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Professional Discipline Newsletter

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Ontario Divisional Court Establishes a Minimum Level of Assistance that a Tribunal Must Provide to an Unrepresented Party

The Divisional Court, in *Challans v Timms-Fryer*, 2017 ONSC 1300, has established a minimum level of assistance that a tribunal must provide to an unrepresented party.

This case involved an application brought by a police officer with the Amherstburg Police Service, seeking judicial review of a decision by the Ontario Civilian Police Commission (the "OCPC") to order a new disciplinary hearing against him pursuant to the *Police Services Act*.

Mr. Timms-Fryer had made a complaint to the Office of the Independent Policy Review Director (the "OIPRD") regarding the conduct of the police officer during a confrontation. Mr. Timms-Fryer had been pulled over, and eventually charged with assaulting a police officer and resisting arrest, but was later acquitted of these charges. He alleged that the arresting officer had exercised an unlawful arrest, used unnecessary force, acted in a manner prejudicial to discipline, and used profane, abusive and insulting language.

The Hearing Officer found the police officer not guilty of all charges, but on appeal, the OCPC overturned this decision on appeal, noting a failure by the Hearing Officer to

provide a minimum level of assistance to the unrepresented complainant, Mr. Timms-Fryer, who, pursuant to the Police Services Act, was a party to the discipline proceeding before the Hearing Officer. This failure of the Hearing Officer was considered to be a breach of natural justice and procedural fairness which required a new hearing.

The OCPC outlined reasons why the Hearing Officer failed to provide the minimum level of assistance, including:

1. the Hearing Officer did not confirm that the Mr. Timms-Fryer, as the complainant, was aware he was entitled to representation by legal counsel;

2. the Hearing Officer did not explain his or the roles of the parties in the proceedings or the process that would be followed;

3. the Hearing Officer failed to confirm that the complainant understood the process and the tribunal's and the parties' role in the proceedings;

4. the Hearing Officer did not invite the complainant to cross-examine any of the witnesses called at the hearing, save for when the police officer gave evidence, but even then did not give the complainant sufficient time to prepare questions;

5. the Hearing Officer did not ask the complainant whether he wished to call any witnesses or adduce evidence; and

6. the Hearing Officer failed to give the complainant a meaningful opportunity to make submissions at the conclusion of the evidence.

The police officer sought judicial review of the OCPC's decision arguing that the above failings of the Hearing Officer, while acknowledged, ought not to have justified ordering a new hearing, unless the respondent could establish actual prejudice arising from these failings. The Divisional Court rejected this argument and upheld the OCPC's decision to order a new hearing.

In so doing, the Divisional Court held that a party, in the position of the complainant, did not need to show actual prejudice arising from his denial of natural justice and procedural fairness and that requiring actual prejudice to be demonstrated was an impossible burden, requiring speculation about what evidence might have been revealed if the respondent had been able to ask questions of the witnesses.

To the contrary, this breach of natural justice and procedural fairness was seen by the court to be inherently prejudicial, because a party was denied a meaningful role in the proceeding, which is the very purpose of procedural fairness.

As a result of this decision, the Divisional Court appears to have confirmed that a minimum standard of assistance which a tribunal must provide an unrepresented party, requires the tribunal to:

1. Confirm that the party understands that they have a right to counsel;

2. Explain the process and the tribunal's and the parties' roles in the proceedings;

3. Confirm that the party understands the process and the parties and tribunal's role in the proceedings;

4. Afforded the party an opportunity to cross-examine witnesses and sufficient time to prepare questions;

5. Asked whether the party wants to call any witnesses or adduce any evidence; and

6. Afforded the party a meaningful opportunity to make closing submissions.

Although not raised by the Divisional Court, in our view, it is also good practice for a tribunal to ensure that an unrepresented party also understands the distinction between submissions and evidence and the need for the party or his/her witnesses to testify in order for there to be evidence from the party at the hearing. ■

Divisional Court Finds that Discipline Committees Cannot Suck and Blow at the Same Time When Deciding Whether to Award Costs

In the decision of *Truman v Association of Professional Engineers of Ontario*, 2016 ONSC 472, the Divisional Court reversed a decision of the Discipline Committee of the Association of Professional Engineers of Ontario, which had refused to award a member costs of a stayed discipline proceeding.

In so doing, the Court also confirmed that it has the jurisdiction to award costs to a member for an unwarranted Discipline Committee hearing.

Pursuant to the Professional Engineers Act (the "Act"), complaints against professional engineers are investigated by a Complaints Committee which then decides whether to refer those matters to the Discipline Committee.

In Truman, the Complaints Committee referred a matter to the Discipline Committee which then proceeded to stay the disciplinary hearing, finding that the Complaints Committee's referral lacked the necessary requirements to enable a disciplinary hearing to take place. In so doing, the Discipline Committee stated that the referral by the Complaints Committee was so deficient that there were no clearly defined allegations of acts or omissions in the Statement of Allegations to which an individual could respond or mount a proper defence. The Discipline Committee when on to state that the discipline proceeding was unwarranted as it could not succeed.

Section 28(7) of the Act permits the Discipline Committee to order costs payable to the member where it, "is of the opinion that the commencement of the proceedings was unwarranted." However, the Discipline Committee then refused to award the member costs of the proceeding.

The member appealed, arguing that the Discipline Committee's decision to refuse costs was unreasonable, especially when taking into account that the initial complaint lacked sufficient detail.

The parties agreed that the standard of review to be applied on the appeal was reasonableness, however, the Divisional Court found the Discipline Committee's costs decision to be unreasonable.

The Complaints Committee had sent a Statement of Allegations to the Discipline Committee, which asserted that the appellants were guilty of professional misconduct. However, the complaint failed to set out any specific act of misconduct within the meaning of section 72 of Regulation 941 made under the Act, which defines professional misconduct. The Discipline Committee in staying the proceedings had found that they were unwarranted.

However, in its costs decision, the Discipline Committee held that there was evidence before the Complainants Committee, which if proved, would have allowed a finding of professional misconduct. Essentially, the Discipline Committee came to the opposite conclusion than it had reached on the stay application.

The Divisional Court held that given that the Discipline Committee had stated that a finding of professional misconduct could not succeed based on the allegations made against the appellants, the decision to deny costs was unreasonable.

In effect, the Divisional Court found that the Discipline Committee "sucked" in deciding to stay the proceedings as being unwarranted and could not turn around in its costs decision and "blow" by denying the member his costs of the unwarranted proceedings.

As a result, the Divisional Court went on to award the member costs of the discipline proceedings, in accordance with section 31(3) of the Act, which gives an appellant court jurisdiction to “exercise all powers of the committee.”

Accordingly, regulators should remain cognizant of the fact that many of them will have similar provisions in their governing legislation and/or by-laws permitting a discipline committee to award costs against them if the commencement of the proceedings was unwarranted and that they will likely have to pay costs if such a finding is made.

— KC —

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