IN THE SUPREME COURT OF NOVA SCOTIA

Citation: MacLean v. Nova Scotia (Workers' Compensation Board), 2006 NSSC 338

Date: (20061114)
Docket: SN 260733
Registry: Sydney

Between:

Raymond Joseph MacLean
Plaintiff/Respondent

v.

The Workers' Compensation Board of Nova Scotia
Defendant/Applicant

Judge: The Honourable Justice Frank Edwards

Heard: November 6, 2006

Counsel: Clara E. Gray, for the plaintiff/respondent
David P.S. Farrar, Q.C., for the defendant/applicant

By the Court:

[1] ***Introduction:*** This is an application for an Order striking out the Originating Notice (Action) and Statement of Claim on the ground that it the action is statue-barred by virtue of the ***Workers' Compensation Act***, SNS 1994-95, c.10 (as amended) and for an Order setting aside the Originating Notice (Action) pursuant to Rules 14.25 and 25.01 of the Civil Procedure Rules on the grounds that the pleadings:

(I) disclose no reasonable cause of action;

(ii) are false, scandalous, frivolous or vexatious;

(iii) may prejudice, embarrass or delay the fair trial of the proceeding; and

(iv) that they are otherwise an abuse of the process of the court.

[2] The application was originally scheduled to be heard in May of this year by Justice MacAdam. However, after discussion between Justice MacAdam and Counsel, it was agreed that the matter would be adjourned without day to allow the Respondent time to file an Amended Originating Notice (Action) and Statement of Claim. Subsequently an Amended Originating Notice and Statement of Claim was filed with the court on June 30, 2006, and an Amended Defence filed on July 13,

2006. An Amended Interlocutory Notice was filed on September 13, 2006 and the matter set down before me. I heard the application on November 6, 2006 and reserved decision.

[3] ***Facts:*** The background facts are as follows. Mr. MacLean was injured in the course of his employment on February 26, 1996, and was therefore entitled to claim workers compensation benefits pursuant to the ***Workers' Compensation Act***, SNS 1994-95, c.10 (as amended) (the "Act"). He did receive medical aid-type benefits until August 1996. He appealed the award to the Workers' Compensation Appeals Tribunal, (the "WCAT"). When that appeal was unsuccessful, he filed a further appeal with the Nova Scotia Court of Appeal and by virtue of a Consent Order dated June 30, 1999, the parties agreed to remit Mr. MacLean's case to the Board for a rehearing.

[4] Initially upon remittal, the Board conducted a "reconsideration" rather than a full review. Ultimately, a full review did take place which resulted in a denial of Mr. MacLean's case. On appeal, the denial was upheld by the WCAT.

[5] On October 3, 2003, the Supreme Court of Canada found that those workers who suffer from chronic pain were entitled to individualized assessments to determine eligibility for benefits for chronic pain. To comply with the Supreme Court of Canada ruling, the Government of Nova Scotia passed the Chronic Pain Regulations on July 22, 2004. Subsequently the Board determined that Mr. MacLean was not eligible for specific benefits for his chronic pain and he appealed that determination to the WCAT.

[6] There were two decisions made with respect to Mr. MacLean's entitlement to chronic pain benefits, respectively on September 28, 2005 and October 17, 2005. The latter decision granted Mr. MacLean a greater level of benefits than the former. These decisions, by the Board's Transition Services Team, were both appealed by Mr. MacLean. On February 1, 2006, a Board hearing officer denied his appeal. Mr. MacLean then appealed the hearing officer's decision to the WCAT. The WCAT held a hearing in Sydney on August 15, 2006, in which Mr. MacLean's counsel participated. The WCAT rendered a written decision on September 19, 2006. That decision allowed Mr. Maclean's appeal in part. The conclusion reached by WCAT is summarized on page 9 of the Decision:

> “Conclusion:
>
> The Worker’s appeal is allowed in part. He does not have a permanent physical impairment, apart from his substantial pain-related impairment. He was not eligible to receive a temporary benefit after July 26, 1996. He is entitled:
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> > to have his eligibility for an extended earnings-replacement benefit assessed by the Board;
> >
> > to be paid the medical aid the Hearing Officer awarded him without further delay; and
> >
> > to have his eligibility for medical aid, beyond costs related to his 1997 chiropractic treatments, assessed.
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> In closing, I note that neither the Worker, nor his Representative, is unaware of any steps the Board has taken to determine whether the Worker has a permanent psychiatric impairment. According to the PMI Guidelines, psychiatric Impairments are usually evaluated on the basis of psychological testing. The Worker’s Representative has provided the Board with a psychological assessment that Dr. R. Landry prepared about the Worker on April 6, 2005. The Board’s medical staff should review Dr. Landry’s report as soon as possible. If Dr. Landry’s does not provide the necessary evidence, the Board should arrange to have the Worker assessed so that his eligibility for a permanent psychiatric impairment can be determined without further delay.”

[7] Mr. MacLean commenced this action against the Board on January 5, 2006, and as indicated, continued the action by way of an Amended Originating Notice (Action) and Statement of Claim on June 30, 2006.

[8] ***Law:*** *The Applicable Rule* -- Civil Procedure Rule 14.25(1) provides as follows:

> "Striking out Pleadings, etc.
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> 14.25(1) The Court may at any stage of a proceeding order any pleading, affidavit or statement of facts, or anything therein, to be struck out or amended on the ground that,
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> (a) it discloses no reasonable cause of action or defence;
> (b) it is false, scandalous, frivolous or vexatious;
> (c) it may prejudice, embarrass or delay the fair trial of the proceeding;
> (d) it is otherwise an abuse of the process of the court;
>
> and may order the proceeding to be stayed or dismissed or judgment to be entered accordingly."

[9] On an application under Rule 14.25(1)(a), an Order striking out the pleading will be made if, on the facts pleaded, it is "plain and obvious" the action discloses no reasonable cause of action (see ***Hunt v. Carey Canada Inc.***, [1990] 2 SCR 959 (SCC) at p. 967-980).

[10] In ***Cummings v. MacKay*** [2004] N.S.J. No. 149 (C.A.) Justice Chipman stated as follows at paragraph 11:

> "On an application under Rule 14.25 the court must be satisfied, before a proceeding can be dismissed, that it is plain and obvious that the pleading of the party making the claim discloses no reasonable cause of action. It is assumed that the

> plaintiff can prove all the allegations of fact in the statement of claim and the question of law for the judge is, whether the action is certain to fail because it contains a radical defect as contemplated by Rule 14.25. The test is a stringent one. (See *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959)...."

[11] In ***Touche Ross Ltd. et al v. V.P. McCardle et al*** (1987), 66 Nfld. & PEIR 257 (PEISC), McQuaid, J. discussed the purpose of a properly drafted Statement of Claim at p. 258:

> "The essence of a properly drawn pleading is clarity and disclosure. With respect to a statement of claim in particular, the defendant, or each defendant if there be more than one, must know from the face of the record precisely what case he, or each of them, has to answer. He must not be left to speculate or to guess the particulars of the case alleged against him and of the remedy sought from him. He must not be left to ascertain this through some esoteric process of divination."

[12] ***Whether a Reasonable Cause of Action Disclosed:*** It is clear that the Plaintiff's original Statement of Claim had not disclosed any cause of action. The Plaintiff had made a series of allegations against the Defendant without supporting allegations of fact which would give rise to or evidence of a cause of action against the Defendant. No doubt it was for that reason that the matter was adjourned without day to give the Plaintiff an opportunity to file an appropriate Amended Statement of Claim.

[13] The Amended Statement of Claim also does not contain allegations of fact which would support a reasonable cause of action. That proposition is self-evident from a cursory reading of the amended portions of the Statement of Claim commencing at the final 2 sentences of paragraph 3 and continuing through to paragraph 19.

> 3. On or about the 23rd day of February, A.D., 1996, the Plaintiff was injured during the course of his employment with the Department of Community Services and as a consequence the Plaintiff became entitled to claim benefits under the **Workers Compensation Act** which he did. **Plaintiff's injuries resulted in chronic pain disabling him from employment. In the process of making his claim the WCB held that Raymond MacLean's claim was not compensable. In the process of making his claim Mr. MacLean made submissions to various courts, including to the Supreme Court of Canada about whether chronic pain should be decidedly compensable, and to the Nova Scotia Court of Appeal about the approach taken by the WCB, in particular with respect to its weighting of the medical evidence. The opinion of the Courts in each case favoured Mr. MacLean's position and not the position taken by the WCB. During the process of making his claim it was decided by the Supreme Court of Canada that chronic pain is compensable by the WCB.**
>
> **4. In the process of making his claim the WCB has continued in its decisions to ignore the direction of the Nova Scotia Court of Appeal.**

5. In the process of making his claim the WCB has for all intents and purposes conspicuously ignored the decision of the Supreme Court of Canada insofar as it relates to situations such as those of Raymond MacLean's that injured workers should be compensated for chronic pain resulting from work injury.

6. In the process of making his claim the WCB has continued to fail to compensate Mr. MacLean for the chronic pain they earlier acknowledged and relied on to deny him benefits, proffering the new position now years later and without a single shred of evidence for it, that Mr. MacLean's chronic pain arose not from his work injury but from a preexisting psychological condition, despite that prior to the work injury Mr. MacLean did not suffer from chronic pain and was not disabled from employment.

7. In the process of making his claim the WCB acted outside its jurisdiction by making two different "final" decisions on the same evidence within days of each other and both denying the benefits Mr. MacLean is entitled to.

8. In the process of making his claim the WCB by ignoring Court Orders and by seeking and finding ways to circumvent them have not only failed to provide natural justice in its process but have used its process to deny the worker the natural justice which higher courts intended to result to the worker.

9. In the process of making his claim the WCB acted fraudulently outside of its jurisdiction for an improper purpose when after making two "final" decisions within days of one another, which was questionable in and of itself, the WCB then contacted

the office of the workers solicitor to direct that the first decision not be opened or if it had been opened to be disregarded.

10. **In the process of making his claim the WCB actively and purposefully discriminated against the worker in securing and in relying upon a blatantly prejudiced and medically unfounded opinion to deny the workers claim for chronic pain benefits on the basis that he suffers from a recognizable mental illness.**

11. **In the process of making his claim the WCB repeatedly advised the worker about time periods which they would follow and then failed to follow, denying the worker any measure of certainty in the process.**

12. **In the process of making his claim the WCB acted arbitrarily in rendering one and then another "final" decision without any appeal by the worker and without any explanation to the worker which was outside of the jurisdiction of the board and contrary to the rules and the claimant's expectation of natural justice.**

13. **In the process of making his claim the worker has been forced, if not to give up, then to go through an uncertain WCB process again and again such that he is now at the Tribunal for the third time on the same continuous claim without success, and despite that the nature of his injuries and his resulting claim for chronic pain benefits is a mirror of the claim which succeeded on the same issue before the Supreme Court of Canada and despite also that during the process the higher courts, to which he has turned for assistance or to submit his position as an injured**

worker respecting chronic pain, have agreed with him contrary to the position of the WCB.

14. **In the process of making his claim the WCB through its failed process has forced the worker, if not to give up, then to continue his fight into the future without any certainty that he is engaged in a process which will provide any final resolution let alone a fair resolution and the worker submits that, by the WCB acting without regard for the justice that the Nova Scotia Court of Appeal and the Supreme Court of Canada decisions envision and by its acting without regard to the Charter Rights of the worker has acted in a dismissive and unwarranted vindictive manner.**

15. **In the process of making his claim the WCB acted fraudulently in relation to the claim by acting to secure and then, in rendering its decisions, by relying on patently unreasonable and unfounded medical opinions to deny the workers claim.**

16. **In the process of making his claim the WCB failed to provide timely medical and rehabilitation support to help the worker recover from his injuries and to help him return to the work force causing the worker's pain and suffering to continue without recourse and keeping the worker disabled from employment for the long term.**

17. **In the process of making his claim the WCB was negligent initially in denying and then in continuing to deny treatment and rehabilitation support to the worker for his injuries.**

18. **In the process of making his claim Mr. MacLean was talked down to, marginalized, lied to, and misinformed by a revolving set of workers at the**

> **WCB causing him uncertainty, confusion, insult, emotional and psychological harm.**
>
> **19. In the process of making his claim the WCB has disclosed through the behaviour of its workers, a mistrust of injured workers on the face of it, and through the irrational decisions rendered, a bias against the worker and toward the objective to deny benefits.**

[14] Paragraph 3 of the Statement of Claim does not set forth facts upon which a cause of action can be found by the WCB. In particular, it expresses opinions about determinations made by the Supreme Court of Canada and whether the WCB has followed those opinions.

[15] Similarly, paragraphs 5 and 6 are simply opinions and conclusions based on no factual evidence and cannot sustain a cause of action.

[16] With respect to paragraph 7, there is an allegation that the WCB acted outside its jurisdiction in making two different "final decisions", however, there is nothing to suggest in the allegation that the WCB was acting outside its jurisdiction or, alternatively, if it was acting outside its jurisdiction, that it was acting in bad faith.

[17] Paragraphs 8, 9, 10, 11, 12, 13, 14 and 15 do not set forth facts upon which a cause of action can be based. They are more in the form of argument making assertions and conclusions without any factual basis.

[18] Paragraphs 16 and 17 of the Amended Statement of Claim make reference to treatments alleged to have been refused or failed to have been provided. Again, the facts are not set forth which would give rise to a cause of action, nor is any factual foundation set forth for the allegations.

[19] Paragraphs 18 and 19 are also without factual foundation and do not give rise to a cause of action.

[20] Overall, the allegations contained in the Statement of Claim are not allegations, but simply statements being made without any factual basis and take more the form of argument than factual obligations which should be contained in a statement of claim.

[21] The Respondent relies upon the decision ***Shuchuk v. Wolfert***, [2001] A.J. No. 1598 (S.C.). ***Shuchuk*** has a rather peculiar set of facts. In that case, damages

were claimed, in part, because the Workers' Compensation Board of Alberta chose to pursue a neuropsychological examination when the worker's psychiatrist and the psychologist alleged that such an examination would harm him. The Board's own psychologist recommended, at the time, that the examination not be pursued, because if the representation of the caregivers were accepted, there might be some danger. The Board subsequently proceeded with the examination and the worker claimed he was injured by the examination.

[22] In refusing to strike out the claim, the Court relied upon the existence of the report from the WCB's psychologist recommending against the examination.

[23] In a subsequent decision of the Court of Alberta's Queen Bench in ***Taylor v. Alberta (Workers' Compensation Board)***, [2005] A.J. No. 967, at para. 10, the Court put the issue as follows:

> "In essence, the plaintiff seeks a determination of this Court that the plaintiffs neurological problems are "connected to the exposure of chemicals during the plaintiff s employment". Such a determination is within the jurisdiction of the board and the Appeals Commission in accordance with the Workers Compensation Act and is not a mattes to be determined by the Court of Queen's Bench except in accordance with the statutory appeal process. The privative clause contained in s. 17(2) of the Workers Compensation Act bars the action of the plaintiff

> against the board in much the same way as similar actions against superior and inferior Court Judges are barred."

[24] The decision in ***Taylor*** was the decision of a Master in Chambers. That decision was appealed to the Alberta Court of Queens Bench. The appeal was dismissed.

[25] Similarly, Mr. MacLean, appears, to be complaining about the decision-making of the WCB which was clearly within its jurisdiction. A review of the pleadings make this evident. If Mr. MacLean feels the WCB's decisions were erroneous and irrational, those are matters for appeal to the Workers' Compensation Appeals Tribunal ("WCAT"), to which Mr. MacLean has availed himself.

[26] ***Is the Action Statute Barred:*** Section 167 of the ***Act*** states as follows:

> "Immunity from Suit
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> 167 No person may bring an action or other proceeding for damages in any court of law against
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> (a) ***the Board***;
> (b) any member of the Board of Directors;
> (c) ***any officer or employee of the Board***;

> (d) the Appeals Tribunal or any member of the Appeals Tribunal; or
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> (e) any member of the Medical Review Commission established pursuant to section 203,
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> for any action or omission within the jurisdiction conferred by this Part, or beyond the jurisdiction conferred by this Part, where the person responsible for the action or omission acted in good faith." (emphasis added)

[27] Pursuant to Section 167 of the ***Act*** the Plaintiff is statute barred from bringing an action against the Defendant, and more specifically, against the Board, any member of the Board of Directors or any officer or employee of the Board.

[28] In ***Bowles v. Workers' Compensation Board (N.S.)*** [2002] NSCA 160, the Respondent sued the Workers' Compensation Board alleging that he suffered further injury and damages as a result of following the directions of his caseworker to participate in work hardening and physiotherapy. The WCB brought an application to strike the Statement of Claim which was dismissed by the Chambers judge. The issue was whether the action was statute barred and thus, disclosed no reasonable cause of action.

[29] The Court of Appeal allowed the appeal and found that as a result of Section 167 of the ***Act***, no action against the Board or its employees is allowed when acting within its jurisdiction. The Court found that the pleadings therefore disclosed no reasonable cause of action and should have been struck out.

[30] After citing Section 167 of the ***Act***, the Court stated as follows at paragraph 8:

> "By operation of this section, all actions against the Board and its employees 'for any action or omission within the jurisdiction conferred by this part' are unequivocally prohibited. Actions and omissions ***beyond*** the jurisdiction of Part I are prohibited where the person acted in good faith. In other words, actions for bad faith are permitted only when the Board or the employee acted beyond the jurisdiction conferred by this Part I of the *Act*. Part II of the *Act* begins at section 238..."

[31] The Court concluded as follows in paragraph 10:

> "As a result of section 167 of the *Act*, no action against the Board or its employee is allowed when acting within its jurisdiction. The Pleadings, therefore, disclose no reasonable cause of action and should have been struck out. The Chambers judge erred in failing to so order..."

[32] Although the Plaintiff has issued a Statement of Claim claiming negligence, no facts demonstrating or supporting any of the allegations made have been pleaded. Unless the Plaintiff has pleaded facts to support an allegation that the

WCB or any of its employees acted outside the scope of the jurisdiction conferred by Part I of the ***Act*** and in so doing, acted in bad faith, the Plaintiff's claim has not met the requirements of Section 167 of the ***Act***. Therefore, as stated in ***Bowles***, the action is "unequivocally prohibited".

[33] There is nothing in the pleading to indicate that the alleged conduct by the Defendant was outside its jurisdiction and taken for malicious or ulterior purposes.

[34] In ***Cook v. Nova Scotia (Attorney General)***, [2005] NSCA 23, the Court reached the same conclusion. The Plaintiff appealed the decision of the Chambers' judge striking his Statement of Claim against the WCB. On appeal, the Court found that in the absence of any factual claim that the WCB or its employees acted outside of the scope of their jurisdiction, the action against the WCB as statute-barred by virtue of Section 167 of the ***Act.***

[35] In further support of the Applicant's position, and in keeping with the application of Section 167 of the ***Act***, is the Order of the Chambers' judge (dated April 14, 2005) in ***South Shore Injured Workers' Association v. WCB et al.*** ,

[2004] NSSC S.B.W. No. 234337 striking the Plaintiff's Statement of Claim against the WCB.

[36] The Order dismisses the claim on a number of grounds including the grounds that the proceedings are statute-barred by virtue of Section 167 of the ***Act*** and that the pleadings disclose no cause of action pursuant to Rule 14.25.

[37] ***Conclusion:*** I am therefore allowing the application. I will therefore order that the Originating Notice (Action) and Statement of Claim (as amended) shall be struck with costs of $500.00 payable in any event forthwith to the Applicant.

Order accordingly.

J.