Braden-Burry v. WCB, 2002 NWTSC 48

Date: 2002 07 10
Docket: S0001-CV2001 000 257

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

BRADEN-BURRY EXPEDITING
SERVICES LTD.

Applicant

- and -

WORKERS' COMPENSATION BOARD OF
THE NORTHWEST TERRITORIES

Respondent

Application for judicial review of a decision of the Appeals Tribunal established under the *Workers' Compensation Act*.

Heard at Yellowknife, NT on May 14, 2002

Reasons filed: July 10, 2002

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER

Counsel for the Applicant: James R. Posynick
Counsel for the Respondent: Adrian Wright and Michael Triggs

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REASONS FOR JUDGMENT

[1] Three issues arise on this judicial review application. They are: (i) whether the Appeals Tribunal breached the rules of procedural fairness when it researched and consulted information which was not disclosed to the Applicant; (ii) whether the Appeals Tribunal fettered its discretion by applying a policy of the Workers' Compensation Board; (iii) whether the decision of the Tribunal is patently unreasonable.

[2] The background to this matter is lengthy. Pursuant to s. 62 of the *Workers' Compensation Act*, R.S.N.W.T. 1988, c. W-6 (the "*Act*"), the Workers' Compensation Board may divide any industry into one or more classes and any class into one or more subclasses for purposes of levying assessments on employers to contribute to the Accident Fund. For many years, the Applicant has been classified by the Board in Class 5 (Transportation, Communication and Utilities), Subclass 53 (Ground Transportation Not Elsewhere Classified).

[3] The Applicant employs persons who perform work directly involved in, and provide services to, the mining industry. For several years it has taken the position that it should be in Class 2 (Mining), Subclass 27 (Hardrock, Prospecting and Exploration). The assessment rates applicable under Class 2, Subclass 27 are significantly lower than those under Class 5, Subclass 53.

[4] In February 1993, the Applicant requested reclassification into Class 2, Subclass 27, but was refused by the Board. The Applicant took the matter before a Review Committee, which determined that the Applicant was properly classified under Class 5, pursuant to the Board's Operational Procedure 30-02-01, under which an employer whose operations encompass two industries is classified according to the higher risk operation it carries out if that higher risk operation exceeds 25 percent of its total operations as reflected by its payroll. It was found that the Applicant's higher risk operation, expediting, comprised 26.29 percent of its payroll.

[5] The Applicant appealed the Review Committee's decision to the Appeals Tribunal, which dismissed the appeal on July 23, 1996 (the "first Appeals Tribunal decision"). On an application for judicial review of that decision, Vertes J. of this Court found that the Appeals Tribunal had fettered its discretion in considering itself bound by the Operational Procedure. He set aside the Tribunal's decision and remitted the matter for a rehearing: *Braden-Burry Expediting Services Ltd. v. The Workers' Compensation Board of the Northwest Territories* (S.C.N.W.T. No. CV 06742; December 2, 1998). An appeal by the Board from the decision of Vertes J. to the Northwest Territories Court of Appeal was dismissed: [1999] N.W.T.J. No. 84.

[6] The Appeals Tribunal reheard the matter in February 2001 and rendered a decision dated April 30, 2001. It decided that the Applicant was correctly classified in Class 5, Subclass 53. This judgment is the judicial review of that decision.

[7] I will deal first with issue (ii) set out above, that is, whether the Appeals Tribunal fettered its discretion in applying a policy of the Board, specifically Operational Procedure 30-02-01.

[8] The Applicant argued that the Tribunal erred by following the Operational Procedure to the letter without recognizing or exercising its discretion not to do so, and without considering it in the context of the provisions of the *Act* relating to assessments. It merely looked at whether other employers in competition with the Applicant were paying similar assessment rates in order to determine whether the Applicant was being treated fairly. The Applicant argued that in considering only the fairness issue and applying the Operational Procedure, the Appeals Tribunal fettered its discretion.

[9] The Respondent argued that there is no indication in the Tribunal's decision that it considered itself bound by the Operational Procedure and unable to deviate from it. The Respondent took the position that the guidelines set out in the Operational Procedure amount to a presumption that can be dislodged if the employer convinces the Board that

they are not appropriate. In this case, according to the Respondent, the Appeals Tribunal considered and rejected all of the Applicant's arguments as to why its classification under the Operational Procedure should not stand.

[10] Some of the argument before me centered on the extent, if any, to which this Court and the Appeals Tribunal should review the assessment setting process put in place by the Board or the policy developed by the Board as part of that process. The Applicant's position throughout its quest to be reclassified has been that use of the 25 percent threshold to classify an employer in the more hazardous activity when that activity is the lesser part of its operations does not accord with the *Act*, which requires that risk hazard, the employer's claims record and fairness to the employer be considered. The Respondent's position has been that the *Act* gives it a wide policy-making power and function and that this applies as well to the Board's power to develop a classification system. The Respondent says that this is not something the Appeals Tribunal should be asked to intervene in.

[11] The *Act*, in s. 62, expressly gives the Board the responsibility of setting the assessment rates. Although the *Act* does not expressly give the Board the power to make policies, that the Board may do so is contemplated by s. 7.7(1), which provides that the Appeals Tribunal shall, in determining an appeal, apply the policy established by the Board. Under s. 7.7(2), the Board may also, where it considers that the Tribunal has failed to properly apply a Board policy, direct the Tribunal to rehear an appeal and give fair and reasonable consideration to the policy. Section 7.7 was commented on by Vertes J. in his decision, referred to above, and also in *Northern Transportation Company Limited v. Workers' Compensation Board et al.* (S.C.N.W.T., No. CV 06887; January 19, 1998) as follows (paragraph 29 in the latter decision):

> These provisions make it clear that while the Tribunal must apply the Board's policies, it is not an instrument of the Board. It is not under the "direction" of the Board (save and except the limited authority of the Board to direct a rehearing). The Tribunal must make its own decisions on the matters before it. It must make those decisions having regard to the legislation, the Board's policies, and the principles of natural justice. The policies of the Board, however, do not replace the decision-making by the Tribunal. It is the Tribunal that must decide whether a policy applies and, if so, how it applies. It cannot abdicate that responsibility to the Board itself or to some automatic application of any policy. ...

[12] The appeal provisions under the *Act* should be considered with the above in mind. Under s. 64(1) of the *Act*, where an employer is dissatisfied with the amount of an assessment, it may ask for a review before a review committee. Where an employer is

dissatisfied with the decision of the review committee, under s. 64(2), it may appeal to the Appeals Tribunal. Section 7.3 then gives the Appeals Tribunal, subject to s. 7.7, exclusive jurisdiction to examine, inquire into, hear and determine all matters arising in respect of an appeal from a decision of a review committee under s. 64 and the Tribunal may confirm, reverse or vary a decision of the review committee.

[13] Under s. 7.3, therefore, the Appeals Tribunal has wide jurisdiction on an appeal by an employer from a review committee's decision as to the amount of its assessment. On such an appeal, an appellant must be able to raise issues relating to how the amount was decided. If that involves the application of a policy, then the policy must be open to critical examination. I think that is reflected in the comments made by Vertes J. in the extract quoted above.

[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.

[15] In his decision in the earlier judicial review between these parties, Vertes J. pointed out that the issue before him was not the soundness of the Board's policy. Nor is that the issue before me. But the soundness of the Board's policy depends on whether there is a rational basis for it, something which is not set out in the Operational Procedure itself and was not referred to in the Tribunal's decision now under review. However, the rationale underlying the Operational Procedure and its reasonableness or otherwise is certainly relevant to whether its application is justified in the Applicant's circumstances and was in fact one of the main points put forward by the Applicant. In my view, it was the Tribunal's duty on the appeal, and within its jurisdiction, to consider that issue. In my view it cannot be, as argued by the Respondent, that the Appeals Tribunal cannot question the policy.

[16] It is helpful to go back to the July 23, 1996 decision of the Appeals Tribunal that was set aside by Vertes J. on judicial review. In that decision, the Tribunal made a number of findings in the Applicant's favour: that its claims history was minor, that it had been a low risk company for industrial accidents, that the Applicant's request to be reclassified under Class 2, Subclass 27 was consistent with the staking and prospecting

portion of the company. The Tribunal also found that the Applicant was assessed at the same or a lower rate as companies that offered similar services to the mining industry and were identified as competitors and so was not put on an uneven playing field as alleged by the Applicant. However, the Tribunal stated that it was obliged to base its decision on policies and procedures established by the Board. In compliance with the policy in question, Operational Procedure 30-02-01, the Applicant was classified according to its higher risk activity, which exceeded 25 percent of its operations. This Operational Procedure was described by Vertes J. in his decision as (at paragraph 27):

> ... really nothing more than guidelines. It states that an employer is "usually classified according to the most hazardous industry in which he is involved within the following guidelines" (my emphasis). There then follow four factors, one of which being the 25% threshold test. The use of the word "usually" suggests to me something other than "always". Therefore, even the Board's document does not anticipate universal application. In addition, the very fact that the factors are described as "guidelines" suggest something less than strict rules. As noted by Saunders J. in *Shelburne Marine Ltd. v. Workers' Compensation Board*, [1995] N.S.J. No. 493 (S.C.): "If such a policy were applied in all cases, without exception, they could no longer be characterized as 'guidelines'. Such an application or interpretation would offend the discretion granted the Board ... " (para. 42).

At paragraph 29, Vertes J. stated:

> In every case the Tribunal must consider the merits of the particular application. It must have regard to any policies of the Board. But a policy (such as the 25% threshold) is only a factor for the Tribunal's consideration. The Tribunal may, in the end, consider it to be the most important factor but it is not the only factor. If a case warrants deviation from a policy the Tribunal should be prepared to justify it. In any case the Tribunal should identify the factors it relied on in coming to its decision. But in this case, the Tribunal said it was obliged to follow and was bound by the policy. This indicates that the policy was applied without regard to the merits of the applicant's case. That amounts to a fettering of discretion.

[17] In his decision, Vertes J. also pointed out, at paragraph 22, that the issue for the Court was not the reasonableness of the Board's policy, that is, the 25 percent threshold rule. But he noted that if a court is not to second-guess such a policy, there should at least be a rational basis articulated in support of it, in either the policy itself or the Tribunal's decision.

[18] In upholding this decision, the Court of Appeal said:

> The trial judge held that the Appeal Tribunal erred in applying as a policy the Operating Procedure requirement that an employer whose operations encompass only two industries must classify it according to the higher risk operation so long as the higher risk operation exceeds 25% of its operations. The trial judge pointed out that this was not an invariable rule since the same Operating Procedure provided that such a classification would be "usually" made so that the Appeal Tribunal must therefore have some discretion to determine in any particular case whether the "usual" classification would apply.

[19] The Court of Appeal went on to say that the new hearing ordered by Vertes J. should be consistent with the Court's reasons on appeal and paragraph 29 of the reasons given by Vertes J.

[20] In its decision, rendered April 30, 2001, after the new hearing, the Appeals Tribunal observed that very specific information was used by the Board in determining how classifications are laid out and the rate which should be applied. It then stated:

> The hearing panel, based on this information determined that the placement of sub classes and classes is outside its jurisdiction. As per section ***7.7(1)*** *The appeals tribunal shall, in determining an appeal, apply the policy established by the Board.* However, ensuring that an an *(sic)* employer is classified fairly by the Workers' Compensation Board falls within the Appeals Tribunal's jurisdiction. ***7.3.*** *Subject to section 7.7, the appeals tribunal has exclusive jurisdiction to examine, inquire into, hear and determine all matters arising in respect of an appeal from a decision of a review committee under section 24 and 64, and it may confirm, reverse or vary a decision of the review committee.*

[21] The Appeals Tribunal went on to discuss background research it had done about the assessment rates over the years and concluded that in the setting of assessment rates, each subclass is expected to generate enough revenue to cover all costs under the Accident Fund. The Tribunal found that increases were applied across the board, not only to the Applicant's classification.

[22] The Tribunal referred to Operational Procedure 30-02-01, noting that the Applicant's counsel questioned the rationale for the 25 percent threshold. The Tribunal stated that it had gone over the Applicant's payroll documentation in an attempt to determine whether the 26.29 percent which the Review Committee had allocated to expediting could be reduced, and found that it could not.

[23] The Applicant had submitted to the Appeals Tribunal that it should consider the "big picture", in other words, not just the Operational Procedure and not in isolation from the governing legislation. What the Appeals Tribunal considered in that regard was simply whether the Applicant was being treated fairly. It looked at the Applicant's competitors' accounts and found that they were all paying the same rate if not more and have claims records just as good as the Applicant. The Tribunal decided that there was no unfairness to the Applicant because it was not paying a higher rate than its competitors.

[24] In upholding the Applicant's classification under expediting, the Appeals Tribunal concluded:

> The Appeals Tribunal determined that based on the facts: that the company's higher risk activity (expediting) exceeds the 25% threshold as stated in the Workers' Compensation Board policy 30-02-01; that it is in the same classification, paying the same rate with a similar claim record as its competitors; and the fact that it is outside the Tribunal's jurisdiction to make up new industrial classifications, agrees that the appellant was correctly classified in subclass 53. The Appeals Tribunal also sees no problem with expediting being classed under the heading of Transportation because it involves the delivery and transportation of cargo and personnel.

[25] The excerpts above from the Tribunal's decision, specifically the reference to sections 7.7(1) and 7.3 of the *Act* indicate to me that the Tribunal felt that it was obliged to apply the policy but that it could deal with the issue of fairness, which it seems to have perceived as simply whether the Applicant was being treated the same as its competitors.

[26] The question the Tribunal should have asked itself was whether the policy should be strictly applied to the Applicant in its particular circumstances. It did not do that. It did not refer to the rationale for the 25 percent threshold, despite the fact that the Applicant's counsel questioned why that threshold had been adopted. It did not respond to that question except to indicate that it was the policy (page 8 of the decision). It did not consider whether that threshold should be applied to the Applicant or recognize that the Operational Procedure talks about an employer being "usually classified" within its guidelines. There is nothing in its decision that recognizes that the Operational Procedure itself does not contemplate universal application, as was pointed out by Vertes J.

[27] Instead, the Tribunal simply reworked the Applicant's payroll figures to see if there was any room to lower the allocation for expediting to less than 26.29 percent. It did not, for example, ask itself whether the fact that the Applicant exceeded 25 percent by only

1.29 percent, along with the other factors relied on by the Applicant, would justify not applying the guidelines, that is, not classifying the Applicant as it would "usually" be classified or not applying the guidelines strictly since they are just guidelines.

[28] The Respondent argued that the Tribunal did consider whether the fact that the Applicant's payroll allocation for expediting was so close to the threshold would justify not imposing a strict application of the Operational Procedure. In that regard, the Respondent relied on the following portion of the Tribunal's decision, where it discussed the 26.29 percent allocation to expediting:

> The Appeals Tribunal in their deliberations went over all figures and evidence in the file in an attempt to ensure that this was the correct breakdown and in giving all benefits of doubt to the employer could not reduce this percentage. The hearing panel determined that although the employer is very close to the 25% threshold, (within 1.29%) this is calculated giving the employer every opportunity and benefit allowed under the Workers' Compensation Board policy.

[29] In my view, the above passage clearly indicates that the Tribunal applied any benefit of doubt to the calculation of the percentage, and not to whether the percentage threshold as set out in the policy should be strictly applied. In other words, the calculation of 26.29 percent was arrived at after giving the employer the opportunity and benefit referred to. This is the only comment or examination made by the Appeals Tribunal in relation to the content of the Operational Procedure. Having maintained the percentage calculation, the Tribunal simply applied the Operational Procedure, without any further analysis as to whether it was appropriate.

[30] Although the Tribunal looked at the issue of fairness, it did so based on the assumption that the Operational Procedure applied, looking outside it only to see whether the Applicant's competitors with similar claims records had been classified the same as the Applicant. In effect, the Tribunal said that it had to apply the policy and only if it found unfairness in the way the policy was being applied as between employers might it decline to follow it.

[31] The Tribunal did not expressly say that it was bound by the Operational Procedure as was the case in the first Appeals Tribunal decision. However, in my view, for the above reasons, the decision makes it clear that the Tribunal considered itself bound by the policy. Accordingly, it fettered its discretion, its decision is set aside and a new hearing is ordered before a newly constituted panel of the Appeals Tribunal. The panel is to be made up of members other than those who have sat on the two previous appeals.

[32] Having decided that there must be a new hearing, I will deal very briefly with the issue described as (i) in the first paragraph of these reasons, that being whether the Appeals Tribunal breached the rules of procedural fairness when it researched and consulted information which was not disclosed to the Applicant.

[33] The Tribunal stated in its decision that it did background research about deficits and surpluses and the setting of assessment rates for the years in question. It also stated that it looked up the Applicant's competitors' accounts. The background research and competitors' accounts were not disclosed to the Applicant.

[34] In my view, the information about deficits and surpluses was more than simply historical information, used by the Tribunal to explain to the Applicant why its assessment rates had risen in the past. It was also used by the Tribunal to meet, at least in part, the Applicant's argument that it had not been treated fairly. More important, the Applicant had asked the Tribunal for the information before the hearing, but it was not provided. It was, therefore, a breach of procedural fairness for the Tribunal to use the information requested without giving the Applicant the opportunity to address it. It cannot be said with certainty that the information did not influence the disposition of the case because the Tribunal did use it in rejecting the Applicant's allegation of unfairness. In my view, the failure to disclose the information in this instance is also reason to direct a new hearing.

[35] As to the information obtained by the Tribunal from the Applicant's competitors' accounts, the Respondent agreed that it should not have been considered, on the basis that it is confidential and irrelevant to the issues before the Tribunal. The Respondent took the position, however, that this information made no difference to the result.

[36] In my view, the Appeals Tribunal did use the information about the competitors' accounts in coming to its decision. The Applicant was asking the Tribunal to look at the "big picture" when considering its appeal rather than just the 25 percent threshold. Part of that big picture was the Applicant's good claims record. The Applicant's argument, or one aspect of it, was that the combination of a good claims record and only a small excess over the threshold percentage, when considered in the context of the legislation, would justify a departure from the policy in the case of the Applicant. However, the Appeals Tribunal's decision indicates that it viewed the issue this way: (i) the Tribunal has to follow the policy unless it is being applied unfairly; (ii) unless the Applicant pays a higher rate than its competitors, there is no unfairness. Thus, the Tribunal did use the

information in coming to its decision, even if it did not address all of the Applicant's argument about unfairness.

[37] The information about other employers' accounts is confidential pursuant to ss. 67(11) and (12) of the *Act* and should not have been reviewed by the Tribunal. However, once the Tribunal decided to review it, it seems to me that it should have been disclosed to the Applicant, taking steps to protect the identity of the employer which had provided the information.

[38] In this case, however, a complicating factor is that the Applicant had given the first Appeals Tribunal the names of competitors that it believed were paying lower rates. The first Appeals Tribunal decision dealt with the Applicant's contention that its classification placed it on an uneven playing field by saying that it had investigated the classification and rates of the four competitors identified by the Applicant and found that they were assessed at the same rate or in some instances at a higher rate. Knowing that, it seems to me that had the Applicant felt the details of the information were important to its position, it should have brought an application for disclosure before the second Tribunal, where the issue of confidentiality could have been addressed. Since the Applicant already knew, from the first Appeals Tribunal decision, that the competitors it had identified had been assessed at the same or a higher rate than it had, it could not have been surprised by that information. I would not have directed a new hearing on the basis of this instance of non-disclosure alone.

[39] The Applicant also argued that a reasonable apprehension of bias arose because the Board was the likely source of the information as to the assessment rates and the competitors' accounts. There is, however, no factual basis on which to find that any member of the Appeals Tribunal prejudged the case or had a personal interest in the outcome. Nor is the test for institutional bias, that an apprehension of bias exists "in a substantial number of cases", met: *2747 - 3174 Quebéc Inc. c. Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919.

[40] As I see it, the problem is not one of bias, but disclosure. The Appeals Tribunal should not have approached the Board for, or allowed the Board to approach it with, information on the case it was deciding, without disclosing that information to the Applicant.

[41] In light of my decision that there is to be a new hearing, I will not deal with the third issue argued, that is, whether the decision of the Appeals Tribunal was patently unreasonable, except to say that in considering itself bound by the Operational Procedure,

the Tribunal made a patently unreasonable interpretation of its jurisdiction and of the Procedure itself.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
10th day of July 2002

Counsel for the Applicant: James R. Posynick

Counsel for the Respondent: Adrian Wright and Michael Triggs

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