CITATION: Taylor v. Pivotal Integrated HR Solutions, 2021 ONSC 7720
DIVISIONAL COURT FILE NO.: 381/20
DATE: 20211126

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Ryan Bell, Nishikawa, and Shore JJ.

BETWEEN:	
Paul Taylor Applicant/Moving Party	Applicant/Moving Party appearing on his own behalf
– and –	
Pivotal Integrated HR Solutions and Workplace Safety and Insurance Appeals Tribunal Respondents	*Andrew Lokan*, for the Respondent Workplace Safety and Insurance Appeals Tribunal No one appearing for the Respondent Pivotal Integrated HR Solutions
	HEARD at Toronto by videoconference: November 18, 2021

REASONS FOR DECISION

RYAN BELL J.

Overview

[1] The applicant, Paul Taylor, moves pursuant to s. 21(5) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, to set aside the orders of Sachs J. made October 8, 2020. The motion judge made orders adding the Workplace Safety and Insurance Appeals Tribunal as a party to Mr. Taylor's judicial review application and dismissing the application for extreme delay.

[2] Mr. Taylor asserts that the motion judge's orders should be set aside because,

i. s. 9(2) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 infringes s. 96 of the *Constitution Act, 1867* and s. 7 of the *Canadian Charter of Rights and Freedoms*[1];

ii. the motion judge erred in law in adding the Tribunal as a party to the application;

iii. the "Divisional Court test" for dismissing an application for judicial review infringes ss. 7 and 15 of the *Charter*; and

iv. in dismissing Mr. Taylor's application on the basis of excessive delay, the motion judge erred in law and infringed ss. 7 and 15 of the *Charter*.

Procedural History

[3] In 1997, Mr. Taylor suffered two workplace injuries while employed by his former employer. Pivotal Integrated HR Solutions is the successor to Mr. Taylor's former employer.

[4] Mr. Taylor applied to the Workplace Safety and Insurance Board for benefits. Mr. Taylor challenged the benefits he was awarded within the Board system. He then sought to have those decisions reconsidered or amended, all of which were denied.

[5] In 2005, Mr. Taylor appealed to the Tribunal. In February 2008, the Tribunal allowed Mr. Taylor's appeal in part and granted him additional benefits. The 2008 Tribunal decision is the first Tribunal decision that Mr. Taylor seeks to judicially review in his application.

[6] In October 2012, Mr. Taylor filed a request for reconsideration of the 2008 Tribunal decision. The Tribunal dismissed Mr. Taylor's application for reconsideration in June 2013. The 2013 Tribunal decision is the second Tribunal decision that Mr. Taylor seeks to judicially review in his application.

[7] On July 11, 2013, Mr. Taylor filed an application in the Superior Court of Justice under Rule 14 of the *Rules of Civil Procedure* in which he sought to challenge the 2008 Tribunal decision and the Tribunal's 2013 reconsideration decision. After receiving notice of Mr. Taylor's application, counsel for the Tribunal wrote to Mr. Taylor to advise that his application was, in essence, an application for judicial review, which had to be pursued in Divisional Court. Mr. Taylor abandoned his Rule 14 application after receiving the letter from Tribunal counsel.

[8] Mr. Taylor then commenced an action in February 2014 in the Superior Court of Justice against the Board and the Tribunal. In his action, Mr. Taylor sought the same relief as in his Rule 14 application and included a claim for substantial damages, which he subsequently amended to include punitive damages.

[9] On February 22, 2017, Price J. granted the motion of the Board and the Tribunal to strike Mr. Taylor's claim. Justice Price found that the Superior Court of Justice did not have jurisdiction

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[1] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

to engage in a judicial review of the Tribunal's decisions in the context of an action and that Mr. Taylor's claim disclosed no reasonable cause of action. Justice Price also found that Mr. Taylor had not provided a reasonable explanation for his four-year delay in seeking a reconsideration of the 2008 Tribunal decision.

[10] Mr. Taylor's appeal of Price J.'s decision was dismissed by the Court of Appeal for Ontario on February 6, 2018. Among other things, the Court of Appeal upheld the motion judge's finding with respect to jurisdiction. Mr. Taylor's application for leave to appeal to the Supreme Court of Canada was denied on April 16, 2020.

[11] In March 2020, Mr. Taylor commenced an application for judicial review before the Superior Court of Justice, returnable on March 24, 2020, in which he sought to challenge the Tribunal's decisions. The only named party to the application was the Tribunal. The application could not proceed on March 24 due to COVID-19. In June 2020, in response to correspondence from Mr. Taylor, counsel for the Tribunal wrote to Mr. Taylor, setting out the Tribunal's position that the matter should be brought in Divisional Court. Counsel for the Tribunal also advised that if Mr. Taylor did commence an application in Divisional Court, the Tribunal would seek to have it dismissed on a number of bases, including extreme delay.

[12] On June 26, 2020, Mr. Taylor advised the Tribunal that he was abandoning his application in the Superior Court of Justice on the basis that the Tribunal "is not a legal party" and that he would be filing a "corrected notice." Counsel for the Tribunal responded that any corrected notice should be in Divisional Court and that, pursuant to s. 9 of the *JRPA*, the Tribunal should be named as a respondent.

[13] The present application for judicial review was commenced by Mr. Taylor on August 14, 2020. The only named respondent on the application was Pivotal.

The Court's jurisdiction and standard of review

[14] A panel of the Divisional Court has the authority to hear a motion to set aside the order of a single judge of the court pursuant to s. 21(5) of the *Courts of Justice Act*. The panel hearing a motion under s. 21(5) does not hear the motion to set aside *de novo*. Rather, the standard of review applicable on a s. 21(5) motion is correctness on a question of law and a palpable and overriding error with respect to an error of fact: *The Law Society of Upper Canada v. Piersanti*, 2018 ONSC 640 (Div. Ct.), at para. 9; *Canadian National Railway Company v. Teamsters Canada Railway Conference*, 2019 ONSC 3644 (Div. Ct.), at para. 9.

Analysis

Section 9(2) of the JRPA does not infringe s. 96 of the Constitution Act, 1867 and does not violate s. 7 of the Charter

[15] Section 9(2) of the *JRPA* provides:

> For the purposes of an application for judicial review in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power, the person who is authorized to exercise the power may be a party to the application.

[16] Mr. Taylor argues that s. 9(2) of the *JRPA* infringes s. 96 of the *Constitution Act, 1867* "for matters involving workers' compensation." Mr. Taylor advances four reasons in support of his submission. First, he argues that there is a difference between "administrative functioning" administrative boards, commissions, and tribunals, and administrative boards, commissions, and tribunals that are quasi-judicial in nature. Second, Mr. Taylor argues that the Tribunal has "misused" s. 9(2) to "circumvent the Court's inherent jurisdiction under s. 96." Third, he argues that there would be "unjust opposition" to applications for judicial review in matters of workers' compensation. Fourth, Mr. Taylor submits that the Tribunal does not provide the reviewing court with valuable insight.

[17] Mr. Taylor's arguments are without merit. Section 96 requires that tribunal proceedings be subject to the supervisory jurisdiction of the courts. As the Supreme Court of Canada summarized in *Canada (Min. Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 24, Parliament and the provincial legislatures are constitutionally empowered to create administrative bodies and to endow them with broad statutory powers. Where the legislature has created an administrative decision-maker for the specific purpose of administering a statutory scheme, it must be presumed that the legislature intended the decision-maker to be able to fulfill its mandate and to interpret the law applicable to all issues that come before it. Privative clauses may oust judicial review on questions of law and on other questions not touching jurisdiction. However, because judicial review is protected by s. 96 of the *Constitution Act, 1867*, legislatures cannot shield administrative decision-making from curial scrutiny entirely: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 31; *Crevier v. Attorney General of Quebec*, 1981 CanLII 30 (SCC), [1981] 2 S.C.R. 220, at pp. 236-37; *U.E.S., Local 298 v. Bibeault*, 1988 CanLII 30 (SCC), [1988] 2 S.C.R. 1048, at p. 1090.

[18] Section 9(2) of the *JRPA* does not affect this court's supervisory jurisdiction. It does not shield administrative tribunals such as the Tribunal from curial scrutiny entirely; rather, s. 9(2) permits tribunals to bring relevant matters to the attention of the court.

[19] Allowing an administrative tribunal such as the Tribunal to participate on an application for judicial review does not give rise to "unjust opposition" as Mr. Taylor contends. To the contrary, the presence of the administrative tribunal as a party may help to ensure that the court hears both sides of a dispute where there is no other well-informed party standing in opposition to the party challenging the tribunal decision: *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, at para. 54.

[20] Once a tribunal is a party, the court still has discretion as to the scope of participation to be accorded to the tribunal during the hearing. This involves balancing the need for fully informed adjudication against the importance of maintaining tribunal impartiality: *Hydro Ottawa v. Ontario*

(Workplace Safety and Insurance Appeals Tribunal), 2019 ONSC 4898 (Div. Ct.), at para. 6. This court is under no obligation to accept the submissions of a tribunal that appears before it.

[21] Nor does s. 9(2) of the *JRPA* violate Mr. Taylor's right to a fair and unbiased hearing. Mr. Taylor cites the low "rate of success" in other cases challenging Tribunal decisions before this court and essentially asks us to infer bias or lack of fairness on this basis. I draw no such inference. The Tribunal has the benefit of a strongly worded privative clause, one that the Court of Appeal has described as "the toughest privative clause known to Ontario law": *Rodrigues v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 719, at para. 22.

[22] In addition, there is nothing in s. 9(2) of the *JRPA* that violates procedural fairness, nor is the provision arbitrary or overbroad within the meaning of the s. 7 *Charter* jurisprudence. Section 9(2) does not limit the ability of the court to control its own processes by determining what it does and does not wish to hear from a tribunal: see *Hydro Ottawa*, at para. 7. Section 9(2)'s silence as to the precise limits of the tribunal's participation "necessarily leaves this issue to the court's discretion, as part of its task of ensuring that its procedures serve the interests of justice": *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)*, 2005 CanLII 11786 (ON CA), at para. 27.

The motion judge did not err in adding the Tribunal as a respondent to the application

[23] In exercising her discretion to add the Tribunal as a party to the application, the motion judge correctly applied the *JRPA* and properly considered whether the court hearing the application would benefit from the Tribunal's presence as an adversarial party. As the Supreme Court of Canada stated in *Ontario (Energy Board)*, at para. 54,

> Some cases may arise in which there is simply no other party to stand in opposition to the party challenging the tribunal decision. Our judicial review processes are designed to function best when both sides of a dispute are argued vigorously before the reviewing court. In a situation where no other well-informed party stands opposed, the presence of a tribunal as an adversarial party may help the court ensure it has heard the best of both sides of a dispute.

[24] Based on s. 9(2), the definitions of "statutory power" and "statutory power of decision" in s. 1 of the *JRPA*, and the nature of the 2008 and 2013 Tribunal decisions, the motion judge found, correctly, that the Tribunal may be added as a party. As the motion judge found, the Tribunal's decisions, which Mr. Taylor seeks to challenge on his application, are an exercise of the Tribunal's power to make a decision under the *Workplace Safety and Insurance Act* to determine Mr. Taylor's eligibility for benefits. The Tribunal's decisions are "the exercise...of a statutory power" and, under s. 9(2), "the person who is authorized to exercise the power may be a party to the application." Section 9(2) gives the administrative tribunal the right to be a party to the proceeding if the tribunal chooses to do so: *Ontario (Children's Lawyer)*, at para. 26.

[25] The motion judge properly considered that there was no other party who had appeared to oppose Mr. Taylor's application and that, even if the named respondent had appeared, it would not be "well-informed." The motion judge also considered that neither the Attorney General for Ontario nor the Attorney General for Canada had suggested that they would participate in the application. The motion judge noted that the Tribunal had been an active participant throughout these proceedings and found that its presence as an adversarial party "will ensure that the court can deal with this dispute in a fair and informed manner."

[26] The motion judge did not err in her ruling adding the Tribunal as a party to the application.

The Divisional Court's test does not violate ss. 7 or 15 of the Charter

[27] Judicial review is a discretionary remedy which can be denied on the basis of excessive delay, regardless of the merits of the case: *Ransom v. Ontario*, 2010 ONSC 3156 (Div. Ct.), at para. 4, aff'd 2010 ONSC 5594 (Div. Ct.). In exercising its discretion to dismiss an application for delay, the court will consider the following factors:

i. the length of the delay;

ii. the reasonableness of any explanation offered for the delay; and

iii. any presumed or actual prejudice suffered by the respondent as a result of that delay: *Becker v. Workplace Safety and Insurance Appeals Tribunal*, 2012 ONSC 6946 (Div. Ct.), at para. 4.

[28] Mr. Taylor submits that this test violates the security of the person, contrary to s. 7 of the *Charter*, because it violates an individual's right to a fair and unbiased hearing. Respectfully, the test does not infringe s. 7 of the *Charter*. There is no unfairness in the court considering and balancing the length of the delay, the explanation for the delay, and any presumed or actual prejudice to the respondent in exercising its discretion to dismiss an application for delay.

[29] Mr. Taylor relies on *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 for the proposition that state-imposed physical and psychological harms that are greater than ordinary stress or anxiety may breach s. 7 of the *Charter*. In my view, *Blencoe* does not assist Mr. Taylor. As the Supreme Court of Canada made clear at paras. 57-59, the court's first task is to determine which alleged harms are state-imposed, and to separate those state-imposed harms from those caused by other factors such as the stressful nature of litigation. I agree with the Tribunal that whatever harms Mr. Taylor alleges from the loss of his right to a judicial review on the merits are the result of his own conduct.

[30] Nor does the Divisional Court's test infringe s. 15 of the *Charter*. To prove a *prima facie* violation of s. 15(1) of the *Charter*, a claimant must demonstrate that the impugned law or state action a) on its face or in its impact, creates a distinction based on enumerated or analogous grounds, and b) imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage: *Fraser v. Canada (A.G.)*, 2020 SCC 28, at para. 27.

[31] Mr. Taylor has not established a *prima facie* violation of s. 15(1). First, the Divisional Court's test does not create a distinction based on enumerated or analogous grounds, either on its face or in its impact. It is a flexible test, that allows the court to take into account any reasonable explanation for the delay, including the impact of disabilities and whether or not a litigant is self-represented.

[32] Second, a flexible test that permits the court, in its discretion, to dismiss an application for judicial review – itself a discretionary remedy – on the basis of excessive delay does not impose a burden or deny a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage. It does not stigmatize any group on the basis of disability and it does not perpetuate any prejudice against injured workers.

The motion judge did not err in dismissing the application for excessive delay

[33] In dismissing the application for excessive delay, the motion judge applied the correct test and legal principles. In concluding that the delay in this case has been "extraordinary", the motion judge considered that Mr. Taylor delayed 12 and a half years following the Tribunal's 2008 decision before commencing this application. She also noted Mr. Taylor's delay of more than four years before applying for a reconsideration of the 2008 Tribunal decision and that it had been more than seven years since the Tribunal issued its 2013 reconsideration decision.

[34] The motion judge considered, and ultimately rejected, Mr. Taylor's explanations for his delay. She agreed with Price J. that there was no reasonable explanation for the more than four-year period before Mr. Taylor filed his reconsideration application before the Tribunal. She found that Mr. Taylor's assertions about going to the Human Rights Commission and requesting a different hearing panel were not established on the record before her. She found that, contrary to Mr. Taylor's submissions, he was provided with accurate advice from the Tribunal's counsel, on more than one occasion, about the legal avenue he should pursue. The motion judge concluded that although Mr. Taylor was entitled to ignore the advice he received and to seek to litigate his concerns in inappropriate forums, he could not rely on his choices to excuse his delay in proceeding to judicially review the Tribunal's decisions in a proper manner.

[35] On the issue of prejudice to the Tribunal, the motion judge observed, correctly, that when a delay reaches the magnitude of the delay in the present case, prejudice can be presumed. In his judicial review application, Mr. Taylor relies, in part, on alleged procedural defects in the Tribunal's 2008 decision. As the motion judge observed, it is difficult for any body to effectively respond to allegations regarding the conduct of a hearing that occurred more than 12 years ago. The motion judge found that the Tribunal's interest in timeliness and finality would be severely prejudiced if its decisions continued to be challenged a dozen years after they were made.

[36] The motion judge did not err in concluding that the delay in this case was excessive, that there was no reasonable explanation for the delay, and that the Tribunal would suffer prejudice if the application was allowed to proceed. Her findings were supported by the record before her.

[37] Finally, contrary to Mr. Taylor's submission, the motion judge did not fail to accommodate Mr. Taylor as a self-represented litigant. As the motion judge correctly observed at para. 39 of her reasons, "[w]hile some allowance can be made to accommodate the known difficulties that self-represented people encounter, that allowance cannot be made at the expense of the proper functioning of the administration of justice." To the motion judge's observation I would add, "[s]elf-represented persons, like all other litigants, are subject to the provisions whereby courts maintain control of their proceedings and procedures": Canadian Judicial Council's *Statement of Principles on Self-represented Litigants*, at p. 5.

Disposition

[38] For these reasons, I would dismiss Mr. Taylor's motion. With respect to costs, the Tribunal seeks costs in the amount of $1,000. This amount is reasonable. It is ordered that Mr. Taylor shall pay the Tribunal its costs fixed in the amount of $1,000, all inclusive.

Ryan Bell J.

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I agree Nishikawa J.

S. Shore

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Released: November 26, 2021

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