

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

PHILIP MERCER

Appellant

- and -

WORKERS' COMPENSATION BOARD OF THE NORTHWEST
TERRITORIES AND NUNAVUT AND THE NORTHWEST TERRITORIES
HUMAN RIGHTS COMMISSION

Respondents

MEMORANDUM OF JUDGMENT

Introduction

[1] This is an appeal by Philip Mercer (“Mercer”) from part of an adjudicator’s decision under the *Human Rights Act*, S.N.W.T. 2002, c. 18 (the “HRA”). The adjudicator heard a complaint that the Respondent Workers’ Compensation Board of the Northwest Territories and Nunavut (“WCB”)¹ discriminated against Mercer by failing to include employment insurance income in the calculation of remuneration when determining his WCB benefits. The adjudicator determined that the WCB had discriminated against Mercer and ordered that the WCB pay Mercer the amount he would have received if employment income was included in the calculation of his remuneration for the purposes of his WCB benefits. Mercer is appealing the decision of the adjudicator not to grant his claims for monetary losses, humiliation and embarrassment, and exemplary or punitive damages.

¹The Workers’ Compensation Board of the Northwest Territories and Nunavut is now known as the Workers’ Safety and Compensation Commission. This change occurred after the decision of the adjudicator was made. For ease of reference, I will continue to refer to it as the WCB.

Facts

[2] The facts are more fully explained in the companion appeal, *WCB v. Mercer et al.*, 2012 NWTSC 57, which deals with the WCB's appeal from the adjudicator's decision. I have only included brief facts in this appeal.

[3] Phillip Mercer was injured in 2001 while working. Mercer applied for and received total temporary disability from WCB as a result of his injuries. Mercer was a seasonal worker and the WCB considered his actual employment earnings in the twelve months prior to the injury when determining his WCB benefits. They did not include EI benefits in this calculation.

[4] Mercer appealed the WCB decision regarding his remuneration and the WCB Appeals Tribunal ruled that Mercer's EI benefits should be included on a one-time only basis to calculate the remuneration upon which his WCB benefit would be based.

[5] Mercer filed a complaint with the Northwest Territories Human Rights Commission (the "Commission") alleging that the WCB discriminated against him by excluding his EI benefits from the calculation of his remuneration.

[6] After a hearing, an adjudicator ruled that the WCB had discriminated against Mercer on the basis of his social condition. The WCB was ordered to pay Mercer the difference between what he received and what he would have received but for the contravention of the *HRA*. The adjudicator did not grant any additional compensation to Mercer for monetary losses, humiliation and embarrassment, or exemplary or punitive damages.

Standard of Review

[7] The parties' submit that the standard of review with respect to a decision regarding compensation is that of reasonableness. I agree. See *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53.

[8] The reasonableness standard involves a review and analysis of the decision-maker's reasoning process and decision to determine whether the decision

is reasonable. The question is not whether the decision is correct but whether it is within the range of acceptable and rational solutions. The focus is not just on the outcome but also on the process of articulating the reasons. Applying the reasonableness standard involves a search for justification, transparency and intelligibility in the decision-making process. The reasonableness standard incorporates deference to the decision-making process of the decision-maker. *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paras. 47-49.

Was the adjudicator's failure to order additional costs reasonable?

[9] The Appellant contends that, at the hearing, he claimed monetary losses and referred to the humiliation and embarrassment that he and his wife had suffered. In her decision, the adjudicator did not grant him compensation for his losses or damages for humiliation and embarrassment. The Appellant says that it was an error for the adjudicator to not address these claims in her reasons.

[10] The Respondent's position is that the adjudicator was aware of Mercer's claims, she referred to the remedies that were available to her and chose not to grant Mercer the relief he sought. Thus, the decision of the adjudicator was reasonable.

[11] I disagree. The adjudicator did not provide reasons with respect to the claims of the Appellant for his monetary losses or damages for humiliation and embarrassment. Her failure to provide reasons means that a reviewing court is unable to determine whether her refusal to grant the relief sought by the Appellant was reasonable.

[12] In Mercer's evidence before the adjudicator, he referred to the expenses that he and his wife had incurred that he alleged were a result of the WCB's decision to exclude his EI benefits from the calculation of his income for the purposes of determining his WCB benefits. Mercer also spoke of the embarrassment that he and his wife had suffered. (Pages 31-33, 74-76 of the Appeal Book)

[13] This evidence was also before the adjudicator in the form of a written submission which Mercer read during his testimony and provided written proof of his expenses. (Pages 440-448 of the Appeal Book)

[14] I am unable to find any express statement from Mercer or counsel for the Commission where exemplary or punitive damages were sought. Counsel for the

Commission, in his closing statement, left it to Mercer to speak to specific damages. He stated at p. 144 of the Appeal Book:

[I]t is more appropriate that Mr. Mercer suggests anything that he wishes about quantum or anything else rather than the Human Rights Commission itself. Our primary focus is on the policy and what is going to happen in the future.

[15] Mercer, who was self-represented, declined to provide a closing statement and did not explicitly claim damages.

[16] In the decision of the adjudicator, she referred to section 62(3) of the *HRA* which provides the powers of an adjudicator when a claim of discrimination has been met. The powers are broad and it was open to the adjudicator to make a number of rulings, including with respect to compensating Mercer for his monetary loss, humiliation and embarrassment, and awarding exemplary or punitive damages.

[17] The decision of the adjudicator on compensation, at page 18, is brief and states:

I order that the WCB takes steps to put Mercer in the position he would have been in but for the contravention of the Act. This is, I order that the WCB pay Mercer an amount that equals the difference between what he received as compensation and what he would have received if EI had been included in his “remuneration” for the purposes of determining his compensation.

[18] In a judicial review, the court is concerned, as previously stated, with the “justification, transparency and intelligibility within the decision-making process.” *Dunsmuir, supra* at para 47. This means that a reviewing court must be able to determine why a decision was made or why a claim was accepted or rejected.

[19] A decision that does not refer to a claim made before the tribunal does not meet the standard of “justification, transparency and intelligibility.” A tribunal cannot ignore submissions. If the tribunal is not convinced by the submissions, it should be clear in the reasons and a rational reason for not accepting the submissions should be provided. This is not just the process of articulating reasons but also a matter of procedural fairness: *Burke v. N.L.A.P.P.E.*, 2010 NLCA 12 at para. 67-68.

[20] In this case, while the claim may not have been clearly put to the adjudicator, Mercer was self-represented and the Commission was clear that they were not advancing a claim on behalf of Mercer for any specific quantum of damages.

[21] Where a claimant is self-represented and may not be able to express their claim clearly or coherently, it is especially important for a decision-maker to determine the basis for their claim, as best they can, and respond to it: *Burke, supra* at para. 71.

[22] At this point, based on the existing record, I am unable to determine whether the decision of the adjudicator on Mercer's claim for losses or damages was reasonable. As such, this matter must be remitted back to the adjudicator for her to address Mercer's claims for monetary losses, humiliation and embarrassment, and exemplary or punitive damages.

[23] For the foregoing reasons, the appeal is granted and the matter is remitted back to the adjudicator for consideration of this issue.

[24] With respect to costs, as with the companion appeal *WCB v. Mercer et al.*, 2012 NWTSC 57, the following is ordered:

Within 14 days of the filing of these Reasons for Judgment, counsel will advise the Registry:

- a) Whether they wish to address costs in person or in writing; and
- b) If they wish to appear in person, of their availability for a hearing date, or if they wish to address costs in writing, of proposed filing deadlines for written submissions.

S.H. Smallwood
J.S.C.

Dated at Yellowknife, NT, this
12th day of July 2012

Counsel for the Appellant:

Austin F. Marshall

Counsel for the Respondent Workers' Compensation

Board of the Northwest Territories and Nunavut: Sacha R. Paul

Counsel for the Respondent

Northwest Territories Human Rights Commission: Ayla Akgungor

S-1-CV-2007000188

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

PHILIP MERCER

Appellant

- and -

WORKERS' COMPENSATION BOARD OF THE
NORTHWEST TERRITORIES AND THE NORTHWEST
TERRITORIES HUMAN RIGHTS COMMISSION

Respondents

MEMORANDUM OF JUDGMENT OF THE
HONOURABLE JUSTICE S.H. SMALLWOOD
