SUPREME COURT OF NOVA SCOTIA

Citation: *Oxford Frozen Foods Ltd, v. Nova Scotia (Workers' Compensation Board)*, 2017 NSSC 245

Date: 20170922
Docket: Hfx No. 460266
Registry: Halifax

Between:

Oxford Frozen Foods Limited

- Applicant

v.

The Workers' Compensation Board of Nova Scotia and Attorney General of Nova Scotia

- Respondents

Judge: The Honourable Justice Jamie Campbell

Heard: August 17, 2017, in Halifax, Nova Scotia

Counsel: John A. Keith, Q.C. and Jack K. Townsend, for the Applicant
Bradley D.J. Proctor, Katie Roebothan and Madeleine Hearns, for the Respondents

By the Court:

[1] In this judicial review, Oxford Frozen Foods argues that the Workers' Compensation Board (WCB) failed to follow some basic rules of procedural fairness.

Summary

[2] The *Workers' Compensation Act* S.N.S. 1994-95, c. 10, contains what seems like an unusual provision that can result in a case that is the subject of an appeal, being put on hold while the policy that governs the case is amended, so it can then be applied to that case. The power to do that kind of thing should not be exercised in a way that is anything less than transparent if the idea of a fair and impartial appeal is to be respected at all.

[3] In this case, the WCB was faced with an appeal decision from the Workers' Compensation Appeals Tribunal (WCAT) that WCB staff believed to be wrong. Rather than seek leave to appeal it to the Court of Appeal, as permitted by the *Workers' Compensation Act*, they devised a plan to get around the problem decision. They didn't tell the other party involved, Oxford Frozen Foods, about that plan. If the company appealed the issue of implementation of the problem WCAT decision to a Hearing Officer they would be ready for that. The Hearing Officer who was to hear the appeal, as permitted by the *Act*, would form the opinion that the appeal involved matters of law and general policy and refer it to the Board Chair. The Board Chair, as permitted by the *Act*, who would exercise his discretion to refer the matter to the Board for policy development. Once the newly clarified policy was in place, the matter would go back to the Hearing Officer for an actual decision, as permitted by the *Act*, on the new policy which reflected the preferred, and they say, well established practice. It's a clever and almost elegant procedural move that minimizes the impact of a problematic appeal decision and leaves the other party, Oxford Frozen Foods, wondering what had just happened. And, it seems on its face to comply with the legislation.

[4] The WCB has a broad authority to manage the workers' compensation scheme. It can make policies. It can amend policies that will affect individual cases when those cases and the policy issues they raise are referred to the Board by a Hearing Officer. It is an unusual process by which an ongoing case can be pulled out of the adjudicative stream while policies intended to affect that case are developed. That process, as set by legislation, is not contested here.

[5] Doing that isn't the problem. Having a plan in place as to how to circumvent a WCAT appeal decision using that process - that is the problem. The WCB should not be able to do a tactical work around with respect to a statutorily mandated decision and appeals process to rectify the result of an individual WCAT appeal. Here, the WCAT decision was implemented in a way that left open the very real likelihood that the implementation would be appealed to a Hearing Officer. The issue of law and general policy identified by WCB staff was in effect the very issue that had been decided by the WCAT. Arranging beforehand to have a Hearing Officer refer the appeal to the Board for policy development before the Hearing Officer even knows the case is coming her way is a breach of fundamental procedural fairness. When a case is sent to a Hearing Officer with a plan already in place, unbeknownst to the other party, that the Hearing Officer will adjourn the matter, and the policy under which the decision is to be made will be changed so that the preferred decision will be made, that appears less like the fulfillment of a legitimate policy making role and more like an attempt to circumvent the adjudicative process and avoid the implications of the WCAT decision.

[6] The decisions of the Hearing Officer and the Board Chair are quashed.

Rate Setting in the Workers' Compensation System

[7] The process by which the rate is set for an employer's contribution to the workers' compensation system is at the heart of the matter the dispute that brought the parties to the Hearing Officer and the WCAT. The calculation of the rate is not the issue for the judicial review.

[8] The WCB has a responsibility under the *Workers' Compensation Act* to assess and collect funds from employers to meet its financial obligations. Those of course, include the costs of benefits to injured workers. The WCB has broad discretion in setting rates. It has the legislative mandate to administer the scheme including the power to determine how assessments are made and how rates are set. It decides how much money is required, devises principles of assessment and divides employers into classes for assessment purposes. Its discretion is very wide with respect to rates.[1] That is far from being a simple and straightforward matter and understanding it requires some level of specialized knowledge.

[9] Once the funding needs for the year have been identified the WCB carries out the rate setting process. Section 120 of the *Act* gives the WCB the authority to

[1] *Halifax Employer's Assn. v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2000 NSCA 86

divide employers into classes, subclasses, rearrange and make new classes and transfer employers between classes. The WCB is authorized by s. 121(1) to set rates for a class or a subclass based on the record, risk, cost, or experience in the class over a period of time as determined by the WCB.

[10] The way that those classifications are established are set out in policies of the WCB. Policy 9.3.1R2 provides the overview of the steps that the WBC follows when classifying employers and setting assessment rates. Each employer is classified based on the principal activity of the business. The framework used to do that is the Statistical Industrial Classification published by Statistics Canada. Industries are then placed into groups by grouping the Standard Industrial Classifications that have similar business activities. Once the industry groups are determined the WCB is required to form the rate groups. Rate groups are determined by combining industry groups with similar accident experience. When the rate group is determined, the assessment rates are set for each rate group. According to Policy 9.3.1R2 those rates are based on the rate group's five-year accident experience. That is referred to as the rate group's baseline rate.

[11] At that stage, Policy 9.3.3R1 applies. It provides specific guidance for setting the assessment rate. The data used for setting rates consists of claims costs and assessable payroll of each rate group over a period of five years. The claims costs data used is the actual cash payments for the five-year period for all claims with accident dates during that period. The WCB calculates a claims costs to assessable payroll ratio by assigning a weighting to each of the five years. Greater weight is applied to the most recent year and a lower rate to the most distant year. The weighting factors used are based on actuarial valuations are determined by the WCB.

[12] Once the assessment rates have been set by rate group, the WCB sets the employer's basic rate. That involves a determination of whether a surcharge should be added based on the employer's experience rating. Obviously, the issue of how much an employer pays is a significant one and employers are not always satisfied with the assessment.

[13] Access to the courts to interfere is limited.[2] The Workers' Compensation Board has a broad statutory mandate and within that mandate "has virtually complete policy control over the whole scheme and its policy choices, provided

[2] *Legere v. Nova Scotia (Workers' Compensation Appeals Tribunal),* 2016 NSCA 5, para. 49

they are within the statutory mandate, are binding on WCAT."[3] The WCB has the authority to make decisions and policy choices in order to ensure that the workers' compensation system remains viable and able to meet its primary objectives.

The Appeals Process

[14] When employers are not satisfied with their assessments they have the option to appeal.

[15] Generally, decisions made by the WCB are made pursuant to s. 185 of the *Act*. Those decisions can be appealed to a Hearing Officer under s. 197. That is an internal appeal within the WCB structure. The Hearing Officer can hold an oral hearing and the participants in the appeal may present evidence and make submissions. The Hearing Officer is required to issue a decision within sixty days of the completion of the hearing.

[16] That decision can be appealed to the Workers' Compensation Appeals Tribunal under s. 243. That also involves the submission of evidence and representations by the participants. That is an external appeal to a body administered through the Department of Justice. A party can seek leave to appeal the WCAT decision to the Court of Appeal on issues of law and jurisdiction.

[17] The WCB has authority to make policies that bind the WCB itself, its Chair and every officer and employee of the WCB including Hearing Officers. Those policies also bind the WCAT, provided that the policy is not inconsistent with the *Act*. A Hearing Officer must apply Board policies while the WCAT can refuse to do so if it concludes that the policy is not consistent with the *Act*.

[18] A Hearing Officer, hearing an appeal under s. 197 can refer a matter to the Chair if he or she is of the opinion that the appeal raises an issue of law and general policy that should be reviewed by the Board of Directors. In that case, the Hearing Officer postpones or adjourns the matter upon referral to the Chair. That provision is significant in this judicial review. The referral made by the Hearing Officer is made if the Hearing Officer himself or herself forms an opinion. The WCB can direct a Hearing Officer through policy. The *Act* does not contemplate the Hearing Officer taking directions from the WCB with respect to how discretion must be exercised in individual cases.

---

[3] *Martin v. Nova Scotia (Workers' Compensation Board)*, 2000 NSCA 126, para. 107

[19] When an appeal is referred by a Hearing Officer to the Chair of the WCB under s. 199, the Chair may direct that the appeal be reviewed by the Board of Directors. There is no requirement in that case for the Chair to form an independent opinion as to the nature of the issues raised in the appeal. If an appeal is not referred to the Chair by a Hearing Officer under s. 199, the Chair may exercise the authority under s. 200, to postpone or adjourn an appeal if the Chair is of the opinion that the appeal raises an issue of law and general policy that should be reviewed by the Board.

[20] Moving up the chain, the Board of Directors itself may adopt and issue a policy in consequence of any determination made pursuant to s. 199 and s. 200. That policy is effective immediately and is applicable to appeals that have already been commenced.

[21] So, if a Hearing Officer is of the opinion that an appeal raises an issue of law and general policy the appeal can be referred to the Chair of the Board, then to the Board itself which can make a policy that governs that appeal. The matter is then referred to the Hearing Officer for determination under the new or amended policy. Engaging the process of retroactively effective policy review and development requires either that the Hearing Officer or the Chair of the WCB form an opinion that the appeal raises an issue of law and general policy.

[22] The process is also part of a scheme that provides for both internal and external appeals. The provisions permitting appeals to be taken out of the adjudicative stream pending policy development should not be used as an alternative appeal mechanism. Removing a case from that stream in the first instance without notice to the other party may have fairness implications. Planning a response to an external appeal by catching it at the implementation stage and rerouting it toward policy development intended to undo or effectively reverse the external appeal, certainly has implications for procedural fairness.

Background

[23] That process is important to the understanding of what happened here.

[24] The facts are set out in Justice Ann E. Smith's decision on the preliminary motion in this case.[4] As Justice Smith notes, the dispute at the heart of the matter is Oxford Frozen Foods' appeal from a decision of the WCB's Manager of Business

[4] *Oxford Frozen Foods Ltd. v. Nova Scotia (Workers' Compensation Board)*, 2017 NSSC 136

Intelligence, Brian Field, setting out Oxford's rate grouping for 2015. Mr. Field, in a letter dated September 26, 2014, to Jordan Burkhardt, Oxford's Director of Human Resources says:

> The question we ask ourselves in forming industry groups and rate groups is how much we focus on the short-term vs. long-term performance. Our goal is to set rates based on what we believe the true level of risk in an industry to be. At the end of the day, in setting 2015 rates, your industry was slotted in a rate group with costs about 1.6 times the provincial average. While that might appear high based on your most recent 5-year period alone, it is not out of line with longer-term performance.

[25] On October 30, 2014, Oxford appealed the group rating for 2015. It noted that the group rating had resulted in an increase in its WCB rates despite its performance over the last five years which it believed fully justified a rate reduction. A WCB Hearing Officer denied Oxford's appeal in a decision dated February 23, 2015. Oxford appealed that decision to the WCAT and made written submissions in advance. The WCB provided no written submissions or other materials with respect to that WCAT appeal. The WCAT appeal was heard on June 6, 2016. No one attended or appeared on behalf of the WCB.

[26] On June 23, 2016, the WCAT issued a written decision, finding in favour of Oxford. The Appeal Commissioner of the WCAT accepted Oxford's argument that the Board was limited to looking at five years of data to determine the proper rate group and went on to say that the conclusion was supported by Policy 9.3.3R1 entitled "Data Used in Rate Setting at Rate Group Level". The Appeal Commissioner said that the policy stipulated that the Board will look at claims costs and payroll over a five-year period and it is that data that determines the Industry Group's cost experience. Citing the letter of September 26, 2014, the Appeal Commissioner determined that factors outside the relevant five-year period impacted the Rate Group choice and was then incorrect. The matter was remitted to the Board with direction to revisit Oxford's Rate Group for 2015.

[27] The WCB did not seek leave to appeal to the Court of Appeal. Instead it did something else.

[28] There were some initial discussions between the WCB and Oxford about implementing the WCAT decision. Staff at the WCB were convinced that the WCAT had erred and expressed that view to the WCB Executive Committee. The opinion was that the WCB was not limited to using data from the most recent five years in establishing rate groups.

[29] The staff contemplated revision of the policy arising from the WCAT decision. That was to be addressed at the October 4, 2016 Executive Committee meeting. In advance of that though the staff at WCB discussed the "risks associated with opening up this policy with the Executive". Those were the words used in an internal staff email.

[30] The issue was brought to the Executive Committee where the issue was, as described in an internal staff email:

> ... what if anything do we want to consider doing regarding Policy work stemming from the Oxford decision and what are some things we think EC needs to consider when having this conversation.

[31] The WCB staff made a PowerPoint presentation to the Executive Committee at the October 4, 2016 meeting. In that presentation, the staff postulated that the lack of policy or readily available information may have been what lead to the WCAT reaching what they maintained was an incorrect interpretation of Policy 9.3.3R1. The staff of the WCB then recommended implementation of their interpretation of WCAT decision and monitoring of Oxford's response. If Oxford appealed they would prepare a draft letter from the Chair of the WCB "to request appeal be put on hold".

[32] The concern was that if Oxford did appeal the "spotlight" would continue to shine on that policy area. Aspects of the WCB's rate setting process could "ultimately end up before the Court of Appeal". There was concern expressed that the WCAT decision could become entrenched in the system. Presumably that would happen if Oxford appealed an unsatisfactory Hearing Officer decision to the WCAT and the WCAT agreed with Oxford's argument that the WCB had not really implemented the WCAT June 23, 2016 appeal decision.

[33] Oxford then received a letter from the WCB dated October 6, 2016. That has been referred to as the Implementation Decision. The WCB was taking the position that the WCAT decision applied to 2015 industry rates and that decision did not apply to the years before that back to 2011. The letter says that while industry rate calculations were made using five years of data, the "formation of rate groups is a process that considers risk over a longer period of time".

[34] Oxford took that to be inconsistent with the June 23, 2016 WCAT decision. On November 4, 2016, Oxford appealed the October 6, 2016 Implementation Decision to a WCB Hearing Officer. That is referred to as the Implementation

Appeal. Oxford, through its counsel, noted that it would await discussion about whether the appeal would proceed by paper review or an oral hearing. At this point, Oxford had every reason to presume that the appeal would just take place in the normal course. The appeal argued that the WCB had refused to apply the process ordered by the WCAT to any years before 2015 and failed to take into account Oxford's inappropriate rate grouping for 2014 and any previous years. Among other things the appeal claimed that the WCB erred in considering data from a period greater than five years when setting Oxford's new 2015 rate "despite a clear ruling from the Tribunal that the WCB is limited to looking at five years of data". There were other grounds of appeal but in summary Oxford was asserting that the WCB had not properly implemented the WCAT decision. That appeal to the Hearing officer was, once again, filed on November 4, 2016.

[35] Staff at the WCB had been anticipating the appeal. An email of November 15, 2016 states:

> The appeal has been filed (as discussed at EC a couple weeks ago) and we are now going ahead to implement as we had proposed. (emphasis added)

[36] An email of November 17, 2016 confirmed the plan for response that had been presented to the Executive Committee even before Oxford filed its appeal. On November 17, 2016 WCB staff discussed the Oxford appeal in an email. They acknowledged that a plan had earlier been proposed to the Executive Committee and it was now time to "put this plan in motion". "Given that the appeal has been filed we will begin." The emails confirmed that the CEO of the WCB had committed to talk to the Chair of the WCB "about the fact that the HO decision will be 'punted' to him to allow time for the policy development work". That suggests that the Hearing Officer's decision would be referred to the Chair to allow for a new policy to be developed which would then be applied to the case.

[37] Also on November 17, 2016, counsel for Oxford received correspondence from the WCB Internal Appeals Department acknowledging receipt of Oxford's notice of appeal to the Hearing Officer. As Justice Smith notes in her earlier decision this letter made no mention of the appeal being punted to allow time for policy development, and no mention of the CEO having committed to talking with the Board about the "fact" that the Hearing Officer decision would be punted. Instead the letter just says that the Hearing Officer will begin reviewing the Notice of Appeal. So, at this point, Oxford would have every reason to believe the matter was going to a Hearing Officer for a review with evidence, submissions and a decision based on the evidence and submissions eventually being made by the

Hearing Officer. In "fact", there had already been discussions at the Executive Committee level for the CEO to speak to the Chair about the "fact" that the Hearing Officer decision would be "punted".

[38] On December 2, 2016, the Chief Financial Officer of the WCB circulated a memorandum to the Governance and Policy Committee. That memo expressed concern that if the WCAT ended up once again considering the correctness of the employer's Rate Group the approach could "become entrenched in the system". In other words, if the matter were to go through the appeal process to the WCAT it would likely confirm its earlier decision with respect to the use of data from more than five years. The memorandum set out some recommendations for the Policy and Governance Committee.

[39] That memorandum said that under s. 199, the Hearing Officer "will refer the current appeal back to the Chair" for the Chair's consideration to be reviewed by the WCB Board of Directors. Policy revisions would be undertaken with the limited scope of "fixing" the "gap in understanding and application of the WCB's long standing rate setting process and policies". Once the policy development work was completed the Chair would then return the decision to the Hearing Officer for a decision based on the new policy. This policy would also be "binding on the WCAT should the appeal process proceed to that stage".

[40] On December 15, 2016, the WCB's Policy and Governance Committee met and passed a motion to initiate policy development work on the rate setting and associated policies. Also on December 15, 2016, a WCB Hearing Officer sent a memorandum to the Chair of the Board saying that under s. 199 of the *Act* they were of the of the opinion that the appeal "raises an issue of law and general policy and should be reviewed by the Board of Directors pursuant to s. 183 of the *Act*". They adjourned the appeal and referred it to the Chair of the Board. The memorandum uses the word "opinion" as used in the *Act* suggesting that the Hearing Officer had formed an opinion with respect to the appeal. That however was entirely as the process had been mapped out. That was all going on without the knowledge of Oxford.

[41] On that same day, December 15, 2015, the WCB met and initiated the policy review regarding rate setting.

[42] The Chair then told the Hearing Officer in a memo dated December 21, 2016, that the Board had determined that "exceptional circumstances exist and the

adjournment will be for 12 months or the day on which the Board issues a policy, whichever is earlier".

[43] Oxford was notified by the WCB's Mr. Field of the decisions by phone on January 4 or 5, 2017. At that point, nothing had been communicated to Oxford by the Hearing Officer. The written notification by the Hearing Officer came on January 16, 2017.

[44] Oxford filed a Notice of Appeal of the Hearing Officer's decision of December 15, 2016 to refer the appeal of the Implementation Decision to the Chair. Then on February 9, 2017, Oxford filed this Notice of Judicial Review. It is with respect to the Hearing Officer's decision and the Board of Director's decision to adjourn the appeal. It claims a denial of procedural fairness, that the two decisions were not made in an independent and impartial manner and were an attempt to abuse the internal appeal process under the *Act.*

[45] The judicial review is not about whether the WCAT decision regarding rate setting was correct or reasonable. It isn't about that decision at all. It is about the decision of the Hearing Officer and then the Board Chair to adjourn the appeal pending policy development.

[46] With that outline of the facts, which are essentially not disputed, it is not difficult to understand that someone might have an intuitive sense that there is just something wrong with this. What that "something" is might be harder to define precisely, but there is something about the "punting" of the decision that makes the process appear to have been just too choreographed. The WCB was not satisfied with the decision of the WCAT with respect to the interpretation of the rate grouping policy that limited the data used in making the determination to data from a five-year period. Instead of seeking leave to appeal the issue to the Court of Appeal the WCB seems to have decided to implement the WCAT decision in a manner that staff found more acceptable. Faced with an appeal of that Implementation Decision to the same WCAT that had already decided that the issue, in the opinion of the WCB, wrongly, they developed a strategy. They put Hearing Officer appeal on hold, and created an amended policy that would prevent the WCAT from making the same, "wrong" decision. To Oxford it looks like the Hearing Officer appeal that they launched was a sham while the real decision was already made by the Board of the WCB without notice to or participation by Oxford.

[47] The WCB says that it has an obligation to the workers' compensation system to make sure that rate groupings are done properly. That is a matter of policy and if the WCAT has interpreted the policy incorrectly the WCB has to make sure that the policy is clarified. The *Act* authorizes the Hearing Officer to adjourn matters and refer them to the Board Chair. It authorizes the Board Chair to refer such matters to the Board for policy consideration. Nothing that was done by the WCB was outside the scope of the powers granted by the legislation.

Justice Smith's Decision

[48] Justice Smith dealt directly with two preliminary issues. The first was whether an appeal to the WCAT would provide an adequate alternative remedy to the judicial review of the Hearing Officer's decision to refer Oxford's appeal to the Board of Directors. The second is whether both the Hearing Officer's decision and the Board Chair's decision were interlocutory and therefore not subject to judicial review.

[49] Justice Smith held that the appeal process was not an adequate alternative remedy. I have reached the same conclusion for the same reasons. A WCB policy precludes the WCAT from hearing an appeal of the Hearing Officer's decision. If Oxford were not successful in arguing that the policy was not binding on the WCAT, it would be deprived of the right to seek judicial review because the time limit imposed by the *Civil Procedure Rules* would have passed.

[50] Justice Smith also held that the Hearing Officer's decision and the Board Chair's decision were subject to judicial review. Once again, I have reached the same conclusion. Justice Smith noted the test for distinguishing between interlocutory and final decisions as formulated in *Irving Oil Ltd. v. Sydney Engineering Inc.*[5] Where an order has the effect of terminating an issue or the exposure of a party, it plainly disposes of the rights of the parties and is treated as final. Justice Smith did not determine whether the Hearing Officer's decision and the Board Chair's decision were final.

[51] I find that in the unusual circumstances of this case they are final decisions. The decision to refer an appeal will not, in all cases, terminate the issue. In this case, the intention of the referral, and of the larger plan of which it was a part, was to resolve the "issue" by having the policy amended. The intent was to deal with the consequences of the WCAT decision and the referral for policy development

[5] [1996] N.S.J. No. 99, para. 12

was not to consider what policy should be adopted but to develop a policy that would achieve the desired outcome in the specific case.

[52] In the alternative, I agree with Justice Smith that there are special circumstances that justify the hearing of a judicial review of an interim or interlocutory decision. Those special circumstances are the same ones upon which I based the decision that these are not interlocutory decisions but final ones. The outcome of the policy development was known before the matter was even referred for policy development and it was to respond to a specific WCAT decision that was not appealed to the Court of Appeal.

Procedural Fairness

[53] Oxford argues that the decisions were made in a procedurally unfair manner.

[54] While there are no express provisions that set out the procedures to be used under s. 199 and s. 200 of the *Act*, the common-law duty of fairness applies. When no procedural rules are prescribed, a decision making body is required to act fairly when the rights of an individual are affected. That applies to administrative decisions that affect the rights privileges or interests of an individual. Administrative decisions are those made under a grant of statutory authority and effect either an individual or small number of individuals. That distinguishes those decisions from legislative or policy actions that create broad based norms or policies having general application. Those decisions normally will not attract the duty of fairness. The decision to adjourn and refer the Implementation Appeal was not a legislative or policy decision but an administrative or adjudicative one.

[55] The duty of fairness is not engaged for decisions that are preliminary or interim. I have already addressed that issue in the context of the availability of judicial review. The decision to adjourn the Implementation Appeal while a policy was developed was, according to the WCB, just a preliminary part of the process. The decisions of the Hearing Officer and the Board Chair did not formally determine the appeals they just put the appeals off.

[56] That might well be the case in many circumstances in which appeals are adjourned for policy development. But, in effect the adjournment here was to dispose of the appeals effectively by putting them off until the policy could be changed in a specific way to tailor the outcome. That was not merely an incidental effect. It was the plan. The whole idea was to put things on hold to allow the policy to be amended or clarified to confirm the WCB’s long standing policy and dispose

of Oxford's case. When the adjournment was granted, its intent was to dispose of the appeal.

[57] The decisions of the Hearing Officer and the Chair under s. 199 and s. 200 of the *Act* were made under a grant of statutory authority and dealt specifically with Oxford. The appeals involved an adjudication of Oxford's rights and interests, specifically whether the WCB owed Oxford a refund with respect to its 2015 rates. The decisions had the effect of and were specifically intended to finally resolve the appeals as they relate to the important issue of the data used to determine rate groupings.

[58] The duty of fairness is calibrated to the nature of circumstances of the case. In *Baker v. Canada (Minister of Citizenship and Immigration)*[6] the court set out five factors for consideration. One factor is "the nature of the decision being made and the process followed in making it". That involves a consideration of whether the decision is legislative or political involving the entire community or is an adjudicative decision involving an individual. It also involves the process as set out in the statute for making the decision. The closer the prescribed procedure is to a trial model the greater the duty of fairness.

[59] The second *Baker* factor is the nature of the statutory scheme and the terms of the statute under which the body operates. Greater procedural protections are required when there is no appeal process set out in the statute.

[60] The third factor is the importance of the decision to the individual. More stringent procedural protections are mandated for decision that are of greater importance.

[61] The legitimate expectations of the person challenging the decision is a fourth factor.

[62] The fifth and final *Baker* factor involves giving some respect to the choices of procedure made by an agency itself, particularly where the statute allows the decision maker to choose its own procedures or when the agency has expertise in determining the appropriate procedures.

[63] The appeals here do not involve a challenge to WCB policy or to the ability of the WCB to set its own policy. They arose in the context of a challenge to a

---

[6] [1999] S.C.J. No. 39

specific decision and a specific interpretation of existing policy. Sections 199 and 200 are part of a process that is adjudicative in its nature. There is a process set out by which matters are decided by a Hearing Officer, then appealed to the WCAT and potentially to the Court of Appeal. There is a right of appeal, a time period for filing of an appeal, the ability to tender written submissions and evidence, and the opportunity to request an oral hearing. There are provisions about how and when a Hearing Officer must render a decision. The process is technical and trial like.

[64] There are no provisions that allow for an appeal of the Chair's decision under s. 200 and the decision of the Hearing Officer under s. 199 cannot be appealed to the WCAT under s. 243. Because a party has no ability to appeal these decisions a higher level of procedural fairness may be required.

[65] The matters at issue are significant. The amount of money involved for Oxford is approaching $150,000.

[66] The legitimate expectation of a participant in a matter of this kind would be that the individuals or entities to which representations are made, Hearing Officers, are empowered to make decisions. The process is set up in a way that involves the submission of evidence and making of representations. The Hearing Officer appeal is internal but there is still an expectation that the hearing itself must mean something. A party must be aware of the authority that the Hearing Officer and the Board Chair adjourn appeals and refer them for policy development. The legislative scheme is unusual in that regard. At the same time a party would not legitimately expect that the referral for policy development would be specifically in response to a disputed WCAT decision or that the adjournment would be ordered without notice to a party whose rights are affected by it.

[67] The WCB does have the authority to make policies that set out its own procedures. It should be accorded deference in doing that. There is no dispute about that.

[68] Oxford was owed a duty of fairness. It was involved in an adjudicative process that had the potential to be adjourned for policy development. The manner in which the appeal was sent from an adjudicative track to a policy development track engages the duty of fairness. Once it becomes an issue of policy development that duty does not apply. But plucking the appeal from the adjudicative stream where there are expectations of procedural fairness should itself involve the application of some basic rules of procedural fairness.

Contents of the Duty of Fairness

[69] There are two elements of the duty of fairness that are alleged to have been breached here. Oxford says that the decision was made without notice to it and was made by decision makers who were not impartial and unbiased. In most cases those elements can be considered separately. Here, they are intertwined.

[70] The duty to act fairly requires that before a decision is made that is adverse to a person's interests, that person is told of the case to be met and is given an opportunity to respond. That person should be given an opportunity to influence the decision. Issuing an adjournment without giving the parties an opportunity to respond is a problem. Issuing an adjournment at the request of one party without notice to the other is a bigger problem. Issuing an adjournment at the request of one party without notice to another and in furtherance of a plan to have the case decided in a particular way is a greater problem still.

[71] The real problem here is that the WCB had a plan in place to deal with an unsatisfactory WCAT decision. The WCB staff believed that the WCAT decision was wrong. The staff came up with a plan to get around it without exposing the WCB to the risks involved with an appeal to the Court of Appeal. That involved having the Hearing Officer reach an opinion to have the matter referred to the Board Chair and the Board Chair deciding to refer the appeal for policy development. But it wasn't the consideration of a policy to respond to a new issue or concern. It was coming up with a policy that would address the concerns that the staff had with the WCAT decision. That is different from a situation in which a Hearing Officer independently decides that an appeal raises issues of law and policy that might require policy development. That decision is independently made and does not presume the outcome of the policy development and is not directed at a WCAT decision.

[72] Here Oxford was given no notice at all when the WCB was contemplating adjournment and referral. Oxford was given no opportunity to influence that decision. Oxford was not given the chance to convince the Hearing Officer that this was not a matter that should be referred for policy development. That was not an oversight. Oxford was not notified because the plan was already in place to have the appeal adjourned and referred. That does not suggest necessarily that each time an appeal is adjourned for policy review there must be notice and a formal hearing. It does mean that when the granting of the adjournment is intended to finally resolve the case and the case involves implementation of an external WCAT

appeal decision, the adjournment cannot be granted with no participation by the parties in the decision. That in itself would be enough to require that the decisions be quashed.

[73] But here, there was involvement or participation in the decision with respect to the adjournment. It was only by one party, the WCB. When the Implementation Appeal was started on November 4, 2016, the WCB decided to implement a plan that had already been considered. The Chair would be informed by the CEO that the Hearing Officer's decision would be "punted" to allow time for policy development.

[74] Decisions of this kind are to be made by the person or body empowered to make them. A tribunal cannot delegate its power to someone else, whether that be a single member or an employee. Section 199 of the *Act* refers specifically to a matter being decided by a Hearing Officer based on the opinion of the Hearing Officer. Before the case was before the Hearing Officer it was the clear that a decision had been made by someone other than the Hearing Officer that the matter would be "punted". The Hearing Officer's authority to make a decision under s. 199 is not subject to approval by anyone else within the WCB and cannot be delegated to anyone else. The plan that was put into operation leaves the impression that the Hearing Officer did not make the decision to refer the matter to the Chair but was instructed to do so. That is also a reason to set aside the WCB decisions.

Order

[75] The decision of December 15, 2016 of the Hearing Officer to adjourn Oxford's appeal of the November 4, 2016 Implementation Decision appeal and refer the matter to the WCB Board Chair and the decision of the WCB Board Chair on December 21, 2016, to adjourn the matter and refer it to the Board for policy development are quashed. The Implementation Appeal should be referred to a different Hearing Officer for adjudication based on the policy that existed at the time of the appeal.

Campbell, J.