NOVA SCOTIA COURT OF APPEAL

Citation: ***Guy v. Nova Scotia (Workers' Compensation Appeals Tribunal)***, 2008 NSCA 1

Date: 20080103
Docket: CA 268704
Registry: Halifax

Between:

Stanley Guy

Appellant

v.

Nova Scotia Workers' Compensation Appeals Tribunal and
The Workers' Compensation Board of Nova Scotia

Respondents

Judges: Roscoe, Bateman and Cromwell, JJ.A.

Appeal Heard: November 13, 2007, in Halifax, Nova Scotia

Held: Appeal dismissed per reasons for judgment of Cromwell, J.A.; Roscoe and Bateman, JJ.A. concurring.

Counsel: appellant in person
Alexander MacIntosh, for the respondent Nova Scotia Workers' Compensation Appeals Tribunal
Paula Arab and Madeleine Hearns, for the respondent The Workers' Compensation Board of Nova Scotia
Edward Gores, Q.C., for the respondent Attorney General of Nova Scotia not participating

Reasons for judgment:

I. INTRODUCTION:

[1] The Workers' Compensation Board (WCB) has a policy governing living allowances to be paid to injured workers who maintain a second residence during vocational rehabilitation; the WCB has also capped the room and board expense under the policy at $750 per month. The appellant contends that the cap is inconsistent with the **Workers' Compensation Act**, S.N.S. 1994-95, c. 10, as am. (**WCA**) and therefore invalid.

[2] In my view, the **WCA** permits the Board to impose this cap. I would dismiss the appeal.

II. OVERVIEW OF FACTS AND ISSUES:

[3] I will not go into the many different aspects of the worker's various claims and the WCB's responses to them. What is material to this appeal is that the WCB accepted the worker for vocational rehabilitation in the form of an educational program in Halifax. The worker moved here to pursue his course of study. The WCB undertook to provide him with a living allowance of $750 per month, the maximum amount provided for under the WCB's Policy 4.2.4 (now Policy 4.2.4R).

[4] The worker found that this amount was not sufficient. There is no issue that his position in this regard was anything other than a reasonable one in the circumstances. He requested an increase, but WCB refused because he was receiving the maximum amount permitted under the Policy.

[5] On the worker's appeal to the Workers' Compensation Appeals Tribunal (WCAT), one of the issues was whether this cap on the amount of the allowance imposed by the Policy was consistent with the **WCA**. WCAT found that it was. It reasoned that the WCB had a broad discretion with respect to such benefits under the **WCA** and that it had acted consistently with the **WCA** in exercising its discretion by means of the Policy.

[6] The Court granted the worker leave to appeal WCAT's decision on the issue of whether what is now Policy 4.2.4R, section 3, headed "Living Allowance," is

inconsistent with s. 112 of the **WCA**. Some other points were raised during the hearing of the appeal and I will address them as well.

III. ANALYSIS:

A. Standard of Appellate Review:

[7] The consistency of the policy with **WCA** is a question of law. It does not, in my view, engage to any great extent WCAT's expertise acquired through its highly specialized functions in the workers' compensation system. Both the nature of the question and how it relates to WCAT's expertise suggest less rather than more deference to WCAT's decision. When one takes into account the other factors which must be considered under the pragmatic and functional approach to determining the standard of review, none of them favours giving WCAT deference on a question of this nature: see, for example, **Nova Scotia (Department of Transportation and Public Works) v. Nova Scotia (Workers' Compensation Appeals Tribunal)("Puddicombe")**, 2005 NSCA 62, [2005] N.S.J. No. 137 (Q.L.) at para 15 - 20.

[8] Taking all of the factors into account, I agree with the respondent that the applicable standard of review here is correctness, the standard most favourable to the worker in the circumstances of this case. This means simply that the Court is entitled to substitute its own view of the law for WCAT's on this issue if persuaded that WCAT was wrong.

B. Is the Policy Inconsistent with the WCA?

1. Legal principles:

[9] The question of whether the Policy is inconsistent with **WCA** engages two legal principles.

[10] The first is that subordinate legislation must be authorized by a statute and not conflict with it. This is simply one aspect of the fundamental principle of legality: delegated power must be exercised within the limits granted by the legislature. If those limits are exceeded, the exercise of power is said to be *ultra*

vires – beyond the authority of – the delegate: see, e.g., David J. Mullan, **Administrative Law**, (Toronto: Irwin Law, 2001) at 141.

[11] The second principle is related to the first. Unless it has clear legislative authority, a decision-maker generally must exercise its statutory discretion having regard to the particular circumstances of the case before it; it must not exercise its discretion solely on the basis of general rules or policies without regard to those particular circumstances. This is often referred to as the principle that a decision-maker may not "fetter" its discretion: see, e.g. Donald J.M. Brown and John M. Evans, **Judicial Review of Administrative Action in Canada**, (Toronto: Canvasback Publishing, 1998 updated to July, 2007), vol 3, s. 12.4410 ff. As Brown and Evans point out, "[s]ome statutes confer express authority on agencies to formulate rules or guidelines that are legally binding. However, as with all grants of statutory authority, whether such powers confer authority to create rules that have the force of law, or merely guide the judgment of decision-makers in much the same way as those made without explicit statutory authority, will depend upon their construction.": para 12. 4422.

[12] The main question in this case is whether the **WCA** gives the WCB the authority to exercise its statutory discretion with respect to vocational rehabilitation benefits by means of policies which have the force of law. To answer that question, we must interpret the scope of the policy-making power conferred on the WCB as well as its powers to award living allowances.

2. Interpreting the legislation:

[13] As with the interpretation of any statute, the words of the **WCA** must "... be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of the [Legislature]": **Rizzo and Rizzo Shoes Ltd. (Re)**, [1998] 1 S.C.R. 27; Elmer A. Driedger, **The Construction of Statutes**, (Toronto: Butterworths, 1974) at 67.

[14] The WCB is entitled by s. 183 of **WCA** to adopt policies "consistent with" Part I of **WCA** and the regulations. These policies are expressly by statute binding on the WCB and on WCAT, although in the case of WCAT, only to the extent that they are consistent with **WCA** and the regulations: s. 183(5) and 183(5A). These policies are not, therefore, informal administrative guidelines. Because the WCB's

policies are specifically authorized and made binding by statute, they have more in common with subordinate legislation than with administrative policies and guidelines which are not specifically authorized or binding. In short, within the workers' compensation system, these policies, by express statutory provision, have the force of law. The legislature could not more clearly have evidenced its intent that the WCB has the authority to make policies which are binding to the extent that they are not inconsistent with the **WCA** or the regulations under it.

[15] Section 112 of **WCA** provides that the Board "may make any expenditures and take any measure that, in the Board's opinion, will (a) aid injured workers in returning to work; and (b) reduce the effects of workers' injuries." Two things are striking about this provision.

[16] The first is that it confers an extremely broad discretion on the Board to make expenditures provided that the Board thinks they will help injured workers return to work or reduce the effects of their injuries. Secondly, this discretion is concerned with the expenditure of funds generally; the discretion is not conferred in the context of a provision which creates a specific benefit for which individual workers may be eligible.

[17] In this respect, s. 112 is distinct from other provisions of the **WCA** which confer entitlement to certain sorts of benefits and set out in detail how they are to be determined. Examples of this sort of provision may be found in the sections of **WCA** dealing with permanent impairment benefits (ss. 34 - 36) and earnings replacement benefits (ss. 37 - 48). In both cases, the statute confers entitlement to the benefit ("the Board <u>shall pay</u> to the worker a permanent-impairment benefit": s. 34(1); "an earnings-replacement benefit <u>is payable</u> to the worker": s. 37(1)) and sets out in some detail how the amount of the benefit is to be calculated. Unlike these provisions, s. 112 does not establish a particular benefit to which a worker is or may be entitled or how its amount is to be determined. Rather, the section confers a discretion on the WCB to make expenditures for the broadly-stated objectives set out in the section. Thus, the discretion conferred on WCB by s. 112 is not to award particular benefits in a specific case, but rather a discretion to spend money for broadly stated purposes.

[18] This understanding of s. 183 and s. 112 of **WCA** is consistent not only with the grammatical and ordinary sense of the words of theses sections, but also with

the overall scheme and purpose of the **WCA**. The WCB is given broad powers to manage the Accident Fund out of which benefits are to be paid and to give shape, by regulation and by policy, to many of the benefits contemplated by the **WCA**: see, for example, s. 114 ff, s. 10(8), s. 184; **Boyle v. Workers' Compensation Board (Nova Scotia)**, 2004 NSCA 88, 225 N.S.R. (2d) 69 at paras. 47-51 and para. 68. Within the scheme of the **WCA**, policies are intended to provide the WCB with a means to bring clarity, predictability, consistency and a measure of financial control over the process of awarding benefits.

3. The policy:

[19] The Policy itself provides that when the worker is involved in a vocational rehabilitation program or service, the WCB may reimburse the worker for travel expenses "in accordance with the provisions" of the Policy: section 1. Section 3 of the Policy, the part in issue here, provides that when, in the Board's discretion, it is appropriate for a worker to relocate and maintain a second residence for the duration of his/her vocational rehabilitation program, a vocational rehabilitation counsellor may authorize a living allowance in the form of reimbursement for room and board expenses to a maximum of $750/month, which is considered to include the costs of rent, basic utilities, meals and travel expenses: section 3.

[20] There is no issue here about whether the Policy is being applied in accordance with its terms. What is in question is whether section 3 of the Policy itself is consistent with the **WCA**.

4. Applying the principles:

[21] The question, then, is whether the Policy is inconsistent with **WCA**. The appellant's position, in effect, is that **WCA** requires that the broad discretion in s. 112 be exercised on a case-by-case basis, unfettered by binding policies such as section 3 of Policy 4.2.4 which imposes a cap on reimbursement for living expenses. I cannot accept this position, taking into account the following three points.

[22] First, as noted, the **WCA** expressly gives the WCB authority to make policies which are binding and therefore have the force of law. This authority to make binding policies in itself shows that the legislature intended the WCB to have

the ability to fetter its own decision-making discretion in some respects by making policies to be applied in all cases. I agree with the submission by the WCB that it has a broad mandate to adopt policies that contain limiting provisions provided that they are not inconsistent with the **WCA**.

[23] Second, the discretion conferred on the WCB by s. 112 with respect to spending funds on vocational rehabilitation is extremely wide. It permits the WCB to spend money for broadly stated purposes but does not create any particular sort of benefit or confer any entitlement on workers to receive, or even to apply for, particular benefits. As noted earlier, this is not a discretion addressing a benefit to be paid to a particular worker, but rather it addresses certain types of expenditures for certain broad purposes.

[24] Third, I do not see any inconsistency between s. 112, on the one hand, and on the other, policy 4.2.4R, section 3, which of course must be consistent with the **WCA** and regulations. Section 112 gives the WCB the power to decide how much money, if any, it will spend and, within the broadly stated purposes set out in the section, on what to spend it. As counsel for the WCB properly noted, Policy 4.2.4R, section 3, defines and sets parameters around that discretion. This, in my view, is not inconsistent with the type of discretionary expenditure authority conferred on the WCB by s. 112. Rather, when one looks at the scheme of the **WCA** as a whole, this appears to be a situation in which the legislature has chosen to leave the definition of these benefits largely to the WCB by exercising its regulation and/or policy-making powers.

[25] I conclude, therefore, that section 3 of Policy 4.2.4R is authorized by s. 183 of the **WCA** and is not inconsistent with s. 112.

[26] I will mention briefly some other points that were raised during the hearing of the appeal.

[27] The worker submitted that the Policy limiting living allowances to $750 per month was an unreasonable and arbitrary exercise of the discretion conferred by s. 112. I cannot agree. The WCB, in my view, is entitled to decide how much, if any, money from the Accident Fund will be devoted to living allowances. While the cap it has set will be insufficient in some cases, it is not in my opinion so

inadequate across the board as to be arbitrary or unreasonable in relation to a second residence.

[28] The worker also submits that the amounts payable under this Policy should be revised and updated as the WCB has done with respect to other types of reimbursements. While I can certainly understand the worker's position on this point, the question of when various benefits should be reviewed and adjusted upwards is a matter for the WCB, not the Court, to decide.

[29] The worker further submitted that an individual could be placed in an impossible situation because of an inadequate living allowance. The WCB under s. 113 has the power to suspend, reduce or terminate compensation if a worker fails to co-operate in the development or implementation of a rehabilitation program. The situation could arise in which a worker was given inadequate means to pursue a rehabilitation program and yet have benefits cut off for failing to do so. This point was not considered by WCAT and I am not persuaded on the record we have that this scenario is what has occurred in this case. I would simply note that, if a worker were able to demonstrate that he or she had been forced by the WCB to pursue a particular vocational rehabilitation program and yet the worker could not reasonably be expected to do so on the available resources, different legal considerations than the ones I have discussed and applied here might well be relevant.

IV. DISPOSITION:

[30] I would dismiss the appeal.

Cromwell, J.A.

Concurred in:
Roscoe, J.A.
Bateman, J.A.