

CANADA / JUDGMENT

# Ahluwalia v. Workers' Compensation Appeal Tribunal

2020 BCSC 1717

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 1717 Ahluwalia v. Workers' Compensation Appeal Tribunal

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ahluwalia v. Workers' Compensation Appeal Tribunal,

2020 BCSC 1717

Date: 20201030

Docket: S229722

Registry: New Westminster

In the Matter of the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241

Between:

Gurdeep Kaur Ahluwalia

Petitioner

And

Workers' Compensation Appeal Tribunal

Respondent

Before: The Honourable Mr. Justice Riley

On judicial review from: An order of the Workers' Compensation Appeal Tribunal, dated June 12, 2020 (WCAT Decision No. A1801901).

Oral Reasons for Judgment

Representative for the Petitioner:

J.S. Ahluwalia

Counsel for the Respondent:

J.T. Lovell

Place and Date of Hearing:

New Westminster, B.C.

October 26, 2020

Place and Date of Judgment:

New Westminster, B.C.

October 30, 2020

## Introduction

[1] This is a petition for judicial review. It relates to a decision of the respondent Workers' Compensation Appeal Tribunal ["WCAT"], dismissing the petitioner Ms. Ahluwalia's appeal from an earlier decision made under the Workers Compensation Act, R.S.B.C. 2019, c. 1 [WCA], on the basis that the tribunal did not have jurisdiction. WCAT appears in response to the petition, arguing that the tribunal's decision that it did not have jurisdiction is subject to review on a standard of patent unreasonableness, that the decision is not patently unreasonable, and that the decision making process was procedurally fair such that the petition for judicial review should be dismissed.

## Facts and Procedural History

- [2] Ms. Ahluwalia initially made a report to her employer, alleging that she had been bullied at her workplace by a supervisor and an assistant manager. Ms. Ahluwalia was not happy with how the report of bullying was dealt with and thus filed a complaint to the Workers' Compensation Board, referred to in these reasons as Worksafe BC.
- [3] An occupational safety officer at Worksafe BC conducted an investigation into the matter and concluded that the employer's response and follow up to the bullying report were in compliance with Worksafe BC requirements regarding occupational health and safety. That decision of the Occupational Safety Officer, was dated 22 November 2019.
- [4] Ms. Ahluwalia then applied for review of the Occupational Safety Officer's decision. That review was conducted by a Review Officer at Worksafe BC. The review officer gave a six page decision explaining that she was "satisfied that the evidence demonstrates that the employer took reasonable steps to meet its obligation with regard to the worker's complaints of bullying and harassment", such that there was no basis for issuing an order against the employer under s. 21(1) of the WCA. That review decision is dated 30 April 2020.

- [5] The 30 April 2020 review decision was communicated to Ms. Ahluwalia via a letter dated the same date. The cover letter included a box, at the bottom of the letter, containing the following notation:

Please Note: Decisions by review officers are final decisions of Worksafe BC. Most types of decisions can be appealed to the Workers' Compensation Appeal Tribunal (WCAT). However, some decisions, such as decisions on vocational rehabilitation, commutations, orders other than penalties, and certain types of pensions are not appealable. The enclosed pamphlet provides further information about which decisions may be appealed and how to initiate an appeal. WCAT decides which decisions may be appealed and you can contact them if you require additional guidance. If you do decide to appeal this decision, you must do so within 30 days of the date of this letter.

- [6] Having received that letter, Ms. Ahluwalia then completed and submitted a notice of appeal and cover letter dated 4 May 2020, seeking to appeal the review decision to WCAT.
- [7] On 13 May 2020, a representative of WCAT wrote a letter to Ms. Ahluwalia, raising a concern about whether WCAT had jurisdiction to hear an appeal in the matter. The reason for the concern was that the review decision in issue had to do with a decision not to issue an order against the employer under what is now s. 21(1)(a) of the WCA, under which employers are required to ensure the occupational health and safety of all employees. That category of decision, having to do with occupational health and safety, is specifically exempted from the appeals jurisdiction of WCAT under s. 288 of the WCA, which is cited in a footnote to the 13 May 2020 letter sent to Ms. Ahluwalia. The 13 May 2020 letter invited Ms. Ahluwalia to make further submission as to why the WCAT should not dismiss the appeal on the basis that WCAT did not have jurisdiction.
- [8] Ms. Ahluwalia then wrote a responding letter dated 30 May 2020, setting out various reasons why in her submission the WCAT should not dismiss the appeal. The letter raised a number of concerns about the reviewing officer's decision, but did not expressly address the jurisdictional point.
- [9] Finally, on 12 Jun 2020, Vice Chair of WCAT rendered a decision dismissing Ms. Ahluwalia's appeal on the basis that the tribunal did not have jurisdiction to decide it.
- [10] It is in that context that Ms. Ahluwalia has brought the current petition seeking judicial review of the WCAT decision dismissing her appeal.

## Privilege of Audience

- [11] Ms. Ahluwalia's petition is actually signed by her husband, Mr. Ahluwalia, purporting to act under a Power of Attorney document. Thus, the first issue in the proceeding before me is whether the petition is properly brought and whether the court should hear Mr. Ahluwalia on behalf of his wife, Ms. Ahluwalia.

- [12] The petition itself is signed by Mr. Ahluwalia, purporting to be Ms. Ahluwalia's attorney under a Power of Attorney. A copy of the Power of Attorney document has been filed and on its face it seems quite clear that Ms. Ahluwalia authorized Mr. Ahluwalia to commence the petition on her behalf. The question is really whether the court should permit Mr. Ahluwalia to speak to the matter in the place of Ms. Ahluwalia herself.
- [13] Ms. Ahluwalia is the petitioner, and the mere fact that Mr. Ahluwalia has a power of attorney does not give him a right or entitlement to appear on her behalf or in a court proceeding in the British Columbia Supreme Court. This is clear from the case of *Facchin Estate*, 2012 BCCA 112, in which Donald J.A. made the point that the merely holding a power of attorney does not give a right or entitlement to appear in court. Where a person who is not a qualified legal professional, in other words a not member of the Law Society of British Columbia, seeks to appear in court on behalf of someone else, that person is seeking what is known as the privilege of audience, the privilege of being allowed to speak on behalf of another person.
- [14] In this case, Mr. Ahluwalia seeks to speak on behalf of his wife, in circumstances where he has a power of attorney, and where Ms. Ahluwalia is specifically aware of the proceeding and wishes Mr. Ahluwalia to speak for her. I have been given no reason to believe that Mr. Ahluwalia is charging a fee for the practice of law. Nor have I been given any reason to believe that Mr. Ahluwalia has acted improperly or abused the privilege of audience in this Court or in any other in the past. I should add that I specifically confirmed in court, on the record, with Ms. Ahluwalia herself that she is aware of the court proceeding and that she wishes to have Mr. Ahluwalia speak to it on her behalf. Ms. Ahluwalia informed the Court that it is her preference to have her husband speak on her behalf. In these circumstances, I am prepared to grant Mr. Ahluwalia the privilege of audience.

## WCAT's Standing

- [15] A second preliminary point has to do with the standing of WCAT to appear as a party and make submissions at this judicial review proceeding. Mr. Ahluwalia does not object to WCAT appearing or making submissions. I will say that counsel for WCAT has certainly been of assistance in ensuring that all of the necessary materials and relevant law has been placed before the Court, and in that sense, there was much benefit to WCAT appearing as a party on the judicial review proceeding.
- [16] The law on this issue - the standing of an administrative tribunal to appear and make submission on a judicial review proceeding in which its decision is under review - is set out in *Ontario Energy Board v. Ontario Power Generation Inc.*, 2015 SCC 44 at para. 57 and 59. Applying the considerations discussed therein to the circumstances of this case, what I find to be most telling is that (i) the petition is "otherwise unopposed" meaning that there is no other party before the court to defend or speak to the decision in issue, and (ii) the underlying issue which is the subject of the proceedings is not what might consider to be a compensation issue as between Ms. Ahluwalia and Worksafe BC or the employer, but rather

an issue about the employer's compliance with occupational health and safety requirements, an issue that involves broader public policy questions. For these reasons I consider it entirely appropriate and in the interests of justice to grant standing to WCAT to speak to the merits of the petition in this case.

### The Merits of the Petition

- [17] That brings me then to the merits of the issue, which is whether there is a basis for the court to revisit or set aside WCAT's decision dismissing Ms. Ahluwalia's appeal for lack of jurisdiction.
- [18] Judicial review proceedings are governed by s. 2 of the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241 [JRPA] which provides that such proceedings are to be initiated by way of petition for prerogative relief.
- [19] With respect to the standard of review, I must follow the guidance given in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [Vavilov]. The starting point in Vavilov is that the standard of review is presumed to be reasonableness, unless that presumption is rebutted. One of the situations where the presumption of reasonableness is rebutted is where the legislature has otherwise prescribed the applicable standard of judicial review: Vavilov at para. 10, 16-17.
- [20] The British Columbia legislature has provided for a particular standard of review of administrative tribunal decisions in s. 58 of the Administrative Tribunals Act, S.B.C. 2004, c. 45 [ATA]. More specifically, s. 58(1) provides that where the relevant legislation contains a privative clause, the tribunal must be considered an expert in matters over which it has exclusive jurisdiction. Where that is the case, s. 58(2)(a) provides that the standard of review for findings of fact, findings of law, or exercise of statutory discretion is the standard of patent unreasonableness, and s. 58(2)(b) provides that with regard to questions of procedural fairness or natural justice, the question will be whether the tribunal acted fairly. For all other matters, s. 58(2)(c) provides that the standard of review is correctness.
- [21] Section 308 of the WCA give WCAT exclusive jurisdiction to decide all matters of fact, law and discretion arising out of an appeal proceeding under the WCA. Section 209 of the WCA provides that all decisions of WCAT on such matters are to be considered final. These provisions amount to a comprehensive "privative clause", reflecting the intention of the legislature to recognize WCAT as an expert tribunal whose findings of fact, law, and discretionary decisions are reviewable only on the highly deferential standard of patent unreasonableness: *Singla v. Workers' Compensation Appeal Tribunal*, 2020 BCSC 1227 at para. 8-9.

- [22] In the case at bar, the issue decided by WCAT is one of interpretation of a statutory provision regarding the scope of its appeal function. This is a legal question, or at best a question of mixed fact and law. That would be a matter over which WCAT has exclusive jurisdiction and expertise, and is thus reviewable on the strict standard of patent unreasonableness.
- [23] I should add that the legal issue in this case has to do with WCAT's jurisdiction. Where previously it might have been argued that such jurisdictional questions are treated separately from other legal issues, Vavilov clarified the law on this issue. The majority held at para. 65-68 that jurisdictional points are no longer treated as a distinct category of legal issues subject to some less deferential standard. The only exception to this is where there is an issue or dispute as to the jurisdictional boundaries of two or more administrative bodies, as discussed in Vavilov at para. 17, 53-54. That is not the case here. It is simply a question of interpretation and application of the WCA provisions respecting jurisdiction of WCAT. That is, I find, a matter contemplated by s. 58(1) to (2)(a) of the ATA, governed by the standard of patent unreasonableness.
- [24] Turning to the substance of the matter, there are two questions to be decided on the merits of this judicial review. The first is whether WCAT's decision that it did not have jurisdiction to determine Ms. Ahluwalia's appeal was patently unreasonable. The second is whether the manner in which WCAT made the decision involved any denial of natural justice.
- [25] I turn to the first of those two questions, namely whether the decision itself was patently unreasonable.
- [26] WCAT decided that it did not have jurisdiction because Ms. Ahluwalia's appeal related to a decision respecting an order under Part 2 of the WCA as contemplated in s. 288(2)(b) of the Act, and none of the exceptions in s. 288(2)(b)(i) to (iii) applied. To be clear, the relevant portion of s. 288(2) of the Act states that there is no appeal to WCAT from a decision of a review officer respecting an order made under Part 2 of the Act (occupational health and safety), other than specifically enumerated orders listed in s. 288(2)(i) to (iii). The decision of the review officer in this case related the obligations of the employer to ensure health and safety of employees, a matter falling under s. 21(1) of the Act, which is in Part 2 of the Act. Further, the decision of the review officer did not relate to one the exceptions in s. 288(2)(i) to (iii). Thus, WCAT concluded that it did not have jurisdiction.
- [27] As to whether that conclusion is patently unreasonable, a legal interpretation is patently unreasonable where it "almost borders on the absurd" or is "openly, clearly, evidently unreasonable": *West Fraser Mills Ltd. v. British Columbia (Workers Compensation Appeal Tribunal)*, 2018 SCC 22 at para. 28. That standard is not met here. I consider WCAT's interpretation to be a rational one. It was open to WCAT to interpret s. 288(2) so as not to apply on the basis that what was in issue was a decision "respecting an order" made under Part 2. Although no order was actually made, Worksafe BC's decision was basically a decision to "not issue an order" against the employer. It was, on the reasoning of WCAT, a decision "respecting" an order under Part 2 of the Act. I cannot find that legal interpretation

to be patently unreasonable.

- [28] That brings me to the second question, that is, whether the manner in which WCAT made its decision involved any denial of natural justice or breach of the rules of procedural fairness.
- [29] Recall that after Ms. Ahluwalia filed her appeal, an assessment officer sent a letter to Ms. Ahluwalia raising a concern about whether the tribunal had jurisdiction, and inviting Ms. Ahluwalia to make submissions on that point. Ms. Ahluwalia responded in a letter outlining some of her concerns, but the letter did not directly address the jurisdictional issue that had been raised by the assessment officer. After WCAT received Ms. Ahluwalia's letter, the tribunal concluded that it did not have jurisdiction, and that decision was communicated to Ms. Ahluwalia in a letter written by the Vice Chair/Deputy Registrar of WCAT.
- [30] In addressing the issue of whether this process somehow breached the rules of procedural fairness or natural justice, counsel for WCAT drew the court's attention to ss. 31 of the ATA, and s. 297 of the WCA. Section 31 of the ATA provides that at any time after an application is filed, the tribunal may dismiss the matter for lack of jurisdiction, provided that the applicant is given the opportunity to make written submissions or otherwise be heard on the point, and provided that the ultimate decision is communicated in writing, with reasons. Section 297 of the WCA allows WCAT to conduct hearings in writing. Counsel says the combined operation of these provisions allow for the process which occurred in the case at bar, namely a preliminary determination of a point of jurisdiction, after receiving written submissions from the party seeking to appeal.
- [31] I agree with counsel that this process was fair to Ms. Ahluwalia. There was no denial of natural justice or breach of procedural rules of fairness. The tribunal sent a letter to Ms. Ahluwalia identifying its jurisdictional concern, and inviting submissions. After receiving submissions, the tribunal made a determination that it lacked jurisdiction, and communicated that decision to Ms. Ahluwalia in writing, with reasons.
- [32] At the hearing of the petition, Mr. Ahluwalia asserted that the process was unfair because Ms. Ahluwalia was led to believe that she had a right of appeal, and filed an appeal on that basis. He refers to the cover page of the review officer's letter, which contains a box from which I quoted above. Mr. Ahluwalia refers to the final sentence in that box, which reads, "If you do decide to appeal this decision, you must do so within 30 days of this letter". Mr. Ahluwalia says this sentence led him to believe there was a right to appeal, and the tribunal treated Ms. Ahluwalia unfairly by later refusing to hear it. There are several responses to this submission.
- [33] First, one must read the contents of the box in their entirety. This portion of the review officer's letter contains a sentence which states in express terms that "some, such as decisions on vocational rehabilitation, commutations, orders (other than penalties) and certain types of pensions are not appealable". The letter then makes reference to an enclosed pamphlet providing further information about which decisions may be appealed. So, read as a whole, and interpreted objectively, the cover letter does not give the impression

that there was an absolute right to appeal to WCAT.

- [34] Second, even if the letter gave a mistaken impression, the bottom line is that a letter from a review officer at Worksafe BC cannot confer jurisdiction on WCAT to decide matters that are expressly exempted from its appeal function by the statute. It is a jurisdictional issue, and not a discretionary matter.
- [35] Third, again even if the letter did leave a mistaken impression, WCAT itself specifically raised the jurisdictional point with Ms. Ahluwalia, explained the basis for the concern, and invited submissions. So the tribunal's process raised and resolved any confusion. The process by which the tribunal went about deciding that it lacked jurisdiction and dismissing the appeal on that basis gave Ms. Ahluwalia the opportunity to be heard on the issue.
- [36] In the result, I must conclude that there is no basis to interfere with WCAT's decision. The petition is dismissed, with no costs payable by either party.
- [37] I wish to make one last point about some of the arguments made by Mr. Ahluwalia, which really go to the merits of the review officer's decision, rather than the jurisdictional point which is dispositive of this petition. Ms. Ahluwalia has continuing concerns about the manner in which her initial grievance was investigated, and the process by which Worksafe BC conducted its investigation. Ms. Ahluwalia says it was not proper for her employer to allow a person who was the subject of at least some of her bullying grievances to be the one to actually investigate the matter. As Ms. Ahluwalia put it in her letter to WCAT, "the person named in my complaint was the main investigator of my complaint". Ms. Ahluwalia says this was procedurally unfair. Ms. Ahluwalia also says the prevention officer and the reviewing officer failed to properly consider the evidence and failed to consider the employer's record keeping practices. Ms. Ahluwalia says there was security video in the restaurant that would bear out her complaints about bullying, and these videos were never accessed in the investigation of her complaints.
- [38] As counsel for WCAT explained at the hearing of this matter, the WCA does not give WCAT jurisdiction to review decisions of the sort made by the reviewing officer in this matter. What that means is that the reviewing officer's decision was in effect a final decision, not reviewable under any provisions of the WCA. But this does not necessarily mean the final decision of the reviewing officer is immune from scrutiny. It may well be that the reviewing officer's decision is itself subject to judicial review in the superior court under the JRPA. This is in many ways a more cumbersome process than an appeal to WCAT, but for the reasons mentioned above the tribunal made no reviewable error in determining that it lacked jurisdiction for such an appeal in this case.

"Riley J."

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