SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Jevco Insurance Company, Applicant

-and-

Wu Yu Hang, Respondent

BEFORE: Anne London-Weinstein J.

COUNSEL: Tara Lemke for the Applicant

Chris Schiffmann for the Respondent

HEARD: August 25, 2022

ENDORSEMENT

[1] The Applicant brings an urgent motion seeking an order staying the Licensing Appeal Tribunal ("LAT") Adjournment Order dated July 22, 2022 pending a hearing of an application for judicial review by a panel of the Divisional Court.

[2] The Applicant further seeks an order that the LAT file in this case be stayed pending the hearing of the application for judicial review by a panel of the Divisional Court. The Respondent opposes the request to stay the proceedings until the matter has been heard by the Divisional Court.

Background:

[3] The Respondent was involved in a motor vehicle accident as a passenger on January 29, 2020 and made an accident benefits claim to the Applicant, Jevco Insurance Company. A dispute arose regarding entitlement to statutory benefits.

[4] The Respondent filed an application to the LAT on January 20, 2021 (the "First Dispute"). In-house counsel was retained to deal with this dispute, and hearing dates were set for September 7, 8, and 9, 2022.

[5] The Respondent filed a second application to the LAT on June 29, 2022 the ("Second Dispute").

[6] The Applicant retained Williams Litigation Lawyers LLP to act in regard to the Second Dispute on July 12, 2022. The matter was assigned to Ms. Lemke, a partner at the firm. Ms. Lemke was retained for the First Dispute on July 13, 2022. There is no evidence before me that counsel was unaware that dates had already been set at the time she agreed to act for Jevco.

[7] Counsel for the Applicant requested an adjournment of the September LAT hearing dates on July 15, 2022. The adjournment being sought was for 6 months. It was not opposed, but express consent was not provided. That request was denied on July 26, 2022 and it was ordered that the September hearing dates proceed as set.

[8] Counsel for the Applicant served and filed a notice of Application for Judicial Review of the Adjournment Order on August 5, 2022.

[9] On August 8, 2022, the Respondent withdrew the second LAT application.

[10] On August 9, 2022, the Applicant filed an urgent motion seeking to stay the hearing scheduled for September 7, 8 and 9, 2022.

[11] On August 15, 2022, a motion hearing was held. Vice Chair Hunter denied the Applicant's motion.

Legal Issues:

[12] The Applicant argues that the reasons in the Adjournment Order violate principles of procedural fairness.

[13] The adjournment application of July 15, 2022 was based on:

a) The short time between counsel's retention and the September 2022 hearing dates;
b) The fact that the file contents had not been received;
c) The fact that counsel could not comply with timelines for the hearing;
d) The availability of counsel considering an unrelated LAT hearing starting September 12, 2022 and a four week jury trial starting October 3, 2022;
e) The adjournment was expected to be six months;
f) There were outstanding production issues relating to the hearing; and

g) The adjournment was not opposed.[1]

[14] The Tribunal's reasons for denying the adjournment included:

a) The Tribunal, not the parties, decides when cases will proceed;
b) The adjournment would unreasonably delay the proceedings;
c) A Tribunal does not need to arrange its hearings to enable counsel to appear in other "higher courts";
d) A party retaining new counsel should select a lawyer who is available for existing dates; and
e) Parties are expected to be ready to proceed within the Tribunal's legislated timelines when they file their applications. If the party is not prepared to proceed, they should settle or withdraw the application.

[15] A Notice for Application for Judicial Review of the Adjournment Order was served and filed on August 5, 2022. This application alleges that the reasoning and conclusions of the Order violate the principle of procedural fairness.

[16] A court on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just. *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 106.

[17] The test on a motion to stay was set out by the Supreme Court of Canada in *RJR-MacDonald v. Canada (Attorney General),* [1994] 1 S.C.R. 311, pp. 348-349. The three-part test is:

a) Is there a serious issue to be tried?
b) Is there irreparable harm if the relief is not granted?
c) What is the balance of inconvenience to the parties?

[1] A review of the reasons of Vice Chair Lindsay Lake dated July 22, 2022 denying the request for an adjournment indicate that consent was not provided. Counsel advise by email dated August 30, 2022, that the paralegal handling the case before the LAT at the time did not oppose the adjournment request, but was not in a position to consent. Mr. Schiffmann's firm was not involved at that point.

Is there a serious issue to be tried?

[18] The first step in the analysis includes a limited review of the merits of the case. This is a modest test wherein the moving party must show the appeal is not frivolous or vexatious. *Stuart Budd & Sons Limited v. IFS Vehicle Distributors ULC*, 2014 ONCA 546, 327 O.A.C. 22, at para. 23.

[19] This case raises issues related to procedural fairness and the right to counsel of choice. The issues presented are serious issues to be tried. These issues are of particular importance given the interplay between the role of in-house counsel and litigation counsel. I am sympathetic to the position of the Applicant, as I am cognizant of the fact that busy trial counsel have multiple, sometimes conflicting, scheduling commitments in various courts.

[20] I also agree with the Applicant that the reasons provided by the Tribunal may tend to suggest that insufficient weight was given to the consideration of the need not only for procedural fairness, but also the maintenance of the appearance of fairness.

[21] I note that the representative acting for the Respondent at the time did not oppose the request for the adjournment, although express consent was not provided.

[22] However, the Tribunal denied the adjournment based partly on the fact that new counsel should be available for dates which have already been set. Counsel in this case had prior commitments which conflicted with her ability to appear for the September dates in this matter.

[23] The loss of judicial resources brought about by an adjournment must be avoided whenever possible in order to maintain the orderly functioning of the courts.

[24] I appreciate that there is in-house counsel who do not deal with contested matters. Often contested matters are resolved by negotiation. Where negotiations founder, outside litigation or trial counsel is retained.

[25] I agree with the comments of Justice Edwards in *Mallette v. The Wawanesa Mutual Insurance Company,* 2020 ONSC 1448, at para. 13, regarding the practice of having trial counsel handle matters that cannot be resolved by negotiation.

[26] Justice Edwards wrote, "There is absolutely nothing wrong with that approach. However, where counsel feel the need to retain outside counsel, they must do so with the clear understanding that any lawyer who is retained to argue a contested matter is available on the date scheduled by the court. This applies to both trial dates and motion dates." The same reasoning applies to matters occurring within a tribunal setting.

[27] In *Khimji v. Dhanani* (2004), 69 O.R. (3d) 790 C.A.), Doherty J.A., at para. 35, stated:

> Individual litigants have a right to pursue and defend their respective claims. They must do so, however, within a court structure that must accommodate thousands of individual litigants. That system can function effectively only when litigants take scheduling commitments seriously and make genuine efforts to comply with court orders relating to adjournments and related matters. Where a litigant successfully obtains the adjournment of a trial having failed to exercise due diligence in retaining counsel, that litigant must expect that absent unforeseen circumstances, the trial will proceed on the new trial date.

Is there potential for irreparable harm to the Applicant?

[28] The analysis centers on the nature of the harm and not the magnitude of it. Harm may be irreparable if it cannot be recovered or corrected at the time there is a hearing on the merits of the case. *RJR-MacDonald*, p. 348.

[29] The Applicant argues that the time preceding a hearing would typically include deadlines for various procedural steps. Dates may include finalizing witness lists, document briefs and final production deadlines.

[30] The Applicant points out that the request for adjournment was associated with the retention of counsel less than two months before the hearing dates. The request was made at a time when the file had not yet been received or reviewed. Procedural timelines could not reasonably be met in such circumstances.

[31] The Applicant argues that the net effect of the order compromises the Applicant's ability to respond to the merits of the dispute as they are being denied counsel of choice. Being forced to participate in a hearing in such circumstances would create harm that could not be remedied and could impact the Applicant's ability to have a full and balanced hearing on the merits of the matter. It would result in an unbalanced hearing if counsel of choice is unavailable and/or cannot properly prepare for the hearing date due to other preexisting hearing and trial commitments.

[32] I was not satisfied at this point in the proceedings that the harm to the Applicant if the stay is not granted would be irreparable. It is reasonably possible that other counsel from Ms. Lemke's firm may be able to argue the matter. It is reasonably possible that the presiding official at the time of the hearing on the merits of the matter may decide that the lack of preparation time has been unduly prejudicial. The parties and the public are both entitled to a hearing on the merits of the matter which is not only fair, but which maintains the appearance of fairness. If it is apparent at the time of the hearing on the merits of the matter that the appearance of fairness has been compromised, an adjournment could be considered by the presiding official. Justice must not only be done, but be seen to be done. *Aristotle Realty Corp. v. Elcarim Inc.* (2007), 51 C.P.C. (6th) 326 (Ont. S.C.).

[33] In *Aristotle Realty Corp*, Perell J. referenced some of the relevant principles involved in the exercise of a court's discretion in deciding whether to grant or refuse an adjournment. They include:

a) That justice must not only be done, but appear to be done;
b) The overall objective of the determination of the matter on its substantive merits;
c) The prejudice not compensable in costs, if any, suffered by a party by the granting or the refusing of the adjournment;
d) Whether the ability of the party requesting the adjournment to fully and adequately prosecute or defend the proceeding would be significantly compromised if the adjournment were refused; and
e) The need of the administration of justice to orderly process civil proceedings.

[34] In *Wawanesa,* Justice Edwards reluctantly granted the adjournment as counsel candidly admitted that she was too junior to litigate the matter and senior counsel, who was not available, was required.

[35] In this case, there is no evidence before me that other counsel from Ms. Lemke's firm is not available to deal with this matter, which distinguishes the outcome of *Wawanesa* from the case I must decide.

[36] However, my role in this matter is not to determine whether the adjournment should have been granted or not, or whether I would have decided matters differently. I am tasked with determining whether the Applicant has met the test for a stay of the proceedings until this matter can be reviewed by a Divisional Court panel.

[37] A stay is a discretionary remedy. *BTR Global Opportunity Trading Limited., v. RBC Dexia Investor Services Trust,* 2011 ONCA 518, at para. 3.

[38] For the reasons I have indicated, I am not satisfied that the Applicant met the second prong of the *RJR-MacDonald* test. The three prongs of the test are interrelated and not individual hurdles.

[39] The "overarching consideration is whether the interests of justice call for a stay." *Longley v. Canada (Attorney General)*, 2007 ONCA 149, 223 O.A.C. 102, at para. 15. A stay can be granted on basic consideration of fairness and overall justice. *Abouzour v. Heydary*, 2015 ONCA 249, 126 O.R. (3d) 101, at paras. 37-38.

Does the balance of inconvenience favour the Respondent?

[40] This step of the analysis involves weighing which of the parties would suffer greater harm from granting or refusing a stay pending a decision on the merits. The interest of the public is also a relevant consideration under this factor.

[41] The Applicant argues that an unbalanced hearing would cause Jevco to suffer greater harm, including potential exposure to payment of benefits that it may not otherwise have been required to pay. However, I have also considered that the public has an interest in courts and tribunals functioning in an orderly manner. If this matter is stayed, it will be many months before a hearing can be held. At the time of the adjournment request the claim was more than 500 days old.

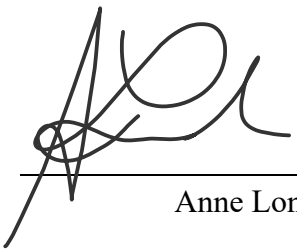
[42] In the eventual hearing on the merits of the benefits in dispute, Jevco would be required to pay interest on any benefits that are found to be overdue. This interest continues to accrue until there is a hearing on the merits, including during any possible stay of the hearing, and would

compensate the Respondent in the event of a delayed hearing. While this is true, the Respondent will remain without benefits until such time as the matter can be adjudicated.

[43] I found that the balance of inconvenience favours the Respondent.

[44] Having found that the harm at this stage to the Applicant is not irreparable and that the balance of inconvenience favours the Respondent, I have concluded that the interests of justice do not mandate a stay of proceedings in this case, despite the importance of the issues raised. The application for a stay is therefore dismissed.

[45] Despite my conclusion in this case, given the importance of procedural fairness and the maintenance of the appearance of fairness, on a different set of facts, a judicial stay of proceedings could very well be warranted. A litigant is not required to simply withdraw or concede where counsel of choice is not reasonably available, or where there have been unforeseen delays, for example. On the facts of this particular case it was not reasonable for counsel to have agreed to act without ensuring she was available for the dates that had already been set in this matter, as the Tribunal concluded.



Anne London-Weinstein J.

Date: August 30, 2022

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Released: August 30, 2022