COURT OF APPEAL FOR ONTARIO

CITATION: Yatar v. TD Insurance Meloche Monnex, 2022 ONCA 446
DATE: 20220607
DOCKET: C69874

Lauwers, Nordheimer and Zarnett JJ.A.

BETWEEN

Ummugulsum Yatar

Applicant (Appellant)

and

TD Insurance Meloche Monnex

Respondent (Respondent)

and

Licence Appeal Tribunal

Respondent (Respondent)

and

Income Security Advocacy Centre, Advocacy Centre for Tenants Ontario and Attorney General of Ontario

Interveners

Sean Dewart, Ian McKellar and Rebecca Ward, for the appellant

Derek Greenside and Riley Groskopf, for the respondent TD Insurance Meloche Monnex

Valerie Crystal and Trevor Guy, for respondent Licence Appeal Tribunal

Nabila F. Qureshi and Anu Bakshi, for the intervener Income Security Advocacy Centre

Ryan Hardy, for the intervener Advocacy Centre for Tenants Ontario

Christopher Thompson, for the intervener Attorney General of Ontario

Heard: April 25, 2022

On appeal from the order of the Divisional Court (Justices Katherine E. Swinton, Michael A. Penny and Freya Kristjanson), dated April 21, 2021, with reasons reported at 2021 ONSC 2507, 157 O.R. (3d) 337, affirming a decision of the Licence Appeal Tribunal, dated April 23, 2020.

Nordheimer J.A.:

[1] Ummugulsum Yatar appeals, with leave, from the decision of the Divisional Court that dismissed her application for judicial review of a decision of the Licence Appeal Tribunal (the "Tribunal"). The Divisional Court also dismissed the appellant's appeal from the Tribunal's decision, but that aspect of the Divisional Court's order is not challenged before us.

[2] For the following reasons, I would dismiss the appeal.

A. BACKGROUND

[3] Ms. Yatar was injured in a motor vehicle accident on February 7, 2010. At the time, she was insured under a motor vehicle liability policy of insurance issued by the respondent, TD Insurance.

[4] Ms. Yatar submitted an Application for Accident Benefits dated February 22, 2010 to TD Insurance, as well as an Employer's Confirmation Form dated March 13, 2010, and elected to claim Income Replacement Benefits ("IRBs").

Among IRBs and other benefits, she also claimed housekeeping and home maintenance benefits pursuant to the *Statutory Accident Benefits Schedule – Accidents on or after November 1, 1996*, O. Reg 403/96 ("the SABS").

[5] TD Insurance initially paid benefits, but on January 7, 2011, it wrote to the appellant and stated that payment of IRBs, housekeeping, and home maintenance benefits had been stopped effective January 4, 2011, because it had not received a completed disability certificate within the time requested in its letter of December 8, 2010. TD Insurance advised the appellant that "no benefit is payable for the period after the date specified and before the day the insurer receives the completed disability certificate." It also advised the appellant that she was required to be examined by its chosen assessors at the times and locations set out in an attached Notice of Examination.

[6] In January 2011, Ms. Yatar attended two insurer's medical examinations, one with a psychologist and one with a physiatrist, for the purpose of determining her entitlement to IRBs, housekeeping, and home maintenance benefits.

[7] On February 16, 2011, TD Insurance wrote to the appellant and denied her claim for housekeeping and home maintenance benefits based on the results of the examinations. In the same letter, TD Insurance advised the appellant that it had determined that she was entitled to IRBs and that it would continue to monitor her psychological treatment and rehabilitation in order to assess her ongoing

entitlement to this benefit. The Tribunal adjudicator found that a dispute resolution form was not attached to the February 16, 2011 letter.

[8] On September 6, 2011, the appellant attended a third insurer's medical examination, to address her ongoing entitlement, if any, to IRBs.

[9] On September 19, 2011, TD Insurance wrote the appellant to deny her claim for IRBs and to advise that payment of her IRBs would be stopped effective September 28, 2011. The adjudicator found that a dispute resolution form was not attached to the September 19, 2011 letter.

[10] The appellant applied for mediation at the Financial Services Commission of Ontario ("FSCO") on September 13, 2012 to dispute the denial of her IRBs and housekeeping and home maintenance benefits. The mediation took place between June 18, 2013 and January 14, 2014. The mediator's report is dated January 14, 2014.

[11] The appellant filed a Notice of Action in the Superior Court of Justice on March 31, 2016, followed by a Statement of Claim on April 29, 2016. That action was dismissed through a consent order, dated March 27, 2017. A year later, in March 2018, the appellant commenced an application before the Tribunal. On April 29, 2019, the Tribunal adjudicator found that the appellant's claim was statute-barred because it had been commenced more than two years after the denial of benefits by TD Insurance. The appellant requested a reconsideration of that decision. On April 23, 2020, the adjudicator confirmed his decision.

[12] On May 21, 2020, the appellant commenced her application for judicial review to the Divisional Court, which was in addition to her already commenced appeal to that court from the Tribunal's decision. In her application for judicial review, she sought to have her application and her appeal heard together.

B. THE DECISIONS BELOW

1. The adjudicator's preliminary decision

[13] In his preliminary decision dated April 29, 2019, the adjudicator concluded that the appellant's claims both for IRBs and for housekeeping and home maintenance benefits were statute-barred by operation of the two-year limitation period in s. 281.1(1) of the former *Insurance Act*, R.S.O. 1990, c. I.8, and s. 51 of the former SABS. He concluded that the applicable limitation period expired in April 2014.

[14] The adjudicator rendered his decision after conducting a "combination hearing" that proceeded with both written submissions and in-person cross-examination.

[15] While there was a dispute between the parties on the issue, the adjudicator concluded that a dispute resolution form had been attached to the January 7, 2011 letter that TD Insurance had sent to the appellant. He concluded that the appellant was required to initiate any dispute with respect to the denial of benefits within two years of that date. He noted that the appellant had not filed her application to dispute the denial of benefits until March 16, 2018, more than seven years later.

[16] The adjudicator went on to note that the appellant had requested mediation of the denial of benefits on September 13, 2012, as that process existed at the time. That mediation concluded with a report from the mediator dated January 14, 2014. The mediation extended the limitation period. Under the applicable process at the time, the appellant had 90 days from the date of the mediator's report to challenge the result. Nothing in fact happened until the appellant filed a Notice of Action in the Superior Court of Justice on March 31, 2016. I have already referred to that proceeding above.

[17] The adjudicator concluded:

> This is not a case where the applicant has inadvertently missed the expiry of the limitation period by a few weeks or even months. There must be some certainty in the process to ensure that applicants cannot return and claim a benefit that had statutorily lapsed years earlier.

2. The adjudicator's reconsideration decision

[18] The appellant sought a reconsideration of the adjudicator's decision. That reconsideration was conducted by the same adjudicator based on written submissions from the parties. The appellant asserted that the adjudicator had made six errors in reaching his conclusion.

[19] The adjudicator dismissed the request for reconsideration. He found that there were three letters from TD Insurance to the appellant that were of significance. First was the January 7, 2011 letter that denied both IRBs and the housekeeping and home maintenance benefits because the appellant had not

submitted a completed disability certificate. Second was the February 16, 2011 letter that also denied the housekeeping and home maintenance benefits based on the medical reports that TD Insurance had received. Third was the September 19, 2011 letter that denied the IRBs as a result of a medical report that TD Insurance had received.

[20] The adjudicator was not satisfied that a dispute resolution form was attached to either the February 16, 2011 letter or the September 19, 2011 letter. However, he returned to his earlier finding that a dispute resolution form had been attached to the January 7, 2011 letter. Consequently, the adjudicator concluded that the appellant was aware of the dispute resolution process, thus satisfying that requirement for a valid denial, as established by *Smith v. Co-operators General Insurance Co*., 2002 SCC 30, [2002] 2 S.C.R. 129, at para. 14.

[21] Finally, the adjudicator reiterated that the limitation period was extended by the request for mediation, but confirmed that that extension only took the appeal period to April 2014. The appellant's application to the Tribunal was on March 16, 2018 and was, itself, beyond the two-year limitation period.

3. The Divisional Court decision

[22] In detailed reasons, the Divisional Court considered both the appellant's appeal of the Tribunal's decision and her application for judicial review. With respect to the appeal, the Divisional Court concluded that the appellant had not identified any issue of law and that only a question of law was permitted on an

appeal: *Licence Appeal Tribunal Act, 1999*, S.O. 1999, c. 12, Sched. G, s. 11(6). The Divisional Court concluded that the issues that the appellant had attempted to raise regarding the Tribunal's decision were either questions of fact or questions of mixed fact and law. In particular, the Divisional Court said:

> The only issues about the triggering of the limitation period were whether the denial was clear and unequivocal, and whether the insured person was advised of her right to dispute the denial: *Smith*, above; SABS, section 54. These are both questions of mixed fact and law. The general question of whether, on the facts as found by the decision-maker, the limitation period had expired is also a question of mixed fact and law: *Longo v. MacLaren Art Centre*, 2014 ONCA 526 at para. 38. There was relevant evidence to support the [Tribunal's] conclusion.

[23] The Divisional Court concluded that the appellant had not shown an error of law with respect to the Tribunal's decision and therefore the appeal had to be dismissed.

[24] The Divisional Court then turned to the appellant's application for judicial review. It is this determination that gives rise to the issues on this appeal. The Divisional Court had noted, at the outset of its reasons, that judicial review was a discretionary remedy and that only in "exceptional circumstances" would it exercise its discretion to consider a judicial review application where there was a statutory right of appeal from a decision of the Tribunal.

[25] The Divisional Court considered the question of whether there was an adequate alternative remedy for the appellant that ought to preclude resort to

judicial review. It noted that the Supreme Court of Canada in *Strickland v. Canada (Attorney General)*, 2015 SCC 37, [2015] 2 S.C.R. 713, at para. 42, had said that "neither the process nor the remedy need be identical to those available on judicial review" for the alternative to be adequate.

[26] As instructed by *Strickland*, the Divisional Court then considered the relevant factors on the issue of adequate alternative remedy and found that they militated against the exercise of the judicial review power in light of the processes for review available through the Tribunal and the limited right of appeal. The Divisional Court concluded:

> Taking all the above factors into consideration, I conclude that judicial review of a [Tribunal] SABS decision is only available, if at all, in exceptional circumstances. There are no exceptional circumstances here that would lead me to exercise my discretion to judicially review the questions of fact and mixed fact and law raised by the applicant in her judicial review application.

C. ISSUES ON APPEAL

[27] The appellant raises the following issues on appeal:

1. Did the Divisional Court err in limiting judicial review, in cases where there has been a statutory appeal from a Tribunal decision about SABS, to "exceptional circumstances"?
2. Was the Tribunal's reconsideration decision reasonable?

[28] I will deal with each issue in turn.

D. ANALYSIS

[29] Although the statutory appeal processes, and their amendments, are described in detail in the Divisional Court's reasons, they bear repeating, at least in summary form.

[30] Before April 2016, disputes about an insured person's entitlement to SABS, including the amount to which they were entitled, were resolved in accordance with sections 280 to 283 of the *Insurance Act*, and the SABS, which provided that SABS disputes could be resolved by arbitration or court proceedings. At the time, the FSCO was the administrative body involved in SABS dispute resolution. Mediation of SABS claims through the FSCO was the mandatory first step in dispute resolution. Following a mediation, the mediator was required to report to the parties. After a failed mediation, parties could begin an action in the courts to determine SABS claims, or could proceed to arbitration, either through the FSCO or in a private arbitration.

[31] The limitation period for beginning a proceeding was two years from the date of the insurer's refusal to pay the benefit claimed, but, if the parties pursued mediation, both the *Insurance Act* and the SABS extended the limitation period to 90 days after the mediator's report to the parties: *Insurance Act*, s. 281.1(2)(b); SABS, s. 56(2).

[32] This dispute resolution system was significantly changed, effective April 1, 2016. This included the elimination of FSCO mandatory mediations, the elimination

of court actions, and the elimination of the FSCO's role in arbitrations. The *Insurance Act* was amended, also effective April 1, 2016, to provide the Tribunal with exclusive jurisdiction at first instance over the resolution of disputes in respect of an insured person's entitlement to SABS or the amount of SABS to which an insured person is entitled: s. 280.

[33] The legislature also amended the *Licence Appeal Tribunal Act, 1999*, effective April 1, 2016, by adding s. 11(6), which reads:

> An appeal from a decision of the Tribunal relating to a matter under the *Insurance Act* may be made on a question of law only.

[34] Also on April 1, 2016, the Tribunal adopted their Rules of Practice and Procedure that provide for limited internal reconsideration of Tribunal decisions. These Rules have since been replaced and amended to allow the original decision-maker to also decide the reconsideration request: *Licence Appeal Tribunal, Animal Care Review Board, and Fire Safety Commission Common Rules of Practice and Procedure, Version I (October 2, 2017)*, r. 18.1.

(1) Exceptional circumstances

[35] The main issue in this appeal is whether the Divisional Court was correct in saying that it would only exercise its discretion to consider a judicial review application, where there has also been a statutory appeal from a Tribunal decision about SABS, in exceptional circumstances. As I shall explain, while I agree with the point that the Divisional Court was attempting to make in its reasons, in my

view, the use of the language “exceptional circumstances” was an unfortunate one. As this case demonstrates, it gives rise to confusion regarding access to judicial review as a remedy in cases where there is a statutory appeal. It also has the potential to create similar confusion in cases involving other administrative decision-makers, as the interveners, the Income Security Advocacy Centre and the Advocacy Centre for Tenants Ontario, point out.

[36] I set the background to my analysis with the principle expressed in *Honsberger v. Grant Lake Forest Resources Ltd.*, 2019 ONCA 44, 431 D.L.R. (4th) 1, at para. 17:

> When this court considers a decision of the Divisional Court reviewing a decision of an administrative tribunal, it “steps into the shoes” of the Divisional Court and asks whether the Divisional Court identified the appropriate standard of review and applied it correctly. [Citations omitted.]

[37] The Divisional Court was correct in concluding that the existence of an adequate alternative remedy was a valid reason not to exercise its discretion to hear and determine a judicial review application. In reaching that conclusion, the Divisional Court properly considered the various factors from *Strickland*. Those factors directed that result. I mention only a couple of those factors to reinforce the Divisional Court’s conclusion.

[38] First, it is evident from the amendments that the legislature made to the resolution of disputes over SABS that it intended to greatly restrict resort to the courts for the determination of those disputes. One can draw that conclusion from

the fact that the legislature limited the statutory right of appeal to questions of law only. The result is that issues of fact or mixed fact and law are presumptively left to the Tribunal to determine, subject to the right to request a reconsideration. In this case, as the Divisional Court pointed out, there were no questions of law raised.

[39] Having said that, I recognize that the appellant still has the remedy of an application for judicial review available to her. That availability is clear from a number of sources, not the least of which is s. 280(3) of the *Insurance Act*. The section reads:

> No person may bring a proceeding in any court with respect to a dispute described in subsection (1), other than an appeal from a decision of the Licence Appeal Tribunal or an application for judicial review.

[40] Nothing turns on the decision of the legislature to include a reference to judicial review in this section. The *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, already provides, in s. 2(1), that a "court may, despite any right of appeal, by order grant any relief" by way of judicial review. Further, the case law also makes it clear that "legislatures cannot shield administrative decision making from curial scrutiny entirely": *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1, at para. 24. Similarly, "the existence of a circumscribed right of appeal in a statutory scheme does not on its own preclude applications for judicial review of decisions, or aspects of decisions, to which the appeal mechanism does not apply": *Vavilov*, at para. 52.

[41] The reference in s. 280(3) does not change the analysis nor does it change the fact that judicial review is a discretionary remedy. As Cromwell J. said in *Strickland*, at para. 37:

> Judicial review by way of the old prerogative writs has always been understood to be discretionary. This means that even if the applicant makes out a case for review on the merits, the reviewing court has an overriding discretion to refuse relief. [Citation omitted.]

[42] In my view, when the Divisional Court said that it would only exercise its discretion to hear and determine an application for judicial review in exceptional circumstances, what it was attempting to communicate is that it would only be in rare cases that the remedy of judicial review would be exercised, given the legislated scheme for the resolution of disputes over SABS. Put another way, the Divisional Court was recognizing that there would have to be something unusual about the case to warrant resort to the discretionary remedy of judicial review, given the legislative scheme. That legislative scheme includes the right to reconsideration of the Tribunal's preliminary decision and the statutory right of appeal from decisions of the Tribunal on questions of law.

[43] The decision of the Divisional Court recognizes the legislative intent to limit access to the courts regarding these disputes. This analysis is consistent with the principles regarding the centrality of legislative intent expressed in *Vavilov*. It also recognizes certain realities regarding the remedy of judicial review. One is the fact that judicial review is a discretionary remedy. Another is that a court is entitled to

"refuse to grant any relief on an application for judicial review": *Judicial Review Procedure Act*, s. 2(5). Yet another is that the existence of an adequate alternative remedy is, itself, a reason that justifies the exercise of the discretion to refuse to hear a judicial review application: *Strickland*, at para. 42.

[44] On that point, I do not accept the argument put forward by the appellant that the Divisional Court conflated its discretion to refuse relief with its standard of review analysis and erred by refusing relief without first considering the merits of the application for judicial review. The court's discretion with respect to judicial review applies both to its decision to undertake review and to grant relief: see, e.g., *Strickland*, at para. 42; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, at para. 30.

[45] I also do not accept the argument advanced by the intervener, the Income Security Advocacy Centre, that the Divisional Court's analysis of the legislative intent was "narrow and incomplete". To the contrary, the Divisional Court correctly interpreted the legislative scheme as evincing an intention to limit recourse to the courts. It is inconsistent with the legislature's decision to limit the right of appeal to questions of law alone to then hold that the remedy of judicial review is all-encompassing. Rather, I agree with the Divisional Court's approach, which essentially concluded that judicial review should be restricted to those rare cases where the adequate alternative remedies of reconsideration, together with a limited right of appeal, are insufficient to address the particular factual circumstances of a

given case. What constitutes such a rare case is for the Divisional Court to determine on a case-by-case basis.

[46] Finally, I do not accept the thrust of the arguments advanced by the interveners, the Income Security Advocacy Centre and the Advocacy Centre for Tenants Ontario, that there must be a wide-ranging right to judicial review in cases such as this, or in cases involving tenants or social assistance recipients. That argument ignores the fact that the legislature has the right, through legislation, to restrict appeal rights. As the intervener, the Attorney General of Ontario, pointed out in its factum, “more checks on decision makers does not necessarily mean more justice.” It also ignores the salient fact that the remedy of judicial review is a discretionary one.

[47] Removing the requirement for exceptional circumstances does not change the rationale or result of the Divisional Court’s decision. It remains true that it will only be a rare case where the remedy of judicial review will be properly resorted to, given the alternative remedies that are available to an unsuccessful party. Those alternative remedies will be, in the vast majority of cases, “adequate in all the circumstances to address the applicant’s grievance”: *Strickland*, at para. 42.

[48] On this point, I accept that the Divisional Court’s statement, in the penultimate paragraph of its reasons, that judicial review is only available “if at all” in exceptional circumstances, was also unfortunate and unnecessary. It is clear, both from the legislative sources and from case law to which I have referred above,

that judicial review is always available. The pertinent question is whether it is appropriate, in any given case, to exercise the discretion to hear and determine that judicial review.

(2) Was the adjudicator's reconsideration decision reasonable?

[49] The appellant raises a secondary issue. She contends that the adjudicator's reconsideration decision was unreasonable when he concluded that the January 7, 2011 letter from TD Insurance constituted a valid denial of IRBs, housekeeping, and home maintenance benefits.

[50] In advancing this argument, the appellant misreads the adjudicator's decision. The adjudicator acknowledged that, in his preliminary decision, he had made an error when he said that the IRBs had been denied in the February 16, 2011 letter. He corrected that finding in his reconsideration decision and said it was the September 19, 2011 letter that finally denied the IRBs. The adjudicator then reiterated his central point, which was that the January 7, 2011 letter had denied both the IRBs and the housekeeping and home maintenance benefits. He found that a dispute resolution form had been attached to that letter. The adjudicator therefore found that, when the IRBs were finally denied by the letter of September 19, 2011, the appellant was fully informed of the dispute resolution process. Consequently, he concluded that there was no deficiency that undermined the denial of the IRBs through the September 19, 2011 letter. Indeed,

he found that the denial “is in clear language and the dispute resolution process is plainly evident from the attached Form.”

[51] In the reconsideration decision, the adjudicator went on to hold that, based on his findings, the limitation period would have expired in 2013, but for the FSCO mediation process that extended that limitation period to April 2014. In either event, the fact that the appellant had not launched her application to the Tribunal until March 16, 2018 meant that it was outside of the limitation period.

[52] The appellant has failed to demonstrate that there is anything unreasonable in the conclusion that the adjudicator reached in his reconsideration decision. Assuming, therefore, that the judicial review application ought to have been considered, which I have already concluded was not the case, that application would have failed on the presumptive standard of review of reasonableness: *Vavilov*, at para. 16.

(3) Concurrent appeal and judicial review proceedings

[53] Before concluding, I will address one other issue that is raised by the parties and that is the reference by the Divisional Court to what it described as “the systemic difficulties associated with duplicative judicial reviews and appeals.” The Divisional Court identified these difficulties as one of the factors weighing against considering the judicial review application.

[54] I have already said that judicial review is available in these cases. As I have also said, there is a difference between the availability of judicial review and

whether such relief will be granted. However, the fact that judicial review is available does raise the practical problem of how that application should be dealt with when there is also a statutory right of appeal. On that issue, I make two comments.

[55] First, if a party intends to utilize both their right of appeal and their right to seek judicial review, then those proceedings must be brought together. Put simply, a party cannot first exercise their right of appeal and then, if unsuccessful, bring a judicial review application. “Litigation is not to be conducted by instalment”: *Shearer v. Oz*, 2021 ONSC 7844, at para. 5.

[56] Second, once both proceedings are commenced, a motion must be brought for the two proceedings to be heard together with a single appeal book/application record and factum covering both proceedings. It would, of course, be open to the Divisional Court to adopt a Practice Direction that directs that this is the process to be followed, in an effort to avoid such motions. The Practice Direction could also address any issues with differing time periods for filing and like matters. Failing that, the time and expense of such a motion could be greatly reduced if counsel were to agree on the terms of an appropriate order with a further agreement that the motion could then be dealt with in writing.

[57] Simply put, the difficulties that the Divisional Court identified with concurrent proceedings can be minimized through appropriate Practice Directions and/or the co-operation of counsel.

E. CONCLUSION

[58] I would dismiss the appeal. The respondent, TD Insurance, is entitled to its costs of the appeal in the agreed amount of $15,000 inclusive of disbursements and H.S.T. The interveners neither seek, nor are they to be subject to, an award of costs. I would not make any order for costs to the respondent, the Tribunal.

Released: June 7, 2022 “P.D.L.”

“I.V.B. Nordheimer J.A.”
“I agree. P. Lauwers J.A.”
“I agree. B. Zarnett J.A.”