

Thomas v Chandler MacLeod [2015] WADC 78

Key Points

- An appeal pursuant to section 247 of the *Workers' Compensation and Injury Management Act*.

Background

This decision involved an appeal pursuant to section 247 of the *Workers' Compensation and Injury Management Act* (**the Act**) from a decision of an arbitrator who allowed the respondent's application pursuant to section 62 of the Act and ordered that weekly payments of compensation to the appellant be discontinued.

The Law

- “(2) *Subject to sub-section (3), the District Court is not to grant leave to appeal unless –*
- (a) in the case of an appeal in which **an amount of compensation is at issue** –*
- (i) a question of law is involved and the amount at issue in the appeal is both:*
 - (I) at least \$5,000.00 or such other amount as may be prescribed by the regulations; and*
 - (II) at least 20% of the amount awarded in the decision appealed against; or*
 - (ii) a question of law is involved and, in the opinion of the District Court, the matter is of such importance that, in the public interest, an appeal should lie; and*
- (b) In any other case a question of law is involved.”*

Conclusion

His Honour noted that once it has been established that the ground of appeal involves a question of law, the whole decision of the arbitrator is open to review and not merely the identified question of law. The District Court is required to undertake a “*real review of the matter if leave to appeal is granted*”. However, that review is based on the materials that were before the arbitrator and is not conducted by way of a hearing de novo. Where leave is granted and a review is undertaken, the

appellant must still, for the purposes of the review, provide a proper basis for disturbing the arbitrator's decision by pointing to some error in it.

Here it was not suggested that the arbitrator mis-stated the relevant law, but the errors of law alleged involved the failure of the arbitrator to have regard to evidence or alternatively failing to properly articulate evidence for his conclusions reached. His Honour concluded that while the arbitrator did have regard to the evidence, he did not accept it. It is apparent that the arbitrator rejected the evidence despite the lack of cross-examination and did not express the conclusion with the directness that the law requires and did not adequately set out the reasons that led him to reject the evidence. Therefore, the appeal does involve a question of law.

The remaining issue was the question as to the proper construction of section 247(2).

The argument put forward by the respondent was that while an amount of compensation was at issue, because no amount was awarded in the decision appealed against the application for leave is governed by section 247(2)(a)(ii). That is, not only is it necessary for there to be a question of law involved, but the opinion of the Court the matter is of such importance that in the public interest an appeal should lie.

His Honour noted that the terms "an amount of compensation is at issue" and "the amount awarded in the decision" used in section 247 are not defined, nor are those terms used elsewhere. The proper construction of section 247 is not the subject of any appellate authority. His Honour reviewed decisions of the District Court and noted that no ground of leave is available in any case unless a question of law is involved. The legislature also sought to impose a financial threshold to restrict a person's sum in some cases by absolute relative criteria. Even with respect to cases that are subject to and fall below the financial threshold, an exception is provided where the public interest justifies the ground of leave to appeal. The question that has not satisfactorily been answered is exactly how that financial threshold is to be construed and what kind of case it applies to.

The introductory words of section 247(2)(a) show that it is concerned with appeals in which an amount of compensation is at issue. His Honour felt that proper construction required that the phrase "an amount of compensation" be taken to literally mean that. That is, it applied to appeals where there might be a liquidated claim that is readily ascertainable.

Disputes of the kind encompassed by section 62 of the Act do not involve "an amount of compensation", but involve broader claims of entitlement, but not an amount that is determinable. It follows that appeals for that kind of dispute fall into the category 247(2)(b) "...any other case...". All that needs to be shown is that the appeal involves a question of law.

In the case of claims for a liquidated amount which do not fall into section 247(2)(a), the satisfaction of the second criterion does not require that there be a positive dollar amount awarded in the decision appealed against before a grant of leave may be obtained. The function of that section is to provide a procedural hurdle to appeals that involve disputes involving relatively modest amounts of money. It is not intended to create an inconsistent and arbitrary division between appeals brought by the worker as opposed to employers.

Having reached the conclusion that the failure of the arbitrator to properly explain his rejection of the appellant's evidence meant that a question of law was involved, and the conclusion he reached about the construction of section 247(2), His Honour granted leave to appeal. He then proceeded to review the whole of the decision of the arbitrator based on the material that was before him.

His Honour concluded that the arbitrator's reasons for the decisions were deficient, but that his decision was the correct one, justified by all the evidence before him. Given the express objects of the Act, which have the aim of trying to minimise expenses of the parties and providing a dispute resolution that is "fair, just, economical, informal and quick", he noted that section 247(7) gives the Court an express power to substitute and make, in addition, any decision that should have been made in the first instance. He felt no good purpose would be achieved by yet another hearing in front of a different Tribunal. Therefore, he granted leave with respect to the second ground, but dismissed the appeal. That ground involved a complaint that the arbitrator failed to provide any reasons as to how he analysed the appellant's evidence and failed to provide the conclusions he reached with respect to the appellant's evidence.

Lessons Learnt

This decision confirms that the words "an amount of compensation at issue" in Section 247 (2) means a liquidated claim that is readily ascertainable. Section 62 applications do not involve "an amount of compensation" and accordingly appeals from such disputes can be appealed under Section 247(2)(b) where it can be shown that there is an error of law.

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