

CANADA / JUDGMENT

Eugenio v. Dhillon

2007 BCSC 1906

COURT

Supreme Court of British Columbia

DECIDED

22 May 2007

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2007 BCSC 1906 Eugenio v. Dhillon IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Eugenio v. Dhillon, 2007 BCSC 1906 Date: 20070522 Docket: M053048 Registry: Vancouver Between: Lorna T. Eugenio Plaintiff And: Sukhpal S. Dhillon and Bonny's Taxi Ltd. Defendants Before: The Honourable Mr. Justice Hinkson Oral Reasons for Judgment In Chambers May 22, 2007 Counsel for the Plaintiff J.M. Oostlander Counsel for the Defendants D.L. Kozak Place of Hearing: Vancouver, B.C.

- [1] THE COURT: I am going to grant judgment.
- [2] This action arises from a motor vehicle accident which occurred on the 24th of December, 2004. The pleadings in the action were closed on the 8th of December, 2005. The plaintiff, Ms. Eugenio, was examined for discovery by counsel for the defendants on June 5 and July 17, 2006. The trial in this action is set for April 2008 for seven days. The defendants now seek an order to amend their statement of defence to plead the provisions of s. 10 of the Workers Compensation Act R.S.B.C. 1996, c. 492. The plaintiff says that she will be prejudiced by such an amendment as her ability to claim Workers' Compensation benefits may be statute-barred pursuant to the limitation provisions set out in s. 55 of the Workers Compensation Act.
- [3] The defendants offer no reasonable explanation for their failure to seek these amendments since November of 2006 when their counsel said he first realized the potential for the defence pursuant to s. 10 of the Workers Compensation Act. This realization is said to have been based upon the information that was obtained during his examinations for discovery of the plaintiff earlier in 2006.
- [4] Section 10(1) of the Workers Compensation Act reads: The provisions of this Part are in lieu of any right and rights of action, statutory or otherwise, founded on a breach of duty of care or any other cause of action, whether that duty or cause of action is imposed by or arises by reason of law or contract, express or implied, to which a worker, dependant or member of the family of the worker is or may be entitled against the employer of the worker, or against any employer within the scope of this Part, or against any worker, in respect of any personal injury, disablement or death arising out of and in the course of employment and no action in respect of it lies. This provision applies only when the action or conduct of the employer, the

employer's servant or agent, or the worker, which caused the breach of duty arose out of and in the course of employment within the scope of this Part. Subsection (7) of s. 10 provides: If, in an action brought by a worker or dependant of a worker or by the Board, it is found that the injury, disablement or death, as the case may be, was due partly to a breach of duty of care of one or more employers or workers under this Part, no damages, contributions or indemnity are recoverable for the portion of the loss or damage caused by the negligence of that employer or worker; but the portion of the loss or damage caused by that negligence must be determined although the employer or worker is not a party to the action.

- [5] Section 11 of the Workers Compensation Act states in its relevant portions, headed "Certification to Court": Where an action based on a disability caused by personal injury or death is brought, the board [must] on request by the court or by any party to the action, determine any matter that is relevant to the action and within its competence under this Act and, without limiting the generality of the foregoing, may determine whether
- (a) a person was, at the time the cause of action arose, a worker within the meaning of this Part;
 - (b) injury, disability or death of a worker arose out of, and in the course of, his employment and [must] certify its determination to the court.
- [6] Mr. Justice Cumming, as he then was, observed in *Canadian Pacific Ltd. v. Jones Estate*, [1989] B.C.J. No. 1241 at p. 362: What must be borne in mind is that the provisions of the Act do more than simply provide a defence to an action; they go to the standing of the plaintiffs to maintain their action in the first place.
- [7] Pursuant to the reasoning in *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590, I am bound to follow the reasoning of Mr. Justice Owen-Flood in the case of *Brzozowski v. Greyhound Canada Trans. Corp.*, [1998] B.C.J. No. 2400. In that case, two plaintiffs were injured on the 11th of November, 1996, while riding as passengers on a bus owned and operated by the defendants. Proceedings were commenced in which the defendant, Greyhound, admitted negligence on the part of its driver.
- [8] In November 1997 at the plaintiffs' examination for discovery, counsel for Greyhound raised for the first time, a statutory Workers Compensation Act (the "Act") defence pursuant to s. 10 of the Act. The plaintiff then sought a ruling from the Workers' Compensation Board for benefits pursuant to the Act. The adjudicator who heard the plaintiffs' application disallowed their claims as they were brought outside the one-year time limit under s. 55 of the Act. Greyhound then brought a motion to amend its statement of defence to raise the statutory defence pursuant to s. 10 of the Act and were permitted to do so on condition that they undertook to pay the equivalent of any benefits the plaintiff would have received save for its delay in applying to the Board for the s. 10 ruling.
- [9] Mr. Justice Goldie made a similar ruling on an application for leave to appeal in the case of *Parmar v. Virk (FAS)*, 9 B.C.L.R. (3d) 394, [1995] B.C.J. No. 1604. A similar term was imposed in similar circumstances by Madam Justice Stromberg-Stein in the case of *Zacharias v. Lo*,

[1999] B.C.J. No. 881 from a hearing March 8, 1999. I consider that I am obliged pursuant to these authorities to allow the amendment sought. I do so on the same conditions that were imposed by Madam Justice Stromberg-Stein and Mr. Justice Owen-Flood in the Zacharias and Brzozowski actions. That is, the amendment will be allowed on the undertaking of the defendants' insurer that: if the Workers Compensation Board determines that it has jurisdiction, but refuses to extend the limitation period to allow the plaintiff benefits, the insurance company will pay the equivalent of any benefits the plaintiff would have received save for the delay in making the application to the Board.

[10] In the circumstances, I do not propose to make an order for costs. Again, following the reasoning of Mr. Justice Owen-Flood, the costs of this application will be in the cause.

[11] MR. KOZAK: My Lord, it seems that you were reading the term from one of the cases.

[12] THE COURT: I was, from Madam Stromberg-Stein's decision.

[13] MR. KOZAK: From Zacharias.

[14] THE COURT: From Zacharias, the paragraph that you highlighted for me, paragraph 12.

[15] MR. KOZAK: Thank you, My Lord. It almost -- with respect, it almost sounds like a conditional order that if the amendment is made, then the undertaking follows, but I -- so I want to clarify it. The amendment shall be made and the undertaking shall be given.

[16] THE COURT: Well --

[17] MR. KOZAK: Or are you --

[18] THE COURT: -- if the undertaking is not given, there will be no amendment.

[19] MR. KOZAK: Okay. I mean, it sounds like an optional order that the defendants can pursue, then, if they don't want to amend at this time, then they don't need to.

[20] THE COURT: Oh, no.

[21] MR. KOZAK: And that's why I want to be clear. That's almost the way it sounds, like your Lordship -- that's the way it sounds in one interpretation of it, so --

[22] THE COURT: Yes, I expect the undertaking to be provided. If it is not, I want to be so advised by counsel and I may invite you to come back --

[23] MR. KOZAK: Certainly.

[24] THE COURT: -- and make other submissions, but the amendment is allowed only once the undertaken is given.

[25] MR. KOZAK: All right. And if the amendment doesn't make [sic], you want to be so advised?

[26] THE COURT: Yes.

- [27] MS. OOSTLANDER: My Lord, my concern is that we could be pushed beyond the three-year period by numerous delays and I wonder if it might be appropriate to set a time limit for them to determine.
- [28] THE COURT: Well, you have made the application within three years under s. 55 of the Act.
- [29] MS. OOSTLANDER: We have not yet made it, but we will.
- [30] THE COURT: Oh, I am sorry.
- [31] MS. OOSTLANDER: We will go ahead and make it.
- [32] THE COURT: I thought the application was made in March.
- [33] MS. OOSTLANDER: Oh, the application for s. 257, a determination has been made, but she has not applied for Workers' Compensation benefits.
- [34] THE COURT: Oh, I see.
- [35] MS. OOSTLANDER: And we have -- we're at the one-year to three-year period, which expires at the end of this year.
- [36] THE COURT: Right.
- [37] MS. OOSTLANDER: I guess one way around it is for me to just make sure she applies.
- [38] THE COURT: Yes, yes. I am not going to order that she apply, but in the event she does not, there may be no basis upon which to determine what if any benefits she would have been entitled to receive.
- [39] MS. OOSTLANDER: Thank you. Thank you.
- [40] THE COURT: Is there anything else, counsel?
- [41] MR. KOZAK: I don't know if that muddies it more now or I'm just thinking it through, My Lord, that if she hasn't made the application at this point in time and if she never chooses to make it, then there's no way to determine whether she would have been entitled to the benefits. There's no way to give effect to the orders that were made.
- [42] MS. OOSTLANDER: Well --
- [43] THE COURT: Yes, I am expecting Ms. Oostlander will have her client make the application.
- [44] MR. KOZAK: Well, yes, so am I. That would be my guess.
- [45] THE COURT: The reason I asked you whether in the Zacharias case there had been the offer from the insurers, it does not appear that that is the case from my reading of the reasons.
- [46] MR. KOZAK: Yes, I didn't get that, either. I think it was -- I think it's something that the court picked up on from Parmar v. Virk and --
- [47] THE COURT: Right.

[48] MR. KOZAK: -- and stated there must be authority to do that, so --

[49] THE COURT: Well, I am ordering it on the same basis, then.

[50] Since pronouncing these Reasons for Judgment it has come to my attention that s. 11 of the Workers Compensation Act referred to in para. 5 was repealed effective March 3, 2003 (BC Reg. 320/02). This does not affect my decision pronounced May 22, 2007. "Hinkson J."

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