IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Jalloh v. Insurance Council of British Columbia,* 2016 BCSC 47

Date: 20160114
Docket: S148756
Registry: New Westminster

Between:

Mohamed Alie Jalloh

Petitioner

And

Insurance Council of British Columbia, and Financial Institutions Commission

Respondents

Before: The Honourable Mr. Justice Grist

On judicial review from: An Order of the Financial Services Tribunal dated December 7, 2012 (Decision No. 2012-FIA-002(a)) and an Order of the Insurance Council of British Columbia dated May 17, 2012 (File No. 163889-I1024)

Reasons for Judgment

Counsel for the Petitioner:	E.G. Wong L. Assemi
Counsel for the Respondent, Insurance Council of British Columbia:	D.T. McKnight M.T. Hoogstraten
Counsel for the Respondents, Financial Institutions Commission and Attorney General of B.C.:	K. Horsman, Q.C. S.A. Wilkinson
Counsel for the Respondent, Financial Services Tribunal:	F.A.V. Falzon, Q.C.
Place and Dates of Hearing:	New Westminster, B.C. June 24 - 26, 2015
Place and Date of Judgment:	New Westminster, B.C. January 14, 2016

[1] The petitioner's action is for judicial review of the process before the Financial Services Tribunal (the “Tribunal”) and the Insurance Council of British Columbia (the “Council”), which ultimately resulted in a suspension of Mr. Jalloh's general insurance license for a period of four years. The grounds for the challenge by way of judicial review are based on allegations of inadequacy in the services provided by Mr. Jalloh's legal counsel both before the Council and on the subsequent appeal to the Tribunal.

BACKGROUND

[2] The discipline proceedings before the Council and the Tribunal concerned Mr. Jalloh’s actions during June-May 2010 when he was employed as a general insurance salesperson licensed to perform this work by the Insurance Council of British Columbia, a body established under the *Financial Institutions Act,* R.S.B.C. 1996, c. 141 [*FIA*].

[3] A few months earlier, in January 2010, Mr. Jalloh formed a relationship with Ms. Y.B., who became the complainant before the Council. The two lived together for a time, but separated in April or May 2010. When they separated, Ms. Y.B. remained in the apartment they shared for a short time and Mr. Jalloh began to live elsewhere.

[4] On the last day of May 2010, Mr. Jalloh came back to the apartment. There was a confrontation between Mr. Jalloh and Ms. Y.B. Ms. Y.B. called the police and the next day, Mr. Jalloh attended at a local police detachment office and was charged with assault. He was released on conditions the same day; one condition being that he was not to communicate either directly or indirectly with Ms. Y.B.

[5] In December 2010, Ms. Y.B. made a complaint to the Insurance Corporation of British Columbia (“ICBC”) related to Mr. Jalloh: that he had inappropriately accessed her private information on the ICBC database. ICBC investigators were able to establish there had been access to Ms. Y.B.’s personal information on three particular dates from offices where Mr. Jalloh had worked. A subsequent

investigation followed focusing on allegations Mr. Jalloh had accessed this information inappropriately on June 28, August 4, and September 21, 2010.

[6] Mr. Jalloh was contacted by an ICBC investigator and gave a statement on May 9, 2011, in which he said that he must have accessed Ms. Y.B.'s information on June 28 in order to see if she had changed her address from the apartment they had previously shared because the tenancy was in his name and was to conclude at the end of June.

[7] The ICBC investigator passed on the results of the investigation to the Council for further proceedings. In a further interview of Mr. Jalloh conducted by two Council investigators on May 18, 2011, Mr. Jalloh related that Ms. Y.B. had contacted him on a number of occasions from May 2010 to September 2010, asking for money, or a car, or for him to assist her in changing the registration of a car from her daughter's name to hers, suggesting she would drop the criminal complaint if he cooperated. He also said she posed a number of questions to him relating to the cost of her insurance coverage, should she change it in certain respects. Mr. Jalloh said he refused the requests for money and a car, and the changes in the vehicle registration. He said he gave responses to her inquiries in respect of her insurance coverage and in the process must have accessed her registration on the ICBC database.

[8] Mr. Jalloh told the investigators in response to questions about his contact with Ms. Y.B. in light of the restraining order, that he had asked Ms. Y.B. why she was contacting him, and her reply was that the order restrained him and not her and that the questions about her policy were simply requests for service from the agency where he worked.

[9] In affidavits produced on this application for judicial review, Mr. Jalloh said that he told the Council investigators in a third interview in August 2011, that he had been diagnosed and hospitalized as a diabetic in May 2011; and that he was disoriented and made some errors during the first two interviews and wanted to recant what he had said.

[10] In November and December 2011, the Council made various orders restricting Mr. Jalloh's access to ICBC information and gave notice of an intended decision to cancel Mr. Jalloh's license for four years. After notice of the intended decision, Mr. Jalloh exercised his right under s. 237(3) of the *FIA* to require a *de novo* hearing. Accordingly, a three-member hearing committee was constituted to hear the complaint on February 15, 16 and 17, 2012.

[11] Mr. Jalloh instructed counsel, Mr. Pyper. Mr. Pyper had an associate, Mr. Elworthy, appear at the hearing. Witnesses called at the hearing included an ICBC analyst, the ICBC investigator, the two Council investigators, and Ms. Y.B. Mr. Elworthy cross-examined these witnesses and called Mr. Tanner, an automobile salesman who gave collateral evidence of dealing with Ms. Y.B. that Mr. Elworthy argued revealed Ms. Y.B. was not a credible witness. Mr. Jalloh was not called to give evidence at the hearing.

[12] Mr. Jalloh's defence was aimed at attacking the admissibility of the statements made by Mr. Jalloh to the investigators. These objections were made on *Canadian Charter of Rights and Freedoms* [*Charter*] grounds and Mr. Elworthy ultimately challenged the sufficiency of the evidence to establish wrongdoing. The weight of evidence required, in the defence view, was near the criminal standard.

[13] These submissions were rejected and the hearing committee recommended the same term of cancellation as indicated in the intended order, and required that Mr. Jalloh pay hearing costs. The Council accepted the recommendation of the hearing committee and published an order to this effect on May 17, 2012.

[14] On June 18, 2012, Mr. Jalloh filed an appeal to the Financial Services Tribunal. The appeal proceeded as an appeal on the record, with written submissions filed by Mr. Pyper on Mr. Jalloh's behalf. Such an appeal can include an application to introduce new evidence, but no such application was made in this case. The written argument again challenged the admissibility of Mr. Jalloh's statements to the investigators and further alleged that the hearing committee had improperly cast an adverse inference on Mr. Jalloh as a result of his failure to testify.

These arguments were rejected by the Tribunal and the hearing committee's decision was essentially confirmed, with an amendment to the order indicating Mr. Jalloh was to be suspended for a period of four years, rather than the four-year cancellation previously ordered. The Tribunal decision was dated December 7, 2012.

[15] The petition asking for judicial review was filed on June 30, 2013. Mr. Pyper continued to act, and the petition again impugned the admission of Mr. Jalloh's statements and reiterated the allegations of an improper adverse inference. The matter did not proceed directly to a hearing and Mr. Pyper was subsequently discharged as Mr. Jalloh's counsel.

[16] On October 14, 2014, 22 months after the Tribunal decision, the petition was amended by way of an order of Master Muir. The amendments to the petition abandoned the former grounds and for the first time recorded Mr. Jalloh's allegations of inadequate counsel or the ineffective assistance of counsel.

THE PETITIONER'S POSITION

[17] The allegations in respect of the deficiencies in the services of Mr. Jalloh's counsel focus on:

(1) the decision of Mr. Elworthy at the Council hearing not to call Mr. Jalloh to refute the evidence given by Ms. Y.B. that she had not spoken to Mr. Jalloh after June 1, 2010. This statement contradicted Mr. Jalloh's contention that she contacted him on the dates the Council found he had accessed her ICBC information and on other dates, in what he suggested was an attempt to first extort money from him; and when that failed, to subsequently implicate him in the actions which founded the Council complaints. Mr. Elworthy's failings were said to be likely a result of inexperience, inadequate preparation, and a lack of supervision by Mr. Pyper; and

(2) the conduct of Mr. Pyper in failing to bring forward Mr. Elworthy's supposed incompetence before the Council on the appeal to the Financial Services Tribunal. Mr. Jalloh's allegations relating to this second failure of counsel are that Mr. Pyper was in a conflict of interest in assessing the competence of Mr. Elworthy, a junior member of his firm, and that he himself failed to appreciate the significance of the failure to call Mr. Jalloh to give evidence.

[18] In the petitioner's view, this sequence of failings in the adequacy and effectiveness of counsel, first before the Council and then before the Tribunal, requires that both the decisions be set aside and a new Council hearing be ordered to allow Mr. Jalloh to receive a fair hearing in relation to the original complaints.

THE RESPONDENTS' POSITION

[19] The respondents argue that the Court's function in relation to this judicial review is limited to a review of the Tribunal decision on the record of that body's proceedings. The respondents say the Tribunal had the power on appeal to hear any issue in respect of counsel incompetence or inadequacy and it was the applicant's obligation to bring such an issue forward on the appeal. Ultimately, without any such issue being engaged through the appeal process, there is simply nothing to review and the application before this Court must fail.

[20] The respondents' position in respect of the alleged unfairness of the proceedings is that the Court's jurisdiction in dealing with procedural fairness and allegations of a denial of natural justice is limited. On judicial review these heads of jurisdiction are matters which are concerned with the propriety of the hearings before the administrative body under review. Here, the allegations are in relation to the services of the petitioner's counsel, complaints never brought to the attention of the Council or Tribunal and which do not challenge anything these authorities did in adjudicating the cases brought before them.

[21] There are cases which consider whether there has been an effective denial of counsel, or the consequences of ineffective counsel, potentially giving rise to a

miscarriage of justice, but these cases either exclusively or almost exclusively deal with these allegations as grounds of appeal. These grounds of appeal are restricted to criminal matters or proceedings which require consideration of the applicant's *Charter* rights, or other circumstances of similar gravity.

[22] The respondents note that courts and tribunals generally are loath to interfere in relations between a litigant and counsel, that in this instance there was no requirement that Mr. Jalloh proceed with counsel in any event, and that there are remedies both by way of disciplinary proceedings and civil action that can come into play if counsel inadequacy is in issue. Further, they note this application comes after very significant delay and long after the issue should have been brought before the Tribunal.

[23] Lastly, it is argued that even if the record of the proceedings below is expanded by the affidavits presented by Mr. Jalloh on this application and counsel adequacy should become an issue, the fact is that, if called, Mr. Jalloh would have been severely challenged by the statements he made to the investigators should he have given a different account at the Council hearing, particularly in light of the favourable finding of credibility made by the Council in respect of the evidence of Ms. Y.B. The respondents say that the onus is on Mr. Jalloh to show some likelihood of a different result to require a rehearing.

ANALYSIS

[24] This application for judicial review engages both the proceedings before the Council, the body that removed Mr. Jalloh's accreditation for a four-year period of time, and before the Tribunal which rejected his appeal. The process of judicial review is described by Wedge J. in *Kinexus Bioinformatics Corporation v. Asad*, 2010 BCSC 33 at paras. 13-15, as follows:

> [13] The court on judicial review does not sit as an appellate court. It does not re-try the matters decided by the tribunal. It is not the court's role to review the wisdom of the tribunal's decision. The court cannot re-weigh the evidence, make findings of credibility or substitute its view of the merits for that of the tribunal. The court's role is limited to determining whether the tribunal has acted, and made its decision, within its statutory authority or

jurisdiction: *Ross v. British Columbia (Human Rights Tribunal)* (1 May 2009), Vancouver L042211 (B.C.S.C.); *Tse v. British Columbia (Council of Human Rights)*, [1991] B.C.J. No. 275 (QL) (S.C.).

[14] Further, relief under the *JRPA* [Judicial Review Procedure Act, R.S.B.C. 1996, c. 241] is discretionary. The court must determine whether its intervention is warranted having regard to the applicable principles, including the principle of restraint concerning judicial intervention in administrative matters.

[15] Another of the principles applicable to the court's exercise of discretion is that a party should raise concerns respecting procedural fairness, including bias, at the earliest opportunity: *Qin v. British Columbia (Human Rights Tribunal)*, 2005 BCSC 1662. Similarly, issues concerning the timeliness of the complaint must be raised with the Tribunal.

[25] Wedge J. further states at paras. 16 and 17:

[16] As a general rule, the court's review must be based on the Tribunal's record of proceedings as that term is defined in s. 1 of the *JRPA*:

"record of the proceeding" includes the following:

(a) a document by which the proceeding is commenced;

(b) a notice of a hearing in the proceeding;

(c) an intermediate order made by the tribunal;

(d) a document produced in evidence at a hearing before the tribunal, subject to any limitation expressly imposed by any other enactment on the extent to which or the purpose for which a document may be used in evidence in a proceeding;

(e) a transcript, if any, of the oral evidence given at a hearing;

(f) the decision of the tribunal and any reasons given by it;

[17] The court's power to admit evidence beyond the record of proceeding must be exercised sparingly, and only in an exceptional case. Such evidence may be admissible for the limited purpose of showing a lack of jurisdiction or a denial of natural justice. In *Ross*, Silverman J. said the following at paras. 26-27 after reviewing the relevant case law:

> [26] The general rule with respect to the admissibility of extrinsic material is that it is, except in very special circumstances, inadmissible. This is because a judicial review is a review of a decision on the tribunal's record of proceedings. It is that very record which is the subject of the judicial review. Affidavit material describing evidence not before the tribunal or attaching documents that were not before the decision-maker is not part of that record and is generally inadmissible on judicial review. ...
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> [27] There are, however, exceptions to the general rule where extrinsic evidence may sometimes be admissible. For example, it may be admissible for the limited purpose of showing a lack of a jurisdiction or a denial of natural justice. In circumstances where the

> grounds for judicial review are a breach of natural justice or procedural fairness, the petitioner may be entitled to adduce new evidence. However, the new evidence must be both relevant and necessary before it will be admissible[.]
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> In addition, the court may, in rare circumstances, admit affidavit evidence to show that a tribunal made a factual finding incapable of being supported by the evidence. Such affidavit evidence must be restricted to necessary references to factual errors and must not draw conclusions or interpret the evidence forming the record of proceeding. Such affidavit evidence must not be used to convert an application for judicial review into a re-hearing of the merits.

[26] The jurisdiction as it applies to breaches of fairness or natural justice is described at para. 24 of that decision as follows:

> [24] Section 59(5) of the *ATA* [*Administrative Tribunals Act*, S.B.C. 2004, c. 45] provides that questions related to natural justice and procedural fairness are to be decided on the basis of whether, in all the circumstances, the Tribunal acted fairly. Section 59(5) reflects the common law approach to questions of procedural fairness and natural justice, which, as stated by the Court in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 22, is concerned with ensuring that:
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> > ... administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

[27] In this case, there are no issues arising from the record, nor are there any alleged breaches of fairness or natural justice pertaining to the procedure of either authority. The grounds advanced relate to the adequacy or effectiveness of counsel, referencing matters between Mr. Jalloh and his counsel that were not brought to the attention of either administrative body and only come to this Court by way of the affidavits filed following the amendments to the petition in October 2014.

[28] In short form, Mr. Jalloh says notwithstanding that he wanted to give his account of the events leading to the complaint, correct the statements that he gave to investigators, and challenge the evidence presented by the complainant, Ms. Y.B. He was prevented from doing so; first, by Mr. Elworthy at the original hearing and subsequently, by Mr. Pyper, who he says did not bring forward the grounds of counsel inadequacy relating to Mr. Elworthy.

[29] Such an allegation based upon the assertion that the entire proceedings were rendered a miscarriage of justice invokes a distinctly limited jurisdiction. There are criminal cases where counsel inadequacy or ineffectiveness has been entertained as a ground of appeal. In the case of criminal convictions, the *Criminal Code*, R.S.C. 1985, c. C-46, s. 686(1)(a)(iii) specifically provides a statutory obligation to quash convictions founded on a miscarriage of justice. These cases often also reference rights established under the *Charter*. *R. v. G.D.B.,* 2000 SCC 22; and *R. v. Joanisse* (1995), 44 C.R. (4th) 364 (Ont. C.A.), are cases on point.

[30] The obligation to prevent a miscarriage of justice was also invoked in *D.B. v. British Columbia (Director of Child, Family and Community Service)*, 2002 BCCA 55, in which the Court of Appeal dealt with an appeal from an order apprehending children from the appellant's care. The appeal referenced the appellant's *Charter* s. 7 rights and the best interests of the children. Madam Justice Saunders said at para. 31:

> [31] … While a child custody proceeding does not engage the same liberty interest as does a criminal proceeding, the interests of the parties and the community, in my view, bear that quality which engages the caution of the courts where egregious flaws in representation are established.

[31] The limited scope of these grounds was the subject of comment by Garson J.A. in *Wood v. Van Bibber,* 2013 YKCA 15 at para. 71:

> [71] In the civil law context, incompetent or ineffective representation of counsel is a ground of appeal in only the rarest of cases. As Catzman J.A. wrote for the Ontario Court of Appeal, *D.W. v. White* [2004], 189 O.A.C. 256:
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> > [55] ... I would not be prepared to close the door to the viability of ineffective assistance of counsel as a ground for a new trial in a civil action. But ... I would limit the availability of that ground of appeal to the rarest of cases, such as (and these are by way of example only) cases involving some overriding public interest or cases engaging the interests of vulnerable persons like children or persons under mental disability or cases in which one party to the litigation is somehow complicit in the failure of counsel opposite to attain a reasonable standard of representation. The present action is not such a case.

[32] Two further decisions related to the quality of the counsel afforded to the applicants are: *Chandrasegaram v. Newfoundland and Labrador Dental Board*, 2009

NLTD 166 [*Chandrasegaram*]; and *Memari v. Canada (Citizenship and Immigration)*, 2010 FC 1196 [*Memari*].

[33] The *Chandrasegaram* decision was an appeal from a disciplinary tribunal to the Newfoundland and Labrador Supreme Court. In the result, the court set aside a finding of professional misconduct in respect of a dentist who had agreed to the finding, without a hearing, on the advice of counsel. The evidence accepted by the court was that his counsel had negligently advised him to enter into the settlement agreement. In these circumstances, the court quashed the order of the disciplinary committee and ordered a new hearing. The court was convinced that there was a significant breakdown in communication between the appellant and his lawyers leading him to incorrectly assume that he was not admitting guilty, which meant that there had been no actual hearing on the merits.

[34] The *Memari* case involved an application for judicial review of the applicant's claim for refugee protection under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [*IRPA*]. Unlike in the present case, however, the inadequacies of counsel in *Memari* were apparent to the tribunal hearing the application for refugee protection under the *IRPA*. Specifically, the Refugee Protection Division of the Immigration and Refugee Board (the “Board”) noted that there were issues with the counsel's performance in the hearing before them and the record revealed that counsel advised them that she was ill. The case, in my view, is an example of a review of the Board's decision within the parameter of procedural fairness based upon the tribunal record.

[35] In this case, the matter has gone beyond the appeal stage and there is no issue of procedural fairness relating to the administrative bodies below. The case does not raise any *Charter* issues, and while the decision is of course of significance to Mr. Jalloh, there is no public interest component to the application. I find no circumstances here by way of the application for judicial review that give rise to a hearing as to whether there has been a miscarriage of justice. Even if such

jurisdiction should be found available, the Court is of the view that as a discretionary matter, and as a result of the following:

(1) the matter proceeded on the present grounds at a very late stage in the development of the case and were only finally presented 22 months after the appeal decision was known; and

(2) the applicant faces such significant challenges to acceptance of his evidence based upon his previous admissions and the strength of the case advanced against him that there is very little prospect of success.

The circumstances are such that the extraordinary jurisdiction I have described relating to a putative miscarriage of justice should not, in any event, be made available.

[36] The application by way of judicial review is refused.

"W.G. Grist J."