Citation: McCare Global Healthcare Services Inc v The Workers Compensation Board of Manitoba, 2022 MBCA 50
Date: 20220526
Docket: AI21-30-09669

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Madam Justice Diana M. Cameron
Mr. Justice Christopher J. Mainella

B E T W E E N:

MCCARE GLOBAL HEALTHCARE SERVICES INC.	)	***P. D. Edwards*** *and* ***E. L. M. Edwards*** *for the Appellant*
(Applicant) Appellant	)	***G. A. McKinnon*** *for the Respondent*
- and -	)	
THE WORKERS COMPENSATION BOARD OF MANITOBA	)	*Appeal heard and Decision pronounced:* ***May 13, 2022***
(Respondent) Respondent	)	*Written reasons:* ***May 26, 2022***

On appeal from 2021 MBQB 167

MAINELLA JA (for the Court):

[1] This judicial review appeal arises from an assessment dispute under *The Workers Compensation Act*, CCSM c W200 (the *Act*). At the end of the hearing, we dismissed the appeal with reasons to follow. These are those reasons.

[2] By way of background, the applicant is a health care services placement agency that supplies health care service providers, including nurses

and health care aides (service providers), to temporarily staff hospitals operated by various regional health authorities (RHAs) in Manitoba.

[3] The *Act* creates a scheme whereby the respondent assesses, levies and collects from employers to maintain an accident fund. In 2016, the respondent assessed the applicant as the employer of the service providers and an assessment premium was levied (retroactive to 2014). The applicant disputed the assessment, claiming that the service providers were independent contractors—not its workers.

[4] On April 22, 2020, the Manitoba Workers Compensation Board Appeal Commission (the Appeal Commission) determined that the service providers were "workers for the purposes of coverage under the Act" and that the applicant "[was] the employer."

[5] The applicant sought judicial review of the Appeal Commission's decision. The reviewing judge identified the applicable standard of review as being the "standard of reasonableness" (at para 22). He gave thoughtful and detailed reasons addressing the four main arguments raised by the applicant. He said that, "without reservation", the decision of the Appeal Commission was reasonable (at para 24).

[6] The applicant conceded that, while the reviewing judge chose the correct standard of review, the issue was whether he applied it properly (see *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras 45-47). As explained in *Northern Regional Health Authority v Horrocks*, 2021 SCC 42, "This approach accords no deference to the reviewing judge's application of the standard of review" (at para 10). Practically, to decide if the reviewing judge erred, this Court must review the

decision of the Appeal Commission on the standard of reasonableness (see *Inkster v The Workers Compensation Board of Manitoba et al*, 2021 MBCA 14 at para 7).

[7] Although the applicant raised several grounds of appeal, only one merits comment.

[8] The Appeal Commission was required to determine whether the service providers were "worker[s]" within the meaning of section 1(1) of the *Act*. The statutory definition of a "worker" includes a person who enters into a contract of service (i.e., an employee) or a person deemed to be a worker under subsection 60(2.1).

[9] The respondent has a policy, the "Status of Workers, Independent Contractors and Employers" (1 July 2019), Policy 35.10.50, section 30, online (pdf): *WCB* <www.wcb.mb.ca/sites/default/files/35.10.50%20Status%20of%20Workers%2C%20Independent%20Contractors%20and%20Employers.pdf> (date accessed 18 May 2022) (the policy), to assist in determining whether someone is a worker, deemed worker, employer or independent contractor under the *Act*.

[10] The applicant says that the Appeal Commission, guided by the policy, determined that the service providers were traditional workers, analogous to employees, using the common law approach of looking at the totality of the circumstances (see, generally, *671122 Ontario Ltd v Sagaz Industries Canada Inc*, 2001 SCC 59).

[11] The applicant argues that the consequence of that decision is that the Appeal Commission could not deem the applicant to be the employer under section 60(2.1) of the *Act*. It asserts that section 60(2.1) had no relevance once

its claim that the service providers were independent contractors was not accepted. Section 60(2.1) of the *Act* reads as follows:

> **Deemed worker and employer**
> **60(2.1)** Notwithstanding the other provisions of this Act, where a person who is not a worker under this Part performs work for the benefit of another person, the board may deem the first person to be a worker, and the second person to be the employer of the first person, within the meaning of this Act; and the board may determine an amount that shall be deemed to be the earnings of the first person, for the purpose of this Part.

[12] The applicant submits that the Appeal Commission was required to decide on the record if the applicant or the RHAs were the relevant employer. The applicant argues that the Appeal Commission's decision was unreasonable because it never made that decision; it simply relied on the deeming provision in section 60(2.1) of the *Act* to uphold the assessment against the applicant.

[13] In fairness to the reviewing judge, this argument was made to him in a fashion that, to a reasonable observer, would be considered to be a throw-away submission. We say that because this alleged error of the Appeal Commission is entirely absent from the applicant's written submissions on the judicial review. In oral submissions at the judicial review, counsel for the applicant said that the "meat and potatoes" of the dispute was whether the service providers were workers or independent contractors. Not surprisingly, counsel devoted the bulk of his submissions to issues related to that dispute. The transcript of the judicial review confirms that counsel for the applicant made a very brief and passing reference only to the Appeal Commission failing to decide between the applicant and the RHAs who was the relevant employer.

[14] While the Appeal Commission's misapplication of section 60(2.1) became the main point raised by the applicant in oral argument at the hearing of the appeal, its notice of appeal and factum dealt with the point summarily and only in oblique language. Indeed, the panel went so far as to challenge counsel for the applicant that he was raising a new argument on appeal.

[15] Counsel for the respondent appropriately underlined that new arguments should not be entertained on an appeal absent exceptional circumstances. Understandably, the respondent has not had an opportunity to respond to the merits of the refocused appeal, save in the most cursory of ways.

[16] It is well accepted that a judicial review is always a discretionary matter (see *Strickland v Canada (Attorney General)*, 2015 SCC 37 at para 37). Even if the applicant's section 60(2.1) argument had sufficient merit, which it does not, the unsatisfactory way in which the issues in this litigation have evolved would have given us serious pause to allow this appeal. As a general rule, a party to a judicial review must put their best case forward at the first opportunity. The public interest in the orderly administration of affairs and, in particular, the need for proportionality, finality and certainty in what is extraordinary litigation, means that an application for judicial review cannot resemble a dress rehearsal for a dramatic performance where a never-ending series of arguments are auditioned, one at a time, in the hopes of a successful casting.

[17] Despite the ill-defined and malleable course this litigation has taken, we are of the view that it is appropriate to consider the section 60(2.1) argument of the applicant, despite the reality that the respondent did not have a full opportunity to respond to the submission.

[18] There is no issue as to the reasonableness of the outcome reached by the Appeal Commission, given the legal and factual context. The applicant concedes that, if the service providers were traditional workers, then the relevant employer based on the scheme of the *Act*, the record and the submissions of the parties was either it or the RHAs (see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 83).

[19] In terms of the reasonableness of the reasoning process of the Appeal Commission, the starting point is that its reasons have to be read as a whole and in their legal and factual context with appropriate sensitivity to the administrative scheme and the expertise of the decision-maker (see *Vavilov* at paras 93, 97, 103).

[20] Although the main controversy the Appeal Commission had to decide was whether the service providers were workers or independent contractors, the respondent, in its submission to the Appeal Commission, made clear that, if the service providers were in a traditional working relationship with the applicant, analogous to being employees, it would "have to determine who their employer [was], whether it [was the applicant], or one or more other entities."

[21] It is not necessary to conclusively decide whether the Appeal Commission misapplied section 60(2.1) because, even if it did, we have not been persuaded that this was a material error that was sufficiently central or significant to render the decision unreasonable (see *Vavilov* at para 100).

[22] In deciding that the service providers were workers, the Appeal Commission considered an extensive factual record, which included contracts between the applicant and both the service providers and the RHAs, a

determination by the Canada Revenue Agency and oral evidence from representatives of the applicant.

[23] According to the reasons of the Appeal Commission, it was asked to examine the relationship between the service providers, the applicant and the RHAs "as a whole in an effort to determine whom, if anyone, the service providers [were] working for."

[24] In our view, a reasoned explanation for the Appeal Commission's decision—that the applicant was the relevant employer—can be adequately discerned from its reasons for decision (see *Vavilov* at paras 102-3).

[25] Central to the Appeal Commission's decision was its finding that the wording of the contracts between the applicant and the service providers, which described the relationship as one of an independent contractor, was not supported by "the totality of the relationship".

[26] In its reasons, the Appeal Commission found that the "work undertaken by the service providers [was] for the benefit of the [applicant]", the applicant was capturing a "profit" between what the RHAs paid for the service providers and what the applicant paid them, and that the work performed by the service providers was "integral to the [applicant's]" business model. The reason and logic implicit in these findings are that the applicant was the relevant employer. There is no other rational and logical conclusion that can be reasonably drawn given how the Appeal Commission weighed the evidence.

[27] The logic, coherence and rationality of that reasoning conforms to the fact that the standard terms of the contracts between the RHAs and the

applicant made clear that the applicant, not the particular RHA, was the employer of the service providers.

[28] *Vavilov* makes clear that the courts should be reluctant to undermine the efficiency of an administrative regime based on a standard of expected perfection from the decision-maker (see para 91). The concern for the Court is for "sufficiently serious shortcomings" in the decision (at para 100), not a "line-by-line treasure hunt for error" (at para 102).

[29] In the circumstances, we are satisfied that the Appeal Commission did reasonably decide that the applicant was the service providers' relevant employer in rejecting the applicant's independent contractor submission. Regardless of the Appeal Commission's superfluous comments about section 60(2.1), there is no reasonable possibility that the outcome would have been different had the alleged error not been made. In short, the Appeal Commission's reasoning that the applicant was the service providers' employer for the purposes of the *Act* "adds up" (*Vavilov* at para 104).

[30] In the result, the appeal is dismissed with costs.

Mainella JA

Beard JA

Cameron JA