, at least, the case with statistics on rates of mortality, which

are commonly used in actuarial calculations. A tribunal is not required to deconstruct such statistics before each decision is made, or go behind the statistics to the raw data, so that their “validity can be tested”. Such an approach would defeat the whole point of using statistical evidence. The ability to rely on (typically neutral) statistics is one of the hallmarks of expert administrative tribunals, and, as noted, is one reason deference is extended to their decisions.

[23] Requiring an applicant to displace a decision of a tribunal based on statistical evidence does not create any unfairness. If the applicant can point to any flaws in the use of the statistical data, the tribunal can consider them, but merely because a tribunal relied on statistical data does not render a decision unfair or unreasonable. Further, it is not open to an applicant to challenge any particular decision by merely asserting that there is better statistical data than the data selected and used by the Tribunal. An applicant cannot demonstrate that a decision is unreasonable merely by demanding that the tribunal “prove its actuarial assumptions”.

[24] The use of external and internal statistics by the Commission is contemplated by the legislation. As noted, s. 56(4) gives the Commission a wide discretion over the actuarial assumptions to be used when calculating a lump sum payment. The Commission was entitled to select mortality tables that it concluded reflected its own experience. The Commission does not have to justify those policy and statistical assumptions every time it uses them. Even if an expert (like Mr. Cheng) would have preferred to use different assumptions or more precise statistics, that would not necessarily render the Commission’s decision “unreasonable”.

[25] Further, it was not unreasonable for the Tribunal to review the decision of the Commission without examining the sources of the underlying statistical information. The onus was on the respondent to prove that the decision was unreasonable, and merely demanding that the Commission prove the validity of its statistical assumptions was not sufficient. The chambers judge should not have set aside the Tribunal’s decision on this basis.

The Fresh Evidence Application

[26] The chambers judge was also of the view that the Tribunal unreasonably dismissed the Cheng report as amounting to no more than the re-argument of issues previously canvassed:

38 As a party, Mr. Lewis was tasked with refuting the actuarial position of the WSCC before the Tribunal. He attempted to do so without the benefit of either legal counsel or an actuarial expert, and without the benefit of knowing the factual basis for the WSCC's position. It is clear he did not offer meaningful evidence on his own behalf and, given the complexity of the subject matter, it is not surprising that his arguments were very general and likely offered limited assistance to the Tribunal. . . .

39 The Cheng Report is more than argument and thus it should not have been rejected on this basis. It is evidence that demonstrates how using

different assumptions, methodologies and actuarial factors effects pension conversion values and the impact for Mr. Lewis. It provides an evidentiary foundation for Mr. Lewis' arguments respecting the appropriateness of the WSCC's methodology.

This reasoning repeats somewhat the criticism of the Commission's use of statistical assumptions, to the extent that it merely attacks the "appropriateness of the WSCC's methodology". As noted, this was not a valid objection to the result.

[27] As the Tribunal pointed out, the Commission has the mandate to operate the Workers' Protection Fund, and a wide discretion under s. 56(4) to determine the actuarial factors it considers appropriate. Those actuarial assumptions are reflected, at least in part, in the Governance Council's policies, and it is not "unreasonable" for the Commission and the Tribunal to rely on them. The Tribunal had, however, previously recognized that there is a narrow jurisdiction to examine whether the Commission's policy for the calculation of the respondent's lump sum was 1) arbitrary, or 2) that the rationale for the policy should not be applied to his case. In this context, the test for arbitrariness is strict, and requires the applicant to prove that there is no connection between the policy and its objectives: *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para. 98, [2013] 3 SCR 1101.

[28] The newly acquired Cheng actuarial report was clearly in the nature of fresh evidence, and was of a different character than the lay opinions that the respondent was able to give when he was self-represented. The respondent undoubtedly should have produced that type of evidence earlier in the process, but given the particular objectives of the workers' compensation system it was open to the chambers judge to determine that it was unreasonable for the Tribunal to refuse to consider the new report. As the trial judge noted at para. 40, without that consideration it is not possible to tell if the Tribunal's decision falls in the range of reasonable outcomes.

[29] The Cheng report, however, does not mandate reopening every aspect of the Commission's decision:

- (a) The discount rate is set by a policy of the Governance Council. It cannot be said to be arbitrary, or inapplicable to the respondent Lewis's particular circumstances. Any scheme like the Workers' Protection Fund must use a uniform discount rate, and the one selected by the Governance Council is rationally connected to its objectives. The fact that Mr. Cheng might prefer or recommend a different discount rate is of no consequence, and the Tribunal was entitled to conclude that a reconsideration of the discount rate was not called for.
- (b) It is unclear from the record whether the selection of the *1995-1997 Statistics Canada General Life Mortality Table* was directed by the Governance Council. If

so, that selection might possibly only be reviewed in these proceedings if it is shown to be arbitrary or inapplicable to Mr. Lewis's circumstances. Whether Mr. Cheng would prefer other mortality tables, even if they could be shown to be equally or "more" reasonable, would not make the selected mortality tables "arbitrary". The respondent Lewis would be entitled, at best, to have the application of those mortality tables to his circumstances reviewed to see if the rationale for the policy was inapplicable to him. The respondent's main argument appears to be that the Commission uses mortality rates for residents of the Northwest Territories, whereas he lives in Ontario. The Tribunal specifically rejected this argument (*supra*, para. 4). While the Cheng report does not directly address this issue, it might provide a sufficient basis for a reconsideration of that aspect of the decision.

- (c) If the use of the *1995-1997 Statistics Canada General Life Mortality Table* arose as a result of a decision of the Commission under s. 56(4), and not through direction of the Governance Council, the scope of the Tribunal's review could be wider. As the chambers judge noted at para. 40, the outcome might still be the same, but the Cheng report arguably sheds new light on the issue.

It is in this context that the Court must decide whether the matter should be remitted back for a new hearing by the Tribunal, and if so whether further disclosure is required.

[30] The Commission in its explanation for the use of the *1995-1997 Mortality Tables* (*supra*, para. 3) outlined its approach:

Since 2006, we have tracked the variance between expected mortality and actual deaths of pensioners. Up to the end of 2012, the expected mortality has tracked very close to actual mortality experience.

As just outlined in the previous paragraph of these reasons, the respondent can potentially challenge the calculation of the residual lump sum value of his pension by showing that the methodology is arbitrary, or that the rationale of the policy is inapplicable to his circumstances, or perhaps that the Commission's calculation is unreasonable. In order to do that, he may need to have the Commission's post-2006 actual mortality experience. The record does not disclose whether that experience is available or disclosable in a discrete form, so the possible form of disclosure is unclear. The respondent is, however, entitled to have disclosure of that information (but not the raw data behind the statistical mortality experience) in order to support his argument for a rehearing.

Conclusion

[31] In the end, there is no overriding error in the direction that the Tribunal rehear the respondent's application, following disclosure of the Commission's data on its actual mortality experience. As discussed, that rehearing is limited. While the chambers judge erred in her

assessment of the Tribunal's treatment of the statistical evidence, that error does not affect the ultimate result: a direction to the Tribunal to rehear the application. The appeal is dismissed.

Appeal heard on June 13, 2017

Memorandum filed at Yellowknife, Northwest Territories
this day of July, 2017

Watson J.A.

Slatter J.A.

Smallwood J.A.

Appearances:

G. A. McKinnon
for the Appellant

A.F. Marshall
for the Respondent

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