CITATION: TD Insurance Company v. Dominion of Canada General Insurance Company, 2018 ONSC 2594
COURT FILE NO.: CV-17-585221
DATE: 20180423

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: TD Insurance Company and Trafalgar Insurance Company, Applicants

AND:

Dominion of Canada General Insurance Company, Respondent

BEFORE: Nishikawa J.

COUNSEL: Pamela A. Brownlee, for the Applicant, TD Insurance Company

Antonietta Alfano, for the Applicant, Trafalgar Insurance Company

Daniel Strigberger and Julianne Brimfield, for the Respondent, Dominion of Canada General Insurance Company

HEARD: April 16, 2018

ENDORSEMENT

Overview

[1] On Sunday, November 30, 2014, the claimant, Mahadai Singh, was injured when a car backed into her while she was removing items from the trunk of her son's vehicle, which was parked in the driveway of her home. Her son's vehicle was insured by TD Insurance Company ("TD Insurance"). The vehicle that struck her was insured by Trafalgar Insurance Company ("Trafalgar"). At the time, Ms. Singh was employed by McCluskey Transportation Services ("McCluskey") as a school bus driver, and was insured under McCluskey's policy with Dominion of Canada General Insurance Company ("Dominion"). She did not own a vehicle or have a motor vehicle insurance policy.

[2] In this application, the Applicants, TD Insurance and Trafalgar, appeal the decision of Arbitrator Shari Novick, in which she determined that Ms. Singh was not a "named insured" under the Dominion policy.

[3] The parties agree that the outcome of this appeal turns on the issue of whether Ms. Singh was a "named insured" under the Dominion Policy. Pursuant to s. 3(7)(f)(i) of the *Statutory Accident Benefits Schedule*, O. Reg. 34/10 ("SABS"), this depends upon whether a vehicle was made available for her regular use by McCluskey within the meaning of the provision.

[4] For the reasons that follow, I find that the Arbitrator's decision was reasonable and dismiss the appeal.

Analysis

Standard of Review

[5] The parties agree that based on the recent decision of the Court of Appeal in *Dominion of Canada General Insurance Company v. State Farm Mutual Automobile Insurance Company*, 2018 ONCA 101, the standard of review of an arbitrator's decision on a priority dispute arising from the statutory accident benefits regime is reasonableness.

[6] A decision is reasonable if it falls "within the range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dominion of Canada v. State Farm* at para. 58, quoting *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 47. It is not open to a reviewing court to substitute its own view of a preferable outcome: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 59.

The Statutory Scheme

[7] Section 268(2)2 of the *Insurance Act* sets out the priority rules to determine which insurer is liable to pay accident benefits in respect of non-occupants in case of injury from an incident. A non-occupant first has recourse against the insurer of an automobile in respect of which the non-occupant is an insured. If recovery is unavailable, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant. Pursuant to s. 286(5) of the *Insurance Act*, if a person is a named insured under a contract evidenced by a motor vehicle liability policy, the person must claim statutory accident benefits against the insurer under that policy.

[8] In this case, in order to determine whether the claimant was a named insured, the Arbitrator had to apply s. 3(7)(f)(i) of the SABS, which reads as follows:

> (7) For the purposes of this Regulation, …
>
> (f) an individual who is living and ordinarily present in Ontario is deemed to be the named insured under the policy insuring an automobile at the time of an accident if, at the time of the accident,
>
> (i) the insured automobile is being made available for the individual's regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity[.]

The Arbitrator's Decision

[9] The Arbitrator found that Ms. Singh was not a named insured under the Dominion policy because, at the time of the accident, the school bus provided to her by McCluskey's was not a vehicle being made available to her for regular use.

[10] The Arbitrator closely reviewed the language of s. 3(7)(f)(i) of the SABS. At paragraph 38 of her decision, she examined what "made available" means in the context of the provision. She noted that it could not simply mean that the bus was available but that it was made available. The Arbitrator found that this element of making the vehicle available requires an act or active attention on the part of company.

[11] The Arbitrator also considered whether the bus was made available for the claimant's regular use "at the time of the accident", stating that s. 3(7)(f)(i) requires "an intention and action on the part of the company or employer to make the vehicle available to the employee on the day in question" (at para. 41).

[12] Applying s. 3(7)(f)(i) to the facts, the Arbitrator found that the vehicle was not made available to Ms. Singh at the time of the accident. The evidence that she relied upon included the fact that McCluskey operates buses to transport children to and from school and does not operate on weekends. She also considered the language of the McCluskey Employee Manual regarding "Unauthorized Use of Company Vehicles", which states: "You are permitted to use your bus for personal use during business hours only. Any driver found using a company vehicle (bus) without prior authorization – for any reason – could result in disciplinary action for that driver."

The Appeal

[13] The Applicants argue that the Arbitrator's decision was unreasonable because she interpreted the language of s. 3(7)(f)(i) in an overly restrictive manner. The Applicants claim that the Arbitrator failed to adequately take into consideration three key facts in determining whether the vehicle was made available to Ms. Singh at the time of the accident:

- Ms. Singh had keys to the vehicle, and was able to keep the bus at her residence at all times;
- The McCluskey Employee Manual permitted drivers to use the buses for personal use during business hours but McCluskey did not monitor employees' personal use of the buses; and
- The McCluskey Employee Manual required drivers to refuel, clean and maintain buses but did not specifically state that this had to be done during business hours.

Was the Arbitrator's Decision Reasonable?

[14] The Arbitrator thoroughly analyzed s. 3(7)(f)(i) and, by being careful to give meaning to all of the words employed as described above, interpreted the provision in a reasonable manner. The Arbitrator's decision does not, as the Applicant suggests, lead to an incongruity in the case law. Her interpretation of s. 3(7)(f)(i) as requiring that the vehicle be made available by the employer to the employee on the day in question is entirely consistent with Belobaba J.'s decision in *ACE INA Insurance v. Co-operators General Insurance Company*, (2009), 79 M.V.R. (5th) 312 (Ont. S.C.) at paras. 17-19.

[15] Similarly, the Arbitrator's decision is not inconsistent with *Intact Insurance Company v. Old Republic Insurance Company*, 2016 ONSC 3110, 131 O.R. (3d) 485. As the Applicants note, the claimant in that case had more limited access to the vehicle than Ms. Singh in this case. However, he had express permission to sleep in the vehicle the night before his shift. In this case, personal use outside of business hours was not permitted.

[16] In this case, the evidence before the Arbitrator was that employees were not permitted to drive the school buses for personal use outside business hours and that the buses were not in operation on the weekends. While employees' use of the buses outside business hours may not have been actively monitored, unlike *CAA Insurance Co. v. Travelers Insurance Co., Re* (2017), 66 C.C.L.I. (5th) 149 (Ont. Arb.) (Bialkowski), the Arbitrator found no evidence that drivers regularly drove the buses on the weekends and that this was condoned by McCluskey. Given this evidence, it was reasonable for the Arbitrator to conclude that the school bus was not made available to Ms. Singh when the accident took place, which was on a Sunday.

[17] The Arbitrator did consider facts such as the accessibility of the vehicle and keys, but expressly found that accessibility was insufficient. Access to the vehicle would also have to be considered in the context of the express language of the McCluskey Employee Manual. Given this context, it was reasonable for the Arbitrator to find that the accessibility of the keys and vehicle did not mean that the bus was made available to Ms. Singh at the time of the accident.

[18] The Arbitrator also considered but rejected the fact that Ms. Singh could have taken the bus to be washed or refuelled on the weekend. She found no evidence from which she could infer that these tasks were regularly done on Sundays. Moreover, the unauthorized use provision in the McCluskey Employee Manual states "McCluskey Transportation vehicles are fully insured while they are in operations during regular school hours or authorized charters." The buses were used to transport children to school, and personal use was permitted during business hours. The manual did not contemplate use on the weekend.

Conclusion

[19] In her decision, the Arbitrator considered the language of the statutory provision, the case law interpreting the provision, and the circumstances of Ms. Singh's accident. Her

conclusion that the school bus was not made available to Ms. Singh for regular use at the time of the accident and that, therefore, she was not a named insured pursuant to s. 3(7)(f)(i) of the SABS, was reasonable. Given the deference that must be accorded to the decision of an arbitrator interpreting her home statute in determining a priority dispute, I find no basis on which to disturb the Arbitrator's decision.

[20] Based on the foregoing, I dismiss the appeal of TD Insurance and Trafalgar, with costs of the application to the Respondent.

[21] Counsel for the parties anticipated that they could agree on costs. In the event that an agreement is not reached, the Respondent shall make cost submissions within 10 days of the date of this endorsement, and the Applicants shall make cost submissions within 14 days of the date of this endorsement. All cost submissions will be limited to three pages.

Nishikawa J.

Date: April 23, 2018