

SUPREME COURT OF YUKON

Citation: *Canada (Attorney General) v Menzies*,
2014 YKSC 73

Date: 20141217
S.C. No. 07-A0125
Registry: Whitehorse

Between:

THE ATTORNEY GENERAL OF CANADA

Plaintiff

And

MICHAEL MENZIES

Defendant

Before: Mr. Justice R.S. Veale

Appearances:

Paul Battin

Counsel for the plaintiff
No one appearing for Michael Menzies

REASONS FOR JUDGMENT

INTRODUCTION

[1] The plaintiff filed default judgment against the defendant on February 4, 2010, for failing to file and deliver a Statement of Defence. Canada's claim is brought pursuant to the *Government Employees Compensations Act*, R.S.C. 1985, c. G-5, (the "Act") for medical and wage claims on behalf of a Canada Post employee injured on duty at the defendant's residence.

[2] The plaintiff now brings an application for assessment of damages upon affidavit evidence pursuant to Rule 17(7) of the *Rules of Court*.

[3] The plaintiff seeks special damages in the amount of \$50,930.78.

[4] The plaintiff is not pursuing general damages on behalf the injured employees or costs, although both were originally claimed.

[5] The Court granted judgment in the amount of \$50,930.78 representing:

- a) \$29,739.87 for non-insured medical and ancillary costs paid by the Government of Canada for medical treatment of their employee; and
- b) \$21,191.11 for wages paid by the Government of Canada for injury-on-duty leave of its employee between February 1, 2006 and May 18, 2007.

[6] These are my reasons. The 20 cent discrepancy in the addition in the filed order is noted but I consider it insignificant and it is against Canada.

BACKGROUND

[7] On January 9, 2006, Canada Post corporation employee Bona Cameron, while on duty, slipped and fell on snow and ice while coming down the exterior stairs at the residence of the defendant in Whitehorse, Yukon. She suffered a left foot/leg strain, tendon insertion inflammation and a painful *os peroneum* syndrome, which means lateral plantar foot pain. There was no other fracture, contusion, soft tissue or ligamentous injury.

[8] On February 6, 2006, Ms. Cameron elected to claim under the *Act* and agreed that the Government of Canada was subrogated to her rights and may maintain an action against the Third Party Menzies. Counsel for Canada advises that Ms. Cameron elected not to pursue a general damages claim.

[9] Between February 1, 2006, and December 3, 2007, the Alberta Workers' Compensation Board, by arrangement with the Government of Canada, paid insured

medical and ancillary costs in the sum of \$29,737.87, which were billed to and paid for by the Government of Canada. This evidence was provided by affidavit with complete particulars.

[10] The Government of Canada paid \$21,191.11, as wages for injury-on-duty leave pursuant to Article 24 of the Canadian Union of Postal Workers Collective Agreement. This was also proven by affidavit with complete details.

THE LAW

[11] The Government of Canada relies upon the following provisions of the *Act*, which were in force at the time of the accident:

2. In this Act,

"compensation" includes medical and hospital expenses and any other benefits, expenses or allowances that are authorized by the law of the province where the employee is usually employed respecting compensation for workmen and the dependants of deceased workmen;

...

4. (1) Subject to this Act, compensation shall be paid to

(a) an employee who

(i) is caused personal injury by an accident arising out of and in the course of his employment, or

...

5. (1) Where an employee is usually employed in Yukon or the Northwest Territories, the employee shall for the purposes of this Act be deemed to be usually employed in the Province of Alberta.

...

9. (1) Where an accident happens to an employee in the course of his employment under such circumstances as

entitle the employee or his dependants to an action against a person other than Her Majesty, the employee or the dependants, if entitled to compensation under this Act, may claim compensation under this Act or may claim against that other person.

...

(3) If the employee or the dependants referred to in subsection (1) elect to claim compensation under this Act, Her Majesty shall be subrogated to the rights of the employee or dependants and may, subject to the Agreement implemented by the Civil International Space Station Agreement Implementation Act, maintain an action in the name of the employee or dependants or of Her Majesty against the person against whom the action lies and any sum recovered shall be paid into the Consolidated Revenue Fund.

[12] There has been extensive judicial consideration of the extent of the right of subrogation under s. 9 and whether it includes the employee's claim for general damages. Finch J.A., in *McRae v. Canada (Attorney General)* (1997), 99 B.C.A.C. 112, after a complete discussion of the general principles of subrogation in paras. 24 – 38, concluded that the employee still has their personal interest in the claim which is not assigned to the government on electing compensation.

[13] Thus, Finch J.A. disagreed with the reasons of Thorson P., in *The Queen v. P.B. Ready-Mix Concrete & Excavator Ltd* (1956), 5 D.L.R. (2d) 268 (Ex.Ct.), where Thorson P. said at para. 4:

... On his claiming compensation under the Act his rights against the person responsible for his injury pass in their entirety to the Government and are completely vested in it.

...

[14] Finch J.A. emphasized this sentence in his decision and concluded:

42 In my respectful view, the emphasized sentence is inconsistent with the general law of subrogation. The

employer's rights against the third party would only "pass to" or "vest in" the employer if the employee had made a full assignment of all his rights against the wrongdoer.

43 I am therefore of the view that in electing to accept compensation payable under the Act, the plaintiff did not give up any rights for which she had not been compensated.

44 In my respectful view, such an interpretation of s. 9 of the Act complies with the legislative text, promotes the legislative purpose, and leads to an outcome that is just and reasonable. It conforms to the basic modern rule of statutory interpretation, and respects the other principles to which reference was made earlier in these reasons.

45 It would appear, on the face of it, therefore, that in settling its claim against Chen and her insurers, the government compromised the plaintiff's rights without compensating her, and without consulting her. Nothing in the law of subrogation would have permitted this, and I do not understand the Act to have conferred any right to do so. In settling the litigation without taking into account the plaintiff's rights, the government held and exercised powers over the plaintiff, who was vulnerable if not in law, then at least in fact. There appears to be a subsisting claim by the plaintiff against the Attorney-General for breach of a fiduciary duty. The government could not bargain away the plaintiff's rights without being required by equity to account to her for any loss she may have suffered as a result. She may, in addition, have a claim arising from the oral representation of the Manager of Injury Compensation

[15] However, in the case at bar, Bona Cameron appears to have assigned her rights to Canada. Counsel for Canada is satisfied that Ms. Cameron has elected not to pursue a general damages claim. In the event that she had, it would be my view that her claim for general damages would require oral evidence from the injured employee as the assessment of pain and suffering cannot be reasonably concluded without assessing the credibility of the claim. There would be no difficulty presenting the medical evidence by affidavit.

[16] The *Rules of Court* provide for the assessment of damages as follows:

Claim for unliquidated damages

17 (7) Where the plaintiff's claim against a defendant is solely for unliquidated damages, the plaintiff may enter judgment against that defendant for damages to be assessed and costs, and may proceed with the action against any other defendant.

...

Alternative methods of assessment

(17) Where a plaintiff has obtained judgment under subrule (7), (8) or (9), instead of proceeding to trial to assess the damages or the value of the goods, the plaintiff may apply to the court and the court may

- (a) assess the damages or value of the goods summarily upon affidavit or other evidence,
- (b) order an assessment, an inquiry or an accounting,
- (c) give directions as to the trial or hearing of the assessment or determination of value, or
- (d) make any other order it thinks just.

[17] Rule 17(7) clearly gives the court a wide discretion to proceed “upon affidavit or other evidence” and I have no difficulty accepting the affidavit evidence for the special damages claimed by the Government of Canada.

VEALE J.