Date: 2012 07 12
Docket: S-1-CV-2007000187

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

WORKERS' COMPENSATION BOARD OF THE NORTHWEST TERRITORIES AND NUNAVUT

Appellant

- and -

PHILIP MERCER AND
NORTHWEST TERRITORIES HUMAN RIGHTS COMMISSION

Respondents

MEMORANDUM OF JUDGMENT

Introduction

[1] This is an appeal by the Workers' Compensation Board of the Northwest Territories and Nunavut ("WCB")[1], from 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 WCB discriminated against the Respondent Philip Mercer ("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 on the basis of his social condition contrary to sections 5 and 11 of the *HRA.*

[1]The 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] Phillip Mercer resides in Spaniards Bay, Newfoundland. In January 2001, he came to Yellowknife, Northwest Territories to work as a truck driver on the ice road to the Diavik and Ekati diamond mines. On February 18, 2001, Mercer was injured while working, breaking his hip and requiring surgery. Mercer applied for and received total temporary disability from WCB as a result of his injuries.

[3] In determining Mercer's remuneration, the WCB did not include his employment insurance ("EI") benefits from the previous year. As a claimant's remuneration is an important part of determining the quantum of WCB benefits, this omission affected how much Mercer was entitled to receive from the WCB.

[4] Mercer had worked as a seasonal worker for several years prior to his injury. This involved Mercer working seasonally in the Northwest Territories as a transport truck driver for approximately half of the year. When the seasonal work concluded, Mercer returned to his residence in Newfoundland and collected EI benefits if he was unable to find work in Newfoundland.

[5] Because Mercer was a seasonal worker, the WCB considered his actual employment earnings in the twelve months prior to the injury and did not include EI benefits in this calculation. Mercer appealed the WCB decision regarding his remuneration. After his appeal was launched, the WCB changed its policy to make it clear that EI benefits were not included in the definition of "remuneration". 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.

[6] 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. Specifically, he claimed that being a seasonal worker from Newfoundland, the WCB's policy discriminated against him in the provision of a service based upon the prohibited ground of social condition.

[7] After a hearing, an adjudicator ruled that the WCB had discriminated against Mercer on the basis of his social condition contrary to section 5 and 11 of the *HRA.* The WCB was ordered to refrain from committing the same conduct in the future and to take steps to amend its policies to prevent the discriminatory conduct from

occurring again. The WCB was also ordered to pay Mercer the difference between what he received and what he would have received but for the contravention of the *HRA*.

[8] While the WCB Appeals Tribunal's decision means that Mercer's remuneration for the purposes of determining his WCB benefits now includes his EI benefits, mootness was not raised as a defence or answer to the human rights complaint. Because of the potential impact on other individuals who might be similarly situated to Mercer, this issue is still of significance.

Legislative Framework

Human Rights Act, S.N.W.T. 2002, c. 18

[9] The *Human Rights Act* is intended to promote respect for and observance of human rights in the Northwest Territories. In order to protect human rights, the *HRA* prohibits discrimination on several grounds. Section 5(1) of the *HRA* lists the prohibited grounds of discrimination as

> ...race, colour, ancestry, nationality, ethnic origin, creed, religion, age, disability, sex, sexual orientation, gender identity, marital status, family status, family affiliation, political belief, political association, **social condition** and a conviction for which a pardon has been granted. [Emphasis added]

[10] Section 11(1) of the *HRA* states that:

> 11(1) No person shall, on the basis of a prohibited ground of discrimination and without a *bona fide* and reasonable justification,
>
> (a) deny to any individual or class of individuals any goods, services, accommodation or facilities that are customarily available to the public; or
> (b) discriminate against any individual or class of individuals with respect to any goods, services, accommodation or facilities that are customarily available to the public.

[11] The *HRA* establishes a comprehensive process for the investigation and determination of human rights complaints. There are several stages to the process when a complaint is made that there has been discrimination on the basis of a prohibited ground under the *HRA*. Ultimately, as happened in this case, the Director of Human Rights can refer a complaint for hearing in front of an

adjudicator. The adjudicator will hold a hearing into the alleged violation and determine whether the claim is with or without merit. If the adjudicator determines that the claim is with merit, in whole or in part, he or she has the authority to make various orders to address the violation. Pursuant to section 66 of the *HRA*, a decision of the adjudicator can be appealed to the Supreme Court and the Court can affirm, reverse or modify the decision.

Workers' Compensation Act, R.S.N.W.T. 1988, c. W-6[2] **(**the *"WCA"*)

[12] The basis for workers' compensation, which is embodied in section 14(1) of the *WCA,* is the idea that workers will be compensated for personal injuries which are caused by accident and arise out of and in the course of employment.

[13] The Supreme Court of Canada in *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890, noted at para. 27 that workers' compensation is based upon four fundamental principles:

(a) compensation paid to injured workers without regard to fault;
(b) injured workers should enjoy security of payment;
(c) administration of the compensation schemes and adjudication of claims handled by an independent commission, and
(d) compensation to injured workers provided quickly without court proceedings.

[14] Workers' compensation is a compulsory no-fault insurance system administered by the WCB. Simply put, employers are required to contribute to the accident fund and workers who are injured in an accident arising out of and in the course of employment can apply to the WCB for compensation from the accident fund. The practical application of the workers' compensation system can be much more complicated though.

[2] The *WCA* was repealed in 2007 and replaced by the *Workers' Compensation Act,* S.N.W.T. 2007, c. 21. All references in these Reasons for Judgment are to the previous version of the Act which was in force at the time of the conduct in question.

[15] Section 44(1) of the *WCA* established that a worker's net monthly remuneration was one of the bases for determining a worker's temporary total disability compensation. Pursuant to section 39 of the *WCA*, a worker's net monthly remuneration was based upon the worker's gross annual remuneration which was the estimate of the annual remuneration that the worker would have earned in the year if not for the accident. The determination of the estimate of gross annual remuneration was referred to in section 41(2)(a) of the *WCA* where it stated:

> 41(2) The Board may, in addition to any other factors that it considers appropriate, apply the following factors in calculating an estimate:
>
> (a) where the Board considers it equitable to do so, an estimate may reflect the remuneration of the worker during the 12-month period preceding the date of the accident.

[16] Section 1(1) of the *WCA* defined remuneration as

> "remuneration" includes all salaries, wages, commissions, bonuses, allowances, tips, service fees or other earnings, including earnings for overtime, piece work and contract work, the cash equivalent of board and lodging, store certificates, credits or any other remuneration in kind or other substitute for money, but does not include clothing, materials or transportation allowances supplied to a worker because of the special nature or location of the employment.

[17] In estimating a worker's gross annual remuneration, the WCB was guided by a policy entitled *Calculation of Compensation Benefits*, effective April 19, 2001. The policy provided that when a worker was a seasonal worker, "the WCB reviews the worker's actual remuneration, beginning one year before the accident, to develop an estimate of Gross Annual Remuneration."

[18] While not explicitly stated in the policy, the WCB excluded EI benefits from the calculation of actual remuneration. On September 19, 2005, two new policies, *Calculation of Temporary Compensation* and *Calculation of Permanent Compensation*, were introduced. These policies made it clear that "Employment Insurance is not included in the calculation of remuneration."

[19] By the time the new policies were introduced, Mercer had launched his appeal against the WCB Review Committee's decision and the appeal was before the WCB Appeals Tribunal. His appeal before the WCB Appeals Tribunal was not heard until April 20, 2006.

Issues

[20] While the parties have framed the issues somewhat differently, I have found it helpful to modify the structure of the issues. There are three main issues to be decided in this appeal:

1. What is the appropriate standard of review?
2. Did the adjudicator reasonably conclude that Mercer fell within the protected ground of "social condition"?
3. Did the adjudicator reasonably find that Mercer was subject to "discrimination" under the *Human Rights Act?*

1. What is the appropriate standard of review?

[21] Where a Court is called upon to review the decision of a statutory decision-maker, whether it is an application for judicial review or on appeal, the appropriate standard of review must be determined. In judicial reviews, there are two standards of review which might be applicable: correctness and reasonableness. *Dunsmuir v. New Brunswick,* [2008] 1. S.C.R. 190.

[22] In applying the correctness standard, a reviewing court will examine and review the decision-maker's decision, applying its own analysis of the question. If the reviewing court does not agree with the decision-maker, it will substitute its own view and correct the decision. Deference is not shown to the decision-maker and the ultimate question is whether the decision-maker was correct. The standard of correctness is typically used in questions of jurisdiction and other questions of law. *Dunsmuir, supra* at para. 50.

[23] 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, supra* at paras. 47-49.

[24] In determining whether the reasonableness standard applies, the Supreme Court of Canada in *Dunsmuir, supra* at para. 55, held that a reviewing court must consider several factors:

1) Whether a privative clause indicates deference is required;
2) Whether the administrative tribunal has a special expertise; and
3) Whether the question of law is of central importance to the legal system and outside the special expertise of the administrative tribunal which would suggest the correctness standard applies.

[25] In *Dunsmuir*, the Supreme Court suggested that the process of determining the appropriate standard of review involved first ascertaining whether the existing jurisprudence has already determined the appropriate standard of review. If the standard of review had not already been determined, the analysis of the applicable factors was necessary to determine the appropriate standard of review.

[26] The Appellant, citing *Dunsmuir*, argues that the issues before the court are questions of law and attract the standard of correctness. The case of *Aurora College v. Niziol*, [2007] N.W.T.J. No. 37, is cited as proof that the appropriate standard of review has already been determined. *Aurora College* involved an appeal of an adjudicator's decision under the *Human Rights Act* to the Supreme Court. The decision of Schuler J. was that the correctness standard was applicable on questions of law and the reasonableness standard was applicable on questions of fact.

[27] Since the decision in *Dunsmuir*, the Supreme Court of Canada has further elaborated on the reasonableness standard. In *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, the Court stated at para. 24:

> In substance, if the issue relates to the interpretation and application of its own statute, is within its expertise and does not raise issues of general legal importance, the standard of reasonableness will generally apply.

[28] In the consideration of an appeal from a decision of an adjudicator under the *HRA*, the standard of review will generally be that of reasonableness unless the issue is outside the expertise of the adjudicator or involves issues of general legal importance.

[29] In this case, the adjudicator was interpreting her home statute which implies a level of familiarity with the statute. It is to be expected that an adjudicator appointed under the *HRA* has experience and expertise in interpreting the Act. Further, the issues involved do not raise questions of general legal importance. This suggests that the reasonableness standard is applicable.

[30] The decision by the adjudicator also required her to consider Mercer's background, including his level of education, employment history and income, and to apply these circumstances to the statutory definition of social condition and determine whether discrimination was established. This decision-making process involves questions of mixed fact and law and further suggests that the reasonableness standard is the appropriate standard of review.

[31] As a result, I am satisfied that the reasonableness standard is the appropriate one for the remaining issues on this appeal.

2. Did the adjudicator reasonably conclude that Mercer fell within the protected ground of "social condition"?

[32] The Appellant contends that the adjudicator erred in failing to take a purposive approach to social condition because she looked at the elements of social condition but not the overarching purpose of the term. In the Appellant's view, a disparity in wealth is not sufficient to engage social condition but what is required is a disadvantage that impacts the ability of a person to obtain the necessities or essentials of life. The purpose of social condition is to protect those who are disadvantaged to the point of being deprived of the necessities of life from discrimination.

[33] The adjudicator's decision was based upon a consideration of the constituent elements of the definition of social condition as well as the purpose of the legislation. In my view, her approach and her conclusions were reasonable in the circumstances.

[34] Discrimination on the basis of social condition is one of the prohibited grounds of discrimination under s. 5(1) of the *HRA*. Social condition is defined in section 1 of the *HRA* as meaning:

> "social condition" ...the condition of inclusion of the individual, other than on a temporary basis, in a socially identifiable group that suffers from social or

> economic disadvantage resulting from poverty, source of income, illiteracy, level of education or any other similar circumstance.

[35] Social condition was included in the prohibited grounds of discrimination when the *HRA* was enacted in 2002. After second reading in the Legislative Assembly, Bill 1 (which became the *HRA)* was referred to the Standing Committee on Social Programs for review. It was noted by the Committee, at page 9 of its report, that the term social condition "is an imprecise term that will, over time, become unambiguous through interpretation by adjudicators and courts."

[36] Prior to this case, there had not been any interpretation of the term and the exact scope of social condition in the context of the *HRA* remained imprecise and ambiguous.

[37] Quebec and New Brunswick are the only two other jurisdictions in Canada which include social condition as a prohibited ground of discrimination. Quebec, however, does not have a statutory definition of social condition.

[38] The *New Brunswick Human Rights Code* includes a definition of social condition which is similar to, but not exactly the same, as the definition in the *HRA*:

> ...the condition of inclusion of the individual in a socially identifiable group that suffers from social or economic disadvantage on the basis of his or her source of income, occupation or level of education.[3]

[39] The New Brunswick Human Rights Commission adopted a Guideline on Social Condition on January 27, 2005 to set out their position on discrimination on the basis of social condition. At page 4, seasonal workers are included in a list of occupations that might constitute socially identifiable groups that suffer from social or economic disadvantage. Further, employment insurance is listed as an example of a source of income that might be associated with socially identifiable groups that suffer from social or economic disadvantage.

[40] According to the New Brunswick Human Rights Commission, only one of the factors: source of income, occupation, or level of education is required in order for discrimination on the basis of social condition to be established.

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[3] Section 2 of the *Human Rights Code*, RSNB 2011, c. 171.

[41] While there is no case-law interpreting the term, the approach adopted by the New Brunswick Human Rights Commission suggests that the term is to be given a broad and liberal interpretation in accordance with human rights principles.

[42] In reaching her decision, the adjudicator noted that there was little jurisprudence interpreting the term social condition. The adjudicator then looked to the statutory definition of social condition and considered the constituent elements of the definition and whether Mercer met each element.

[43] In *Sullivan on the Construction of Statutes*, 5th Ed. (2008), at p. 24, the following propositions which guide modern statutory interpretation are noted:

1. It is presumed that the ordinary meaning of a legislative text is the meaning intended by the legislature. In the absence of a reason to reject it, the ordinary meaning prevails.
2. Even if the ordinary meaning is plain, courts must consider the purpose and scheme of the legislation; they must consider the entire context.
3. In light of these considerations, the court may adopt an interpretation that modifies or departs from the ordinary meaning, provided the interpretation adopted is plausible and the reasons for adopting it are sufficient to justify the departure from ordinary meaning.

[44] In considering social condition, it is necessary to consider the ordinary meaning of the words while keeping in mind the context; the purpose and scheme of the legislation cannot be ignored. Where there is a statutory definition of a prohibited ground of discrimination, it is necessary to consider the definition of the prohibited ground and whether the claimant falls within that definition.

[45] The adjudicator, reviewing the evidence before her, reasonably concluded that:

a) Mercer belonged to a **socially identifiable group** which consists of seasonal workers who live in areas of high unemployment, are required to work away from home, who earn less than national and provincial average salaries, and have lower education levels with fewer job opportunities;
b) his inclusion in the group was over a number of years and **not on a temporary basis**;

c) the group suffered both **economic and social disadvantage** (the adjudicator recognizing that only one was required to meet the definition); and
d) the disadvantage **resulted from low education levels and source of income**.

[46] The Appellant's contention that social condition is engaged by a disadvantage which impacts the ability of a person to obtain the necessities of life is not supported by a consideration of the definition of social condition. The adjudicator recognized this when she stated at pages 11-12 of her decision:

> In an article published in the Saskatchewan Law Review in 2006, Murray Wesson argued for a definition of "social condition" that refers to poverty or reliance on welfare for the basic necessities of life. Based on the definition of "social condition" in the Act alone, it is clear that the legislators intended to expand the term beyond this narrow and limiting concept.

[47] It is clear from the definition of social condition that social condition is a complex concept with a number of factors. However, it is also clear that the wording used is intentionally broad and that the definition was not intended to be narrowly construed.

[48] Social condition involves more than a low income or a low education level; it also refers to the position that someone holds in society. As stated in *Quebec (Comm. Des droits de la personne) c. Whittom*, 20 C.H.R.R. D/349 (Q.H.R.T.) at para. 14:

> "Social condition" refers to the rank, place, position that a person holds in our society, through birth, income, level of education, occupation; all the circumstances and events that mean a person or group has a certain status or position in society.

[49] This approach suggests that a broad interpretation of social condition is appropriate. In this case, the adjudicator considered more than just the elements of the definition of social condition; her interpretation of social condition was also an expansive one. At page 11 of her decision, she stated:

> I am keenly aware that I am taking a broad perspective on the interpretation of "social condition" in the Act... human rights legislation is to be given a liberal and purposive interpretation, keeping in mind that one of the central purposes of such legislation is to advance human rights.

[50] In considering social condition under the *HRA*, the approach of the adjudicator was a reasonable one; she considered the statutory definition as well as the purpose of the legislation. Her decision that Mercer fell within the definition of social condition was within the range of acceptable and rational solutions.

3. Did the adjudicator reasonably find that Mercer was subject to "discrimination" under the *Human Rights Act*?

[51] Aside from the issue of social condition, there is also the major issue of whether Mercer was subject to discrimination within the meaning of the *HRA*. In order to answer this main question, it is necessary to address a number of sub-issues:

<u>The test for discrimination under the *HRA*</u>

a) Can the WCB resile from their position before the adjudicator?
b) Did the adjudicator select the appropriate test for discrimination?

<u>Discrimination in this case</u>

c) Did the adjudicator reasonably conclude there was discrimination in this case?

I. Was there a service customarily available to the public?
II. Is the complainant a member of a group possessing a characteristic or characteristics protected under the *HRA*?
III. Was the complainant denied the service or discriminated against in the provision of a service?
A. Did the adjudicator select the appropriate comparator group?
IV. Was the protected characteristic was a factor in the denial or discrimination?

d) Did the adjudicator fail to consider the purpose of the government program in her analysis?

<u>The test for discrimination claims under the *HRA*</u>

[52] The Appellant claims that the adjudicator erred in applying the incorrect test for discrimination. The adjudicator should have applied the *Law*[4] test developed by the Supreme Court of Canada in section 15 *Charter* jurisprudence rather than the *prima facie* discrimination test established in *O'Malley v. Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536.

[53] The Respondent claims that the Appellant took the position before the adjudicator that the *Law* test was not applicable and cannot now resile from that position. I agree. In any event, the test selected by the adjudicator was the appropriate test.

a) Can the WCB resile from their position before the adjudicator?

[54] One of the issues before the adjudicator was the test to be used in a claim of discrimination pursuant to the *HRA*. As this was the first case heard under the *HRA*, the issue had not yet been determined. Also, the issue of whether the *Law* test was applicable for claims under human rights legislation was an unsettled issue overall in Canada.

[55] In a judicial review, parties are generally not permitted to raise issues which were not raised before the tribunal: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 23; *Legal Oil and Gas Ltd. V. Alberta (Surface Rights Board)*, [2001] A.J. No 817 (C.A.) at para. 12. Similarly they cannot resile at will from their position at trial. *Mallett v. Alberta (Motor Vehicle Accident Claims Act, Administrator)*, 2002 ABCA 297.

[56] The Commission took the position before the adjudicator that the *Law* test was not applicable and that the *prima facie* discrimination test should be used. Counsel for the WCB stated "I agree with the Commission that the section 15 analysis should not be applied to a case under the *Human Rights Act*, that's the *Law* analysis." He then went on to suggest that the adjudicator adopt the test developed in *Hodge v. Canada (Minister of Human Resources Development*), [2004] 3 S.C.R. 357.

[57] In this case, it was clear that the choice of test was in issue before the adjudicator. The WCB seeks not to raise the issue for the first time but has changed

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[4] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

their position on the issue. The WCB said *Law* was not applicable and now they are saying that it is. No explanation is offered for this change other than the adjudicator made a decision on the applicability of the *Law* test so this should be reviewed because of the importance of the issue. While it is an important issue, the WCB cannot now claim that the adjudicator erred in rejecting the *Law* test when they agreed that the *Law* test was not applicable.

b) Did the adjudicator select the appropriate test for discrimination?

[58] Despite my finding above, I will continue to consider this issue for two reasons:

1) The adjudicator's decision was made in 2007. Since then, there have been a number of decisions on this issue which the adjudicator would not have had the benefit of their reasons; and
2) Despite the recent decisions, the issue is not settled and human rights adjudicators may benefit from further guidance on the appropriate test to be utilized.

[59] The Appellant claims that the appropriate test is the one which has developed under section 15 *Charter* jurisprudence. This test was referred to as the *Law* test and has now been modified in *R. v. Kapp*, [2008] 2 S.C.R. 483. While the analysis can be complex, it was summarized in *Kapp*, *supra* at para. 17 as being a two-part test:

1) Does the law create a distinction based on an enumerated or analogous ground?
2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

[60] The adjudicator considered the applicability of both the *Law* test and the *prima face* discrimination test. The *prima face* discrimination test, which was established in *O'Malley* was the generally accepted test for determining a *prima facie* case of discrimination prior to *Law* and had four parts:

1) There is a service customarily available to the public;
2) The complainant is a member of a group possessing a characteristic or characteristics protected under the *Code*;

3) The complainant was denied the service, or was discriminated against in the provision of a service; and
4) The protected characteristic was a factor in the denial or discrimination. (As stated in *British Columbia (Ministry of Education) v. Moore*, 2010 BCCA 478 at para. 36)

[61] The adjudicator agreed with parties' submission that *Law* was not applicable for three reasons. First, the Supreme Court of Canada had ruled on other human rights cases since *Law* and had not referred to the *Law* analysis. Second, leave to appeal to the Supreme Court of Canada was denied in a case in which the *Law* analysis was applied. Third, the applicability of the *Law* analysis in human rights cases had been questioned on the basis that human rights legislation had to be given a broad and purposive interpretation which was inconsistent with the *Law* analysis.

[62] Since the decision of the adjudicator, *Moore* and a number of other cases have considered the specific issue of what test should be applicable in claims of discrimination pursuant to human rights legislation. The Supreme Court of Canada has not expressly stated, in any human rights case since *Law*, that the *Law* analysis has replaced the traditional *O'Malley* analysis. While the issue remains unclear, in *Moore*, the court's view was that the proper approach to assessing discrimination claims brought under human rights legislation was the traditional analysis established in *O'Malley*: *Moore*, *supra* at paras. 49, 51 and 164.

[63] The *prima facie* discrimination test from *O'Malley* has also been preferred to the *Law* analysis in discrimination claims pursuant to human rights legislation by tribunals and other appellate courts: *Kelly v. British Columbia (Ministry of Public Safety & Solicitor General)*, 2011 BCHRT 183; *Armstrong v. British Columbia (Ministry of Health)*, 2010 BCCA 56; *Ontario (Director of Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593.

[64] In *Tranchemontagne*, the court noted (at para. 88) that there were fundamental differences between the protections afforded under section 15 of the *Charter* and under provincial human rights legislation, specifically:

1) The nature of the legislation
2) The scope of the guarantees provided
3) The circumstances in which the guarantees will apply
4) The specific exemptions or defences which are available

[65] While both the *Charter* and human rights legislation deal ultimately with discrimination, the differences between the two mean that "the precise nature of the evidence to be led and the stringency of the test to be applied to establish discrimination may vary and ultimately will depend significantly on the context." *Tranchemontagne, supra* at para. 89.

[66] These differences suggest that there is validity in maintaining two separate tests: one for claims under section 15 of the *Charter* and another for claims under human rights legislation.

[67] While there are differences, *Charter* equality rights and human rights legislation are ultimately concerned with the same thing, discrimination. Thus, the evolution of the jurisprudence for both *Charter* claims and human rights claims has meant that many of the same considerations are applicable for each.

[68] The more recent analysis has adopted the traditional test, the *prima facie* discrimination test, while being informed by the principles which have been developed through *Charter* equality cases: *Moore, supra* at para. 51 and 54; see also *Tranchemontagne, supra.*

[69] The adjudicator recognized that there was a distinction in discrimination claims under the *Charter* and human rights legislation and the analysis that had developed for each when she stated at page 14 of her decision:

> As already indicated, human rights legislation is to be given a broad and purposive interpretation. Anything that narrows the interpretation of human rights legislation, and imposes additional requirements on complainants, will serve to limit its effectiveness in protecting and preserving human rights. The *Law* analysis is inconsistent with the intentions of the Act.

[70] Based on the foregoing, I agree that appropriate test is the one developed in *O'Malley*. The *prima facie* discrimination analysis has been developed to address the specific requirements of human rights legislation and should be used to assess claims of discrimination under the *HRA*. Section 15 *Charter* principles should not be ignored and may be helpful to guide the analysis. The decision of the adjudicator was appropriate and her approach to determining the issue was reasonable.

Discrimination in this case

c) Did the adjudicator reasonably conclude there was discrimination in this case?

[71] The Appellant claims that, regardless of which test is used, there was no discrimination in this case. A difference in quantum of WCB benefits based upon the comparator group suggested by either party is not sufficient to establish discrimination. Government benefit programs, like workers' compensation, will not perfectly match the actual needs of a claimant and these programs inevitably have to draw lines on factors like income. The resulting difference in quantum between seasonal and permanent workers is not sufficient to ground a conclusion of discrimination.

[72] Government benefit programs do need to have eligibility criteria and it may be necessary to draw lines. However, those lines cannot have the effect of discriminating against a claimant on the basis of a prohibited ground. The adjudicator considered each element of the *prima facie* discrimination test and determined that each had been met. In my view, while I have a concern about the adjudicator's failure to consider the purpose of the workers' compensation program, which I will address later, the adjudicator's conclusions on the issue of whether discrimination had been established on the basis of social condition were reasonable.

I. Was there a service customarily available to the public?

[73] The adjudicator concluded that WCB compensation is a service generally available to the public. This issue was conceded before her and there is no issue that this conclusion was reasonable.

II. Is the complainant a member of a group possessing a characteristic or characteristics protected under the *HRA*?

[74] The adjudicator concluded that Mercer was a member of a group protected under the *HRA* on the basis of social condition. As previously stated, the adjudicator's conclusion on this issue was reasonable.

III. Was the complainant denied the service or discriminated against in the provision of a service?

[75] The issue was not that the complainant had been denied a service; he received WCB benefits, although in an amount less than he claimed. The issue was whether there had been discrimination against the complainant in the provision of the service. The adjudicator began her analysis of discrimination by selecting a comparator group.

A. Did the adjudicator select the appropriate comparator group?

[76] The Appellant claims that the adjudicator created a comparator group with irrelevant characteristics and used a false comparison between seasonal and permanent workers.

[77] The adjudicator selected a comparator group which did not have the characteristics that defined Mercer's social condition. While I may have selected a different comparator group, the adjudicator's choice of comparator group was reasonable in the circumstances. Moreover, recent caselaw suggests that comparison analysis may not be necessary in human rights cases. The important factor is that there is a distinction based upon a prohibited ground which creates a disadvantage.

[78] The adjudicator's conclusion was that Mercer's social condition was characterized by his membership in a group which included: seasonal workers who lived in high areas of unemployment; were required to work away from home, and often outside their province; earned less than national and provincial average salaries; had lower education levels and fewer job opportunities; and relied on EI to supplement their income. These factors established the parameters of what the adjudicator considered appropriate for a comparator group; essentially, workers who did not have these characteristics.

[79] The adjudicator reasonably concluded that social condition, in Mercer's circumstances, consisted of these factors. In determining an appropriate comparator group, it was reasonable for her to consider a comparator group which did not have those same characteristics.

[80] Since the adjudicator's decision, a number of cases have questioned the need for mirror comparator groups and the applicability of comparison analysis in human rights analysis.

[81] The adjudicator relied upon the Supreme Court of Canada's decision in *Auton (Guardian ad litem) v. British Columbia (Attorney General)* (2004), 245 D.L.R. (4th) 1 to select the appropriate comparator group. *Auton* called for mirror comparators which were to be exactly like the claimant except for the characteristic which was the basis for the claim of discrimination.

[82] Since then, the Supreme Court of Canada has moved away from the mirror comparator concept and, in *Withler v. Canada (Attorney General)*, 2011 SCC 12, stated at para. 62-63:

> The role of comparison at the first step is to establish a "distinction". Inherent in the word "distinction" is the idea that the claimant is treated differently than others. Comparison is thus engaged, in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds.
>
> It is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination. Provided that the claimant establishes a distinction based on one or more enumerated or analogous grounds, the claim should proceed to the second step of the analysis.

[83] In recent cases where claims have been brought under human rights legislation, it has been suggested that comparator groups are not required: *Moore, supra* at para. 112; *Ford v. Lavender Co-operative Housing Assn.*, 2011 BCCA 114; *Lane v. ADGA Group Consultants Inc.*, 2008 CarswellONT 4677 (Ont. S.C.J.). While discrimination claims inevitably involve some form of comparison, there is no longer a strict requirement for formal or mirror comparator groups.

[84] Considering the adjudicator's choice of a comparator group and the recent caselaw, her approach and selection of a comparator group were still reasonable. What is important is that, on any comparison analysis, there is a distinction on the basis of EI benefits which is one of the foundations of Mercer's social condition.

[85] The Appellant, as previously stated, contends that there was no discrimination because government benefit programs, like workers' compensation, need to draw lines on factors like age or income. In addition, a difference in quantum of income is not sufficient to engage discrimination.

[86] The adjudicator found that when comparing Mercer to the comparator group that it was clear that he "has been subject to a policy that fails to take into account [Mercer's] already disadvantaged position within Canadian society." (at page 15)

[87] The adjudicator noted that the WCB policy was deficient because it failed to recognize that individuals like Mercer were reliant on EI as part of their yearly income; failed to recognize that EI benefits are capped which has a negative economic impact on the group, which the WCB policy further reinforces by failing to take EI benefits into account; and reinforced the stereotype that individuals like Mercer chose to receive EI benefits rather than work.

[88] Government benefit programs are designed to benefit different individuals and have to limit eligibility on various factors. The question is whether the "lines drawn are generally appropriate, having regard to the circumstances of the persons impacted and the objects of the scheme": *Withler*, *supra* at para. 67.

[89] Workers' compensation is designed to compensate workers who are accidentally injured during the course of employment. The WCB benefits, as stated above, are determined based upon the income of a worker. Therefore, a workers' income is critical to their remuneration. The distinction between a seasonal worker and permanent worker, which is ultimately the distinction in this appeal, is not relevant in determining eligibility for workers' compensation. If a worker is injured, provided that they meet the eligibility criteria, their status as a seasonal or permanent does not matter. Yet it does for the purposes of determining income.

[90] For permanent workers, the WCB policy bases their compensation on their salary at the time of the injury, regardless of how long they have worked and whether they have received EI benefits in the previous 12 months. For a seasonal worker, the WCB policy bases their compensation on their actual earnings in the previous 12 months, excluding EI benefits which may have been received.

[91] The apparent rationale for the distinction is that the WCB considers actual earnings which result from work. The policy overlooks that, in order to receive EI benefits, a recipient is required to work a minimum number of hours and has to be available for work; work is also the basis for the EI system.

[92] WCB argues that EI benefits are not considered for any injured workers. However, this ignores the distinction the policy makes between seasonal workers and permanent workers. This distinction in treatment created a disadvantage when

considering the social condition, as defined by the adjudicator, of individuals like Mercer. Social condition, in Mercer's case, involved EI benefits functioning as an unfortunate, but necessary, part of his income. The adjudicator considered both social and economic disadvantage and concluded that they had been established. Economic disadvantage resulted from the failure to include EI benefits in calculating Mercer's WCB remuneration. Social disadvantage resulted from the societal attitudes which were often held towards individuals in Mercer's situation.

[93] The effect of the WCB policy was that Mercer did not receive the same level of benefits as a permanent worker because he had not worked for a full twelve months before his accident, regardless of whether he was willing and able to work in that period. The adjudicator noted that Mercer was willing to work but that his employment was seasonal in nature and he could not find permanent work or work for the full year. The difference in benefits may be small but the exclusion of EI benefits served to reinforce the economic disadvantage that Mercer suffered.

[94] Overall, the adjudicator was aware of the particular aspects of Mercer's situation and how the WCB policy affected his social condition and her analysis and conclusions on discrimination were reasonable.

IV. Was the protected characteristic a factor in the denial or discrimination?

[95] The adjudicator's analysis of this issue was conflated with the analysis of whether there was discrimination. As a result, her conclusion was stated at page 16 as "It goes without saying that, based on the above analysis, the discrimination (or differential treatment) was based on membership in the protected group."

[96] Again, this conclusion was reasonable based upon her analysis of the other issues.

d) Did the adjudicator fail to consider the purpose of the government program in her comparison analysis?

[97] The Appellant contends that the adjudicator failed to consider the purpose of workers' compensation which is the starting point in the analysis of a discrimination complaint. The Appellant points out that there is no mention of the purpose of

workers' compensation in the adjudicator's decision and contends that this demonstrates that she did not consider the purpose of the government program in her analysis.

[98] The adjudicator's written decision does not contain any analysis of the legislative scheme that gave rise to the discrimination complaint. The only passing reference to the purpose of workers' compensation is at page 14 where the adjudicator writes "counsel have agreed that WCB compensation is a service generally available to the public." This was stated by counsel for the Commission at the outset of the hearing.

[99] The consideration of whether a service is generally available to the public requires consideration of the service and applicable legislation: *Moore, supra* at para. 93. Additionally, analysis of a human rights claims requires a contextual analysis. The context is important because not all distinctions which create a disadvantage are discriminatory: *Tranchemontagne, supra* at para. 93.

[100] While the agreement that WCB was a service generally available to the public removed the need to consider the workers' compensation scheme at that stage of the analysis, it was still important to consider in the overall context of the discrimination claim. In this case, the context was the worker who has been injured in the course of his employment and was seeking workers' compensation but has received a reduced benefit because of his social condition. This requires not just a consideration of social condition and the EI scheme, which was discussed by the adjudicator, but also consideration of the workers' compensation scheme. In my view, this was an error that was not reasonable.

[101] Section 66(2) of the *HRA* allows me to "make an order that affirms, reverses or modifies the order of the adjudicator, and make any other order that the Supreme Court considers necessary." This broad power permits me many options when confronted with an error by an adjudicator.

[102] I have considered several options and have determined that, despite the error, the decision of the adjudicator should be affirmed. Her reasoning and conclusions on all of the other issues were justified, transparent and intelligible. Overall, her decision was reasonable. I have considered the purpose of the workers' compensation scheme in my analysis of the discrimination claim and in the overall context of the appeal. This consideration does not change the reasonableness of the adjudicator's decision. The exclusion of a Mercer's EI benefits from the

calculation of income for the purposes of determining his WCB remuneration constituted discrimination on the basis of his social condition.

Conclusion

[103] Based on the foregoing reasons, the appeal is dismissed.

[104] The issue of costs was not fully argued before me. At the hearing, counsel preferred to address the issue of costs after the Reasons for Judgment were filed in this and the companion case (*Mercer* v. *WCB et al.*, 2012 NWTSC 58). Therefore, I will give counsel an opportunity to speak to costs and counsel are directed to do the following:

> 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: Sacha R. Paul
Counsel for the Respondent Mercer: Austin F. Marshall
Counsel for the Respondent
Northwest Territories Human Rights Commission: Ayla Akgungor

S-1-CV-2007000187

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

WORKERS' COMPENSATION BOARD OF THE
NORTHWEST TERRITORIES AND NUNAVUT

Appellant

- and -

PHILLIP MERCER AND NORTHWEST TERRITORIES
HUMAN RIGHTS COMMISSION

Respondents

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