

CANADA / JUDGMENT

Bihari v. Deltec Electric Ltd.

2020 BCSC 1450

COURT

Supreme Court of British Columbia

DECIDED

30 September 2020

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2020 BCSC 1450 Bihari v. Deltec Electric Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bihari v. Deltec Electric Ltd.,

2020 BCSC 1450

Date: 20200930

Docket: S217541

Registry: New Westminster

Between:

Ranjila Bihari

Petitioner

And

Deltec Electric Ltd.

Respondent

Before: The Honourable Mr. Justice N. Smith

On judicial review from: An order of the British Columbia Human Rights Tribunal, dated June 12, 2019 (Bihari v. Deltec Electric and another, 2019 BCHRT 114)

Reasons for Judgment

Appearing on her own behalf:

Ranjila Bihari

Counsel for Defendant:

S. Hentschel

Place and Date of Trial/Hearing:

New Westminster, B.C.

September 17, 2020

Place and Date of Judgment:

New Westminster, B.C.

September 30, 2020

- [1] The petitioner Ranjila Bihari is a former employee of the respondent Deltec Electric Ltd. ("Deltec"). She complained to the British Columbia Human Rights Tribunal (the "Tribunal"), alleging Deltec discriminated against her on the basis of physical disability.
- [2] The Tribunal dismissed the petitioner's complaint (the "Dismissal Decision") because she had not complied with an order for production of certain documents (the "Disclosure Order"). The petitioner's further application for reconsideration of the Dismissal Decision was also dismissed (the "Reconsideration Decision"). She now applies for judicial review of the Reconsideration Decision.
- [3] The petitioner filed her complaint in July, 2016. She later particularized her claim to include lost wages to the age of 65. After some preliminary procedures that are not relevant here, Deltec applied for disclosure of medical and other records. The basis for the application is summarized in the following excerpts from the Tribunal chair's reasons for the Disclosure order, dated April 4, 2018:

In relation to her wage loss claim, Ms. Bihari alleges that she was actively looking for work and has taken the position that she has done everything she can to mitigate her damages

At issue is whether Ms. Bihari is able to work. The respondents state that Ms. Bihari's wage loss claim is based on her ability to work, while at the same time Ms. Bihari was claiming in another forum that she was totally disabled from working.

- [4] The Tribunal chair found that that the requested documents related directly to matters the petitioner had put in issue. Those documents included the petitioner's Canada Pension Plan Disability ("CPPD") file and the Disclosure order included an order that the petitioner provide Deltec with an authorization allowing it to obtain "a complete copy" of that file.
- [5] The petitioner was represented by counsel at the disclosure application, although only for the limited purpose of that application. The Tribunal chair acknowledged that the petitioner and her counsel raised "legitimate privacy concerns," but concluded that disclosure was necessary due to matters the petitioner had put in issue. The order was subject to conditions, including that the respondent could not use the documents for any purpose

other than the tribunal proceedings and could not retain them or any copies of them after those proceedings and any judicial review was concluded.

- [6] The petitioner took the position that her former counsel had disclosed redacted copies of documents from the CPPD file and the redactions related to matters not relevant to her claim. She refused to sign the necessary authorization.
- [7] The disclosure order required production of documents within 21 days. There was a series of extension to the deadline, but the petitioner continued to refuse to provide the authorization. In a letter to the parties dated February 20, 2019, the Tribunal chair said the petitioner was being put on notice that her complaint may be dismissed under s. 27.5 of the Human Rights Code (the "Code") which reads:

27.5 If, under the rules, a party has been given notice requiring the party to diligently pursue a complaint and the party fails to act on the notice within the time allowed, then on the request of another party or on its own initiative, a member or panel may dismiss the complaint.

- [8] The Tribunal Chair issued the Dismissal decision on April 5, 2018--one year after the Disclosure order was made. The chair noted:

As I understand her submission, Ms. Bihari says that her previous counsel without her consent, already shared a copy of "all my highly sensitive documents." Ms. Bihari says that she has not received any new documents related to the authorization. She wrote that she will not authorize any further disclosure of highly sensitive information, which she considered an injustice.

- [9] The chair concluded:

In these circumstances it is clear that Ms. Bihari has been given notice requiring her to diligently pursue her complaint and that she has failed to act on that notice within the time allowed. It is clear from her correspondence that Ms. Bihari is aware that the consequences of her repeated non-compliance with the Disclosure Order may result in the dismissal of her complaint. While she may consider this an injustice, the parties have a duty to diligently pursue their complaint. In this case, I am satisfied that Ms. Bihari has not met that duty.

- [10] The petitioner applied for reconsideration of the decision. The Tribunal's rules provide for reconsideration only if it is required by "the interests of fairness and justice." The reconsideration application was heard by a tribunal member other than the chair.
- [11] In a decision dated June 12, 2019, the member noted that the application had been filed outside the time set out in the rules for such applications and declined to vary the time limit because the petitioner had failed to provide a reasonable explanation for the delay. One explanation advanced by the petitioner was that she did not have counsel, but the member noted that many self-represented parties appear before the tribunal.
- [12] The member also said:

- [28] In my view. Ms. Bihari has not provided serious grounds for reconsideration. As I observe above, she does not clearly say why she wishes to have the Tribunal reconsider the Original Decision, except that she disagrees with it and believed both that it was unfair to her and that the Tribunal's chair was biased against her. However, she had not identified a realistic basis in fact for either belief...
- [32] As I have said, Ms. Bihari also seeks to reargue the Disclosure Order in her reconsideration application. If Ms. Bihari disagreed with the Disclosure Order, the time for her to challenge it was when the Tribunal made it.
- [13] On this judicial review application, the petitioner continues to dispute the necessity of the Disclosure Order. The legal basis relied on in her petition includes:
- [1] The Human Rights Tribunal erred in its decision to pronounce an Order for an authorization for disclosure of the Applicant's CPP Disability file, as the CPP Disability file had already been provided to counsel for Deltec.
- [14] In her affidavit, the petitioner says:
- [5] The file had already been provided to counsel for the Respondent, in a redacted form, removing sensitive information by my former counsel.
- [15] In argument before me, the petitioner said the redactions related to personal information that could have nothing to do with her complaint. She also said the redactions had been made by Service Canada when it provided the documents to her former counsel.
- [16] In making the Disclosure Order, the Tribunal chair clearly stated that the respondent was to receive authorization for the complete file. The petitioner may be correct that the redacted documents contained all that was relevant, but it is implicit in the Disclosure Order that the respondent was entitled to verify that. Of course, the relevance of any particular document within the file would ultimately have been a matter to be determined by the Tribunal when and if it considered the merits of the petitioner's complaint.
- [17] The tribunal's power to dismiss an application under s. 27.5 is clearly a discretionary one. By operation of the s. 32 of the Code, it is subject to ss. 59 (3) and (4) of the Administrative Tribunals Act ("ATA"), which reads:
- [3] A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.
- [4] For the purpose of subsection (3), a discretionary decision is patently unreasonable if the discretion
- (a) is exercised arbitrarily or in bad faith,
 - (b) is exercised for an improper purpose,
 - (c) is based entirely or predominantly on irrelevant factors, or

(d) fails to take statutory requirements into account.

[18] A patently unreasonable decision is one that is clearly irrational. That standard of review provides a tribunal with the highest level of deference. *Stein v. Keebler*, 2019 BCSC 1194 at para. 89.

[19] While the specific characteristics that make a decision patently unreasonable may be arguable in some contexts, s. 59 (4) of the ATA provides a statutory definition in regard to discretionary decisions.

[20] The jurisdiction of the tribunal to reconsider its own decisions in the interests of justice or fairness is a "limited equitable jurisdiction" and a reconsideration decision is also reviewable only on the standard of patent unreasonableness: *Routkovskaia v. British Columbia (Human Rights Tribunal)*, 2012 BCCA 141 at paras 23 and 30.

[21] For all relevant purposes, this case is indistinguishable from *Stein*. The complaint in *Stein* was dismissed because the petitioner had failed to comply with document production orders. Unlike this case, the Tribunal's dismissal decision was not based on s. 27.5 of the Code. Instead, reference was made to s. 27(1)(d), which refers to the ability of the tribunal to dismiss a complaint without a hearing if:

(d) proceeding with the complaint or that part of the complaint would not

(i) benefit the person, group or class alleged to have been discriminated against, or

(ii) further the purposes of this Code;

Reference was also made to a provision in the tribunal rules that permitted the tribunal to make any order it considers appropriate where a party failed to comply with a decision or order.

[22] Justice Myers referred to the tribunal's broad power under s. 27.3 to make rules governing practice and procedure and to make any order for which a rule could be made under that section. He concluded at para. 87:

[87] While it is not clear whether Member Trerise based his decision on Rule 4, s. 27(1)(d)(ii), or both, he reached the correct conclusion that the Tribunal does have jurisdiction to dismiss a complaint for non-compliance. Given that I have concluded the Tribunal had sufficient jurisdiction to make the order to dismiss, I do not think it matters what the basis of the decision was for the purposes of determining whether the decision was patently unreasonable

[23] Myers J. also noted that the petitioner made a number of submissions challenging the document production orders and said at para. 91

However, she did not seek judicial review of those orders. It is too late for her to challenge them now. Moreover, I do not find any of them to be patently unreasonable.

- [24] I respectfully adopt the same analysis on the facts of this case. As stated in the reconsideration decision, the petitioner took no steps to seek reconsideration or judicial review of the disclosure order when it was made.
- [25] A party subject to a lawful order by the court or a tribunal is expected to comply with it in the absence of a proper and timely application to set it aside. They are not entitled to simply refuse to comply with the order because they disagree with it or because, in their opinion, it is not necessary.
- [26] The petitioner has failed to show that either the Reconsideration Decision or the underlying Dismissal Decision was patently unreasonable on any of the bases referred to in s. 59(4) of the ATA. To the contrary, I find they were necessary and appropriate steps within the Tribunal's jurisdiction to control its own procedure and ensure fairness to all parties. The petition must therefore be dismissed.
- [27] The tribunal filed a response to the petition, but only counsel for Deltec appeared at the hearing. The Tribunal does not seek costs in accordance with the general principle that, with limited exceptions, costs are not awarded for or against administrative tribunals in judicial review proceedings. 18320 Holdings Inc. v. Thibreau, 2014 BCCA 494.
- [28] That does not apply to a private party, such as the Deltec, that becomes party to a judicial review proceeding. Deltec was successful and the normal rule that costs follow the event must apply.
- [29] The petition is dismissed with costs to Deltec.

"N. Smith, J"

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