NOVA SCOTIA COURT OF APPEAL

Citation: *Canada Post Corporation v. Nova Scotia (Workers' Compensation Appeals Tribunal)* , 2004 NSCA 83

Date: 20040617
Docket: CA 203322
Registry: Halifax

Between:

Canada Post Corporation

Appellant

v.

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

Respondents

Judges:	Bateman, Cromwell and Fichaud, JJ.A.
Appeal Heard:	June 2, 2004, in Halifax, Nova Scotia
Held:	Appeal allowed per reasons for judgment of Cromwell, J.A.; Bateman and Fichaud, JJ.A. concurring.
Counsel:	Jan E. McKenzie, Q.C. and Rebekah L. Powell, for the appellant Louanne Labelle, for the respondent Tribunal Paula Arab and Madeleine Hearns for the respondent Board Richard Melanson, for the respondent Robert Nurnber

Reasons for judgment:

I. Introduction:

[1] This case raises difficult issues concerning workers' compensation claims for gradual onset stress under the **Government Employees Compensation Act**, R.S.C. 1985, c. G-8 ("**GECA**").

[2] Robert Nurnber, a long time employee of Canada Post Corporation, made a claim for workers' compensation benefits in October of 2001. He said that he was disabled by stress which he suffered as a result of ongoing workplace harassment. His claim was rejected by a Hearing Officer but that decision was set aside and the claim was recognized by the Workers' Compensation Appeals Tribunal ("WCAT"). Canada Post appeals by leave to this Court.

II. Issues:

[3] The order granting leave to appeal specified the following grounds:

> 1. The Tribunal erred in law by using the wrong test to determine if the psychological condition of the Claimant was an "injury by accident arising out of and in the course of his employment" under the *Government Employees' Compensation Act*, R.S.C. 1985, c. G-5.
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> 2. The Tribunal erred in law by finding that the evidence on the record supported the conclusion that the psychological condition of the Claimant was an "injury by accident arising out of and in the course of his employment" under the *Government Employees' Compensation Act*, supra.

[4] The Hearing Officer and WCAT agreed that the worker suffered from a psychological disability. That concurrent finding is not challenged on appeal. Underlying the appeal is the basic question of whether gradual onset stress is an injury by accident arising out of and in the course of employment within the meaning of **GECA**, s. 4(1)(a)(i) . This basic question has several aspects, not all of which have been fully argued in this case.

[5] First, there is the question of whether the exclusion of gradual onset stress claims in s. 2(a) of the provincial **Workers' Compensation Act**, S.N.S. 1994-95,

c. 10, as amended ("**WCA**") applies to **GECA** claims. This turns on the interpretation of our decision in **Cape Breton Development Corp. v. Morrison (Estate) et al.** (2003), 218 N.S.R. (2d) 53; 2003 NSCA 103; leave to appeal dismissed [2003] S.C.C.A. 525. This point has been fully argued in this appeal.

[6] Second, there is the question of whether gradual onset stress is an injury by accident within the meaning of **GECA**. Although the parties have touched on this point in their submissions, it has not been the main focus of the argument at any stage of this case.

[7] Third, there is the question of how to determine whether the stress arose out of and in the course of employment. I shall refer to this as the causation issue. In this case, WCAT thought that it should attorn to the balance of expert opinion on this issue and decided that the actual nature of the workplace incidents and how others perceived them were irrelevant.

[8] Fourth, and assuming gradual onset stress claims are not entirely excluded, there is the question of what the test for recognition of gradual onset stress claims should be. The contest here is primarily between a three-part test arising from some Ontario workers' compensation decisions and sometimes applied by WCAT (see, for example, **Tribunal Decision No. 2002-601-AD** (Feb. 28, 2003, NSWCAT) and a variant of that, a two-part test, which was used by WCAT in this case. One of the major differences between these two approaches is that the former requires that the employee's reaction to the workplace incidents be reasonable whereas the approach adopted by WCAT in this case rejects this requirement.

III. Analysis:

[9] I will address these four issues in turn.

1. The **Morrison** issue:

[10] As noted, the definition of accident in the Nova Scotia **WCA** excludes stress "...other than an acute reaction to a traumatic event.": s. 2(a). Thus, gradual onset stress claims are specifically excluded. Does this exclusion apply to claims under **GECA**? The short answer, in my opinion, is that it does not matter. I will explain.

[11] The purpose of **GECA** is to provide compensation to federal workers on the same terms and conditions as their provincial counterparts, but the legislation does not carry out this general purpose in all cases or situations: see, for example, **Thomson v. Nova Scotia (Workers' Compensation Appeals Tribunal)** (2003), 212 N.S.R. (2d) 81 (C.A.) at para. 18. While **GECA** ought to be interpreted in light of this general purpose, the cases recognize that complex issues may arise concerning the interaction of **GECA** with the various provincial schemes: **Morrison**.

[12] In this case, the issue concerning the interaction of the two statutes relates to the difference in specific exclusion from the term "accident". As noted, unlike the Nova Scotia statute, **GECA** does not expressly exclude stress. The appellant submits, however, that on the basis of **Morrison**, this express exclusion in the provincial statute applies to **GECA** claims.

[13] In my respectful view, **Morrison** does not support this position at all. As Freeman, J.A. for the Court said at para. 55 of **Morrison**, in evaluating a claim, the Board must first of all determine whether the federal worker has suffered an accident pursuant to s. 4(1) of **GECA**. Further, at para. 54, he said that workers "... made eligible by the GECA definitions in s. 2, ..." are entitled to file claims. Thus, the Court made it clear that the fundamental question of whether the worker has suffered an accident is to be determined having regard to the inclusions in that term found in **GECA**.

[14] In **Morrison** at para. 68, the Court adopted the following test for addressing the interaction between **GECA** and the **WCA**:

> The provincial workers' compensation scheme governs claims submitted under **GECA** provided that:
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> (a) the provision in issue is reasonably incidental to a "rate" or "condition" governing compensation under the law of the province, and
>
> (b) the provision is not otherwise in conflict with **GECA**.

[15] It follows from this that to determine how the different exclusions from the term "accident" in the two statutes interact, one must apply this two part test. The definition of accident in **WCA** complies with the first branch of the **Morrison** test:

it is a provision that is reasonably incidental to a “rate” or “condition” governing compensation under the law of the province. It therefore applies if it does not conflict with **GECA**. Whether it conflicts with **GECA** requires an interpretation of **GECA** to determine whether gradual onset stress constitutes an injury by accident within the meaning of **GECA**.

[16] There are two possibilities. First, **GECA** may include gradual onset stress as an injury by accident. If this is so, the provincial exclusion is in conflict with **GECA** and therefore the provincial exclusion does not apply to **GECA** claims. As **Morrison** makes clear, the applicability of provincial legislation to **GECA** claims, while the general rule, stops at the point of actual conflict with the federal statute. While what constitutes such conflict may in some cases be debatable, it would not be in this example: it is surely a conflict if the provincial law excludes compensation for the very condition which is compensable under the federal law. Second, **GECA** may not include gradual onset stress as an injury by accident in which case the applicability of the provincial exclusion is irrelevant because recovery is not permitted under **GECA** in the first place.

[17] For these reasons, it seems to me, with respect, that the **Morrison** issue in this case is irrelevant to determining whether gradual onset stress is compensable under **GECA**. I therefore conclude that the real question is not whether the provincial exclusion applies to **GECA**, but whether, properly interpreted, gradual onset stress is an injury by accident within the meaning of **GECA**.

2. Gradual onset stress and injury by accident under **GECA**:

[18] The question of whether gradual onset stress is an injury by accident under **GECA** was not really considered by either the Hearing Officer or WCAT in this case. While there has been helpful argument addressing the point in this Court, it was not the focus of the appeal. Given my view that the appeal must be allowed on another basis, I would prefer to leave to another day the question of whether gradual onset stress is an injury by accident within the meaning of s. 4 of **GECA**.

3. The causation issue:

[19] Assuming, without deciding, that gradual onset stress is an injury by accident within the meaning of **GECA**, it is still necessary to show that the stress arose out of and in the course of the worker's employment. This causation issue was the focus of debate in this case at all levels. The basic question, to pose it in an oversimplified way, was whether workplace stress contributed to the psychological disability or the psychological disability caused the workplace stress. As one of the medical reports put it:

> ... the issue in essence, is whether Mr. Nurnber is a victim of harassment and unfairness in the workplace and thus his behavioural deterioration is a consequence of this emotional distress or whether we are dealing with an individual with poor interpersonal skills and poor judgment, who perhaps is manipulative in having problems and conflicts with authority. (Report of Dr. G.C. Gosse, June 12, 2002)

[20] Understandably, the bulk of the medical opinion about causation relied, as it had to, upon Mr. Nurnber's reports of workplace harassment. However, there was also a good deal of evidence about what really happened in the workplace. WCAT was of the view that the question of causation is one for expert medical opinion and that the nature of the workplace incidents and the reaction of other employees to them were irrelevant to the question of causation. The appellant argues that WCAT erred with respect to both of these conclusions.

[21] In my view, the appropriate standard of review with respect to these related issues is correctness. There is no privative clause (apart from the exclusion of appeals on questions of fact) and there is a statutory right of appeal on questions of law and jurisdiction: **WCA**, s. 256(1). The basic issue underlying both of the appellant's arguments is what evidence is relevant to the issue of the causal link between the stress and the workplace. This engages basic legal questions concerning the relevance of evidence and the nature of the inquiry concerning causation. While not all aspects of the link between the injury and the workplace can be addressed by the legal principles of causation, the particular aspect of this issue which arises here can be. In the areas of assessment of relevance, as opposed to weight, and the basic principles of causation in law, WCAT is no more expert than the Court. I would conclude, therefore, that the particular issues raised by the appellant on this branch of the case should be reviewed on the correctness standard.

[22] I agree with the appellant that WCAT erred in law in its approach to the causal link between the stress and the work place in this case. WCAT erred in law when it found that the question of causation in this case was a matter exclusively for medical expert opinion and it also erred in finding that neither the nature of the workplace incidents nor the reaction of other employees to them was relevant. I will develop my reasons for this conclusion addressing each of these points in turn.

[23] I begin with WCAT's view that causation is a matter for experts. The two-part test applied by WCAT required that there be "sufficient medical opinion evidence that the stressors contributed significantly to the development of the psychological injury." In the course of its reasons, WCAT adopted the proposition from an earlier decision that the question of causation is, in general, a medical question on which lay people are not qualified to give opinions. WCAT then said that it might be otherwise if the medical evidence were ambiguous or weak. In those circumstances, said WCAT, "... it might be proper to examine the claimed injury, ... to determine whether such could have been the product of the triggering incident or condition." The Tribunal concluded that "it has been accepted by a majority of examining health care practitioners that workplace incidents caused the injury ...". Further, the Tribunal expressed the view that "the opinion of qualified medical professionals remains necessary, as it does with any claim of injury. ... To the extent that a consistent application of the law requires objectivity, here that objectivity is satisfied by the examining and treating medical professionals: I accept their several opinions as objective support for the Worker's claim."

[24] With great respect to WCAT, these passages disclose a clear error of law. While, of course, expert opinion evidence will often be of great assistance in determining questions of causation, it is neither necessary nor necessarily dispositive. As the Supreme Court of Canada pointed out in **Athey v. Leonati**, [1996] 3 S.C.R. 458 at para. 16, "Causation need not be determined by scientific precision; ... it is essentially a practical question of fact which can best be answered by ordinary common sense." While this statement was made in the context of a negligence claim, the same principle relating to causation has been applied by this Court in considering a claim for compensation under **GECA**: **Ferneyhough v. Workers' Compensation Appeals Tribunal (Nova Scotia)** (2001), 189 N.S.R. (2d) 76 (C.A.) at para. 25.

[25] WCAT's role in determining whether an injury arises out of and in the course of employment is not simply to attorn to the opinion of experts. Rather,

WCAT should determine this issue by reviewing all of the relevant evidence put before it, not simply by acceptance of medical reports filed with the Tribunal. I do not accept WCAT's development of some sort of hierarchy of evidence or presumptive preference for expert testimony on the issue of causation. WCAT recognized that evidence about the actual workplace events could be relevant absent clear expert evidence. But, in my respectful view, such evidence is always relevant and should be weighed in all cases. WCAT should weigh all the relevant evidence and approach causation as a practical question of fact which can best be answered by ordinary common sense.

[26] That the Tribunal failed to do this is clear, not only from its treatment of the expert evidence, but also from its comments concerning the rest of the evidence. WCAT faced conflicting evidence about the nature of the workplace incidents and, as noted, the preponderance of medical opinion was based on Mr. Nurnber's understanding of those incidents. Nonetheless, WCAT found that because "... it has been accepted by a majority of examining health care practitioners that workplace incidents caused the injury... " further inquiry into the nature of the workplace events or the reactions of others to them was simply irrelevant. WCAT remarked that "... an inquiry into the nature of the incidents is not necessary and [is] possibly unwarranted ...". Later in its reasons, the Tribunal stated that perhaps most workers would not have suffered the same reaction to these incidents and perhaps 999 out of 1000 would not have. However, to the Tribunal, this was also not a relevant consideration.

[27] With respect, the Tribunal erred in law by concluding that the nature of the workplace incidents and the reaction of other workers to them were irrelevant to the question of the causal link between the workplace incidents and Mr. Nurnber's psychological condition. The critical question was whether the workplace contributed to the stress or the stress caused the workplace incidents. The fact that certain incidents were or were not stressful, objectively viewed, and the related question of whether other workers found them to be stressful, while not necessarily dispositive of the issue of causation are nonetheless relevant to that question. For example, if the incidents in themselves did not appear to be particularly stressful and the vast majority of other workers did not find them to be so, those facts could support an inference that it was Mr. Nurnber's psychological condition that gave rise to the workplace incidents, rather than the other way around. Conversely, if the incidents, objectively viewed, appeared to be stressful and other employees found them to be so, those facts would tend to support the opposite inference. Of

course, the weight to be given to such evidence in reaching a conclusion about causation is for the trier of fact. However, it is an error of law to simply dismiss such evidence as irrelevant and refuse to consider it.

[28] Counsel for Mr. Nurnber, in his able argument, submitted that some of the expert evidence here addressed the objective facts of the workplace incidents because there was detailed psychological testing tending to show that Mr. Nurnber did not suffer from a personality disorder which therefore tended to support the contribution of the workplace rather than some disorder to his stress. Assuming that is so (and Canada Post contests this interpretation of the record), it is not an answer to the fundamental point. The question is not whether there is evidence which supports WCAT's conclusion, but whether WCAT wrongly approached the issue of causation and ignored relevant evidence in reaching its conclusion. As noted, I have concluded that WCAT did both of these things and that as a result its decision must be set aside.

[29] In summary, I conclude that WCAT erred in law both by its conclusion that where there is clear medical opinion, the question of causation is to be determined exclusively on the basis of that opinion evidence and further by dismissing as irrelevant evidence which both as a matter of law and logic is relevant to the question of causation.

4. Is there a "reasonableness" limitation?

[30] The final issue raised on appeal is whether WCAT erred by rejecting the notion that, to be compensable, a stress based injury must be a reasonable response to the triggering event or events. This issue divided not only the Hearing Officer and WCAT in this case, but has given rise to conflicting decisions within WCAT itself.

[31] In light of my conclusion that the Tribunal has made the errors of law which I have described earlier which necessitate its decision being set aside, it is not necessary for us to address this final issue. It is an intricate and difficult one with many ramifications, including possible **Charter** considerations, not all of which have been explored in this case. I would prefer to address this issue, if necessary, once WCAT's jurisprudence on this difficult point has matured and in the context of a case in which all of its ramifications have been fully explored.

[32] I would, therefore, allow the appeal, set aside the decision of WCAT and remit the matter to the Tribunal for a new appeal hearing according to law.

Cromwell, J.A.

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