

CANADA / JUDGMENT

Ma v. British Columbia (Employment Standards Tribunal)

2016 BCSC 2097

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2016 BCSC 2097 Ma v. British Columbia (Employment Standards Tribunal)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ma v. British Columbia (Employment Standards Tribunal),

2016 BCSC 2097

Date: 20161115

Docket: 169410

Registry: New Westminster

Between:

Ke Ma

Petitioner

And

The Employment Standards Tribunal,

Director of Employment Standards, and

Right Trucks Sales and Service Ltd.

Respondents

Before: The Honourable Madam Justice Devlin

On Judicial Review from: the Employment Standards Tribunal dated December 4, 2014 [Decision No. BC EST# D121/14] and January 9, 2015 [Reconsideration Decision No. BC EST# RD010/15].

Reasons for Judgment

The Petitioner appearing in person:

K. Ma

Counsel for the Respondent The Employment Standards Tribunal:

E.F. Miller

Counsel for the Respondent Director of Employment Standards:

A.J. Adamic

Place and Date of Trial/Hearing:

New Westminster, B.C.

July 21, 2016

October 21, 2016

Place and Date of Judgment:

New Westminster, B.C.

November 15, 2016

Introduction

- [1] This is a petition for judicial review brought by Mr. Ke Ma to set aside the December 4, 2014 decision of the Employment Standards Tribunal (the "Tribunal") in BC EST# D121/14 (the "Appeal Decision"), as well as the Tribunal's reconsideration of that decision in BC EST# RD010/15 (the "Reconsideration Decision"), dated January 19, 2015. Both of these decisions relate to the August 20, 2014 determination of Mr. Ma's initial complaint to the Director of Employment Standards in ER# 177-390 (the "Director's Determination").
- [2] The principal issue on review is whether it was patently unreasonable for the Tribunal to dismiss Mr. Ma's appeal from the Director's Determination without a hearing, and to refuse his application for reconsideration of that decision.

Background

- [3] Mr. Ma was employed full time as an accountant with Right Trucks Sales and Services Ltd. ("Right Trucks") from February 28, 2012 to September 9, 2013. Right Trucks is a dealership and service facility which sells and services used commercial trucks. Mr. Donald Gray is the sole director and officer of Right Trucks. On December 18, 2012, Mr. Ma went on parental leave for 37 weeks, scheduled to return to work on September 6, 2013.

- [4] On August 11, 2013, approximately one month prior to the end of his parental leave, Mr. Ma received a phone call from Mr. Gray, who informed him that his full time accountant position at Right Trucks was no longer available due to a reduction in business. Mr. Gray offered Mr. Ma the option of returning to work part time at three days per week. In the event that Mr. Ma declined the option, Mr. Gray planned to offer the position to Mr. Leung, whom the company had hired to fill in for Mr. Ma during his parental leave. Mr. Ma ultimately decided not to return to work at Right Trucks. He was unemployed from September 2013 to March 2014, at which time he found part time work. His hours increased to full time in April 2014.
- [5] Mr. Leung also declined to take the part time position with Right Trucks. Mr. Ma claims that Right Trucks intended to replace him with Mr. Leung from the outset, and that Mr. Leung only left Right Trucks after he threatened to report him to the ethical committee of the Certified General Accountants Association. In any event, Right Trucks was without an accountant for about a month before Mr. Gray hired Mr. Boulding, who began working part time and moved to full time in December 2013, when he took on additional responsibilities such as picking up drivers and covering the office one day per week.
- [6] Mr. Ma filed a complaint against Right Trucks with the Employment Standards Branch ("ESB") on October 23, 2013. Mr. Ma's complaint was that the reduction of hours in his position (in other words, the elimination of his full time position) was motivated by his taking parental leave, contrary to the duties of employers as set out in s. 54 of the Employment Standards Act, R.S.B.C. 1996, c. 113 [Act]. Mr. Gray maintained that Mr. Ma's full time position was eliminated in a genuine effort to reduce costs in response to a slowdown in business, and claimed there had been a significant overall reduction in staff commensurate with the 40% reduction in Mr. Ma's hours. The hearing of Mr. Ma's complaint was held on April 17, 2014 before Ms. Elliott, a delegate of the Director of Employment Standards (the "Director"). Mr. Ma and Mr. Gray were both present and gave evidence. Mr. Gray called one witness, a sales coordinator from Right Trucks named Ms. Robinson, who gave evidence about the company, including the tenure of Mr. Ma's predecessor Ms. Diehl. Right Trucks' evidence was essentially that the accounting position's hours were subject to periodic fluctuation and that the reduction in Mr. Ma's hours was part of this fluctuation and not motivated by his parental leave.

Determination by the Director of Employment Standards

- [7] The Director's Determination and Reasons for Determination were released on August 20, 2014. The essential findings of the Director are brief enough to reproduce here:

It is clear in both the evidence of Mr. Gray and Ms. Robinson that the accounting position within Right Trucks has been subject to fluctuation over the years. Ms. Robinson stated that Ms. Diehl's hours had been reduced by 40% on two different occasions in the past. As well, in the spring/summer and fall of 2013 staffing levels were reduced at Right Trucks, mostly through attrition but also through lay off. Mr. Gray stated that staffing levels have been reduced from 20 to 12 in

2013/2014. It is clear that the Employer was making a conscious effort to reduce staffing levels in and around the time of the Complainant's parental leave.

After the Complainant did not return to work in September and Mr. Leung left the Employer, another accountant was hired, Mr. Boulding. Mr. Boulding began his work on a part time basis for the initial two months. He was moved to full time hours upon taking on other tasks, such as picking up drivers and dealing with year-end issues.

Part of the Complainant's suspicion of the Employer's motivations in reducing his hours is the timing of the decision. The Employer told the Complainant about the reduction in hours one month prior to his return to work. The Employer admitted that he was going to implement the change in hours upon the Complainant's return to work. While the timing is unfortunate with respect [to] the leave, I do not think that the effort to reduce hours was as a result of the leave. The Employer did in fact reduce the accounting function to part time for both Mr. Leung (after the Complainant was supposed to return from his leave) and for Mr. Boulding in October, 2013. The Employer had also made this same 40% reduction of the accounting function on two previous occasions. It is clear that the Employer was going to reduce the accounting function in any event and the leave, unfortunately, coincided with this decision. I do not find that the decision to reduce the Complainant's hours was motivated by the parental leave. The Complainant's position would have changed whether or not he was at work.

[8] In addition to this finding, the Director concluded that the reduction in Mr. Ma's hours constituted a substantial alteration in the conditions of his employment and could be deemed a termination. The Director therefore found that Right Trucks breached s. 63 of the Act by not providing adequate compensation for Mr. Ma's length of service, and ordered it to pay \$892.44 in outstanding wages as well as a \$500 administrative penalty.

Appeal to the Employment Standards Tribunal

[9] Mr. Ma filed an appeal with the Tribunal on September 15, 2014, claiming \$21,750 in lost wages and \$415 in lost income due to an adjournment and two postponements of the complaint hearing. In Mr. Ma's written argument in support of the appeal, he made two central claims: "biased complaint handling process and biased decision making on the part of the Employment Standards Branch."

[10] With respect to the "bias in the process," Mr. Ma was involved in a mediation session with Mr. Gray and Mr. Krell, a mediator from the ESB, on December 17, 2013. Mr. Ma argued that Mr. Krell demonstrated bias at the mediation by vouching for Mr. Gray's honesty and urging Mr. Ma to settle for one week's pay. Further, the day before the complaint hearing was originally scheduled, Mr. Krell apparently informed Mr. Ma that he could not present what he considered to be an important part of his evidence at the hearing because it included confidential or "without prejudice" statements Mr. Gray had made at the mediation. Mr. Ma complained that he merely wished to refute some of Mr. Gray's claims at the mediation and said that he could have rewritten his evidence to avoid mentioning anything Mr. Gray said if

Mr. Krell had given him more notice. Mr. Ma also complained that the original complaint hearing scheduled for March 26, 2014 was adjourned because Right Truck did not receive a copy of Mr. Ma's evidence in advance of the hearing. Evidently Mr. Krell was supposed to send that evidence to Right Trucks by registered mail and this did not happen, although Mr. Ma noted that he received Right Trucks' evidence from Mr. Krell. The hearing was then postponed twice more, on April 8 and 9, because Mr. Gray was in the United States. Mr. Ma argued that these postponements were for "dubious" reasons and should not have been tolerated by the ESB, further evincing bias.

- [11] Mr. Ma also sought to submit additional evidence for the Director's consideration after the complaint hearing, but was told by Mr. Krell that this would delay the process. Mr. Ma told Mr. Krell that Mr. Gray had lied during the hearing and that he wanted to expose these lies. It appears that Mr. Krell assured Mr. Ma of the delegate's ability to assess credibility. Mr. Krell also apparently told Mr. Ma that he could include the additional evidence in his comments on Right Trucks' financial statements, which Mr. Gray had agreed to provide after the complaint hearing. Mr. Krell said he would call Mr. Gray about the financial statements; however Mr. Ma said he never heard from him again after this conversation, nor did he ever receive Right Trucks' financial statements.
- [12] Mr. Ma also complained that it took four months for the Director to make a Determination after the hearing, and this only after Mr. Ma made an inquiry.
- [13] With respect to bias in the decision-making, Mr. Ma's argument was essentially that the Director failed to properly weigh the evidence and assess Mr. Gray's credibility. He argued that the Director relied heavily on Mr. Gray and Ms. Robinson's evidence and ignored other evidence that tended to support Mr. Ma's position. In particular, Mr. Ma argued that the Director failed to consider that Mr. Gray had access to Right Trucks financial records but failed to produce any documentation in support of his assertions that there was, in fact, a slowdown in business that necessitated a reduction in Mr. Ma's hours.
- [14] In addition, Mr. Ma sought to introduce new evidence on the appeal. In particular, he enclosed with his written argument an amended version of the evidence that Mr. Krell had told him he could not present because it referred to statements made at the mediation; the evidence he had sought to admit after the complaint hearing to refute Mr. Gray's alleged lies at the hearing; and printouts of certain email correspondence which he said contradicted Right Trucks' evidence at the complaint hearing.

The Tribunal's Appeal Decision

- [15] Tribunal member David Stevenson dismissed Mr. Ma's appeal without a hearing pursuant to s. 114(1)(f) of the Act based on a finding that it had no reasonable prospect of succeeding. This finding was made on a review of the record and Mr. Ma's appeal and submissions.

- [16] The main issue for Mr. Stevenson was whether the appeal had any reasonable prospect of success such that Right Trucks and the Director needed to file further submissions. In his Appeal Decision, Mr. Stevenson explained that in determining whether an appeal has any reasonable prospect of success under s. 114(1)(f), the Tribunal considers the general principles governing appeals as well as the statutory grounds of appeal chosen and the specific matters raised in the appeal.
- [17] Mr. Stevenson stated that the burden of proving bias or a reasonable apprehension of bias is high, demanding clear and convincing objective evidence from which "a reasonable person, acting reasonably and informed of all the relevant circumstances, would conclude the object of the allegation was biased." He found that there was no such evidence in this case; rather, Mr. Ma's allegation of bias in respect of the process was "premised on nothing more than subjective, and totally unsupported, impressions." Mr. Stevenson specifically addressed Mr. Ma's concerns about the evidence from the mediation, and found that Mr. Krell did not exhibit any bias in correctly informing Mr. Ma that he could not refer to comments from the mediation session during the complaint hearing. Mr. Stevenson stated that in his view Mr. Ma's allegation of bias in the Determination was "nothing more than an expression of his disagreement with the findings of fact made by the Director," and concluded that there was "no clear objective evidence from which it can reasonably be found Mr. Krell or the delegate deciding the Determination was disposed to hold an adverse view of Mr. Ma or his complaint."
- [18] With respect to the additional evidence Mr. Ma sought to introduce, Mr. Stevenson noted that appeals based on new evidence require an appellant to demonstrate, at a minimum, "that the evidence sought to be admitted with the appeal was not reasonably available and could not have been provided during the complaint process." In addition, an appellant must demonstrate that the evidence is relevant, credible, and probative "in the sense of being capable of resulting in a different conclusion than what is found in the Determination." Mr. Stevenson stated that the evidence Mr. Ma sought to introduce was unacceptable as it was reasonably capable of being provided during the complaint process, and because it was not shown to be credible or probative.
- [19] Mr. Stevenson concluded by commenting that Mr. Ma's appeal essentially amounted to a disagreement with the Director's findings and conclusions in the Determination, which he said were "reasonable and based on the evidence provided." Because of this, and because the Tribunal must defer to the Director's findings of fact unless they raise an error of law in the sense that they are "perverse and inexplicable," Mr. Stevenson found that Mr. Ma had not demonstrated that the appeal had merit.

Application for Reconsideration

- [20] On January 2, 2015, Mr. Ma applied for a reconsideration of the Tribunal's Appeal Decision. His written submissions were divided into five parts.

- [21] First, he sought to clarify that his allegation of bias was not directed at any individuals within the ESB but rather against the processes used by the ESB. He asked the Tribunal to consider his use of the word "bias" as equivalent to "unfair" or "unreasonable," and explained that he had not used these terms because he considered "bias" to be more neutral and less negative. He also explained that he had not raised the specific grounds of appeal set out in the Act because he thought they were all covered "under the general umbrella" of bias. Mr. Ma argued that it was an error for the Tribunal to find he failed to show the Director or Mr. Krell were biased when he had never intended to advance that position.
- [22] Second, Mr. Ma argued that the Tribunal failed to address his argument that Right Trucks should have provided documentation in the form of financial statements (which Mr. Gray apparently said he would provide after the complaint hearing), or preferably payroll records, to corroborate its claim that it reduced its staff by 40% because of slow business around the time it reduced Mr. Ma's hours. Mr. Ma noted that he was at a disadvantage in relation to Right Trucks because he did not have access to these types of documents, and argued that the Director should have exercised "due diligence" before accepting the testimony of Mr. Gray and Ms. Robinson.
- [23] Third, Mr. Ma argued that because businesses are always trying to cut costs, it was an error for the Director to find, and for the Tribunal to agree, that his hours were reduced to cut costs and not in response to his parental leave. He argued that these were not mutually exclusive motivations and that the failure to appreciate this was an error, particularly because there was no corroborating evidence to support Right Trucks' claims of business slowdown and staff reduction.
- [24] Fourth, Mr. Ma argued that the Tribunal misunderstood his complaint about being told he could not present evidence that referred to Mr. Gray's statements at the mediation. He argued that his complaint was not that he was unable to use this evidence, but that he was informed of this one day prior to the complaint hearing, leaving him no time to rewrite his evidence so as to avoid disclosing what was said at the mediation. Mr. Ma noted that this mischaracterization of his complaint made him appear "ignorant and unreasonable," and "weaken[ed] his credibility". Mr. Ma also noted that this was the only one of his multiple complaints about Mr. Krell that the Tribunal specifically addressed in the Appeal Decision.
- [25] Finally, Mr. Ma argued that the Tribunal failed to appreciate that he was unable to present additional evidence or information after the complaint hearing because he never received Right Trucks' financial statements as agreed during the hearing. Mr. Ma repeated that Mr. Krell had told him he could include his evidence responding to Mr. Gray's alleged lies in his comments on the financial statements; however the statements were never provided and the deadline for making additional submissions passed without any warning. Mr. Ma argued that the Tribunal therefore erred in finding that the evidence was reasonably capable of being provided during the complaint process. He also noted that the Tribunal did not explain the reason for its conclusion that the evidence had not been shown to be credible or probative.

The Tribunal's Reconsideration Decision

- [26] On January 19, 2015, Tribunal member Kenneth Thornicroft refused the reconsideration application and confirmed the Appeal Decision pursuant to s. 116(1)(b) of the Act.
- [27] Mr. Thornicroft stated that there was no evidence on the record to show that the delegate was biased against Mr. Ma or that the ESB process was fundamentally unfair. Mr. Thornicroft also noted that Mr. Ma appeared to complain about evidence that Right Trucks did not present to the delegate, and reasoned that this ignored "the fact that parties are free to decide what evidence they will or will not present to the delegate" and that "a party can argue that the other party's failure to present certain evidence should lead the decision-maker to draw an adverse inference." Mr. Thornicroft stated that the new evidence Mr. Ma had sought to admit on appeal was inadmissible "because it could have been presented to the delegate at the complaint hearing (or, at the very least, prior to the issuance of the Determination) and, in any event, was not shown to be credible and probative." Finally, Mr. Thornicroft agreed with the Appeal Decision that the delegate did not err in law in making factual findings that were adverse to Mr. Ma's position, and in particular stated that "the delegate had ample evidence before her that allowed her to reasonably conclude that the employer's motivation to reduce Mr. Ma's working hours was not linked in any fashion to the fact that Mr. Ma took a parental leave." Mr. Thornicroft concluded by stating that Mr. Ma's application for reconsideration did not raise a "serious argument that the Appeal Decision is incorrect either in terms of its legal analysis or in the view the Tribunal Member took of the evidence and arguments submitted on appeal."

Application for Judicial Review

- [28] Mr. Ma filed a petition for judicial review of the Tribunal's Appeal and Reconsideration Decisions on March 18, 2015. In his petition and written argument, Mr. Ma repeated many of the submissions he made during the complaint hearing process and on appeal to the Tribunal. In essence, he makes two main arguments: first, that it was a legal error and procedurally unfair for the ESB and Tribunal to accept Right Trucks' evidence without supporting documentation, which rendered their decisions unreasonable; and second, that the Tribunal acted unfairly and unreasonably in not admitting his new evidence on appeal, and provided inadequate reasons for this decision. With respect to his first argument, Mr. Ma submits that the Tribunal did not act fairly in all of the circumstances because the ESB procedures do not include "a due diligence requirement on the Director or the Tribunal to conduct a critical analysis of the evidence or a minimal verification, such as checking the records, before making a decision." Mr. Ma argues that the Director erred in law and breached natural justice by relying on Right Trucks' evidence "without substantiating records." He says that employees are disadvantaged in terms of the documentary evidence they are able to marshal at a complaint hearing. As Mr. Ma put it, employees usually do not possess their employer's financial and employment records, which puts the employer in the advantageous position of being able to produce the records to contradict the employee or

withhold the records if they support the employee's claims. With respect to his second argument, Mr. Ma says that the new evidence he had sought to introduce could have led to a different result, and that it was ruled inadmissible without sufficient explanation or discussion of the issues.

Standard of Review

[29] The applicable standard of review is uncontroversial. Section 103(m) of the Act provides that s. 58 of the Administrative Tribunals Act, S.B.C. 2004, c. 45 [ATA] applies to the Tribunal. Section 58 of the ATA provides as follows:

Standard of review with privative clause

58 (1) If the Act under which the application arises contains or incorporates a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.

- (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
 - (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
 - (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
 - (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.
- (3) For the purposes of subsection (2)(a), 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.

[30] Section 110 of the Act contains the following privative clause:

Exclusive jurisdiction of tribunal

110 (1) The tribunal has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in an appeal or reconsideration under Parts 12 and 13 and to make any order permitted to be made.

- (2) A decision or order of the tribunal on a matter in respect of which the tribunal has exclusive jurisdiction is final and conclusive and is not open to question or review in any court.
- [31] Taken together, these provisions make it clear that the standard of review applicable to the Tribunal's decisions is "patent unreasonableness": see also *Canwood International Inc. v. Bork*, 2012 BCSC 578 [Canwood] at para. 93; *ICN Consulting Inc., Re*, 2013 BCSC 1499 [ICN] at para. 53. While this was formerly a distinct standard of review along with correctness and reasonableness simpliciter, it is currently regarded as falling at the upper end of the range of deference under the unified reasonableness standard established in *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9 [Dunsmuir]: see *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12 [Khosa] at para. 19; *Victoria Times Colonist Group Inc. v. C.E.P.*, Local 25-G, 2009 BCCA 229, aff'g 2008 BCSC 109 at para. 7. This standard therefore entails a high degree of deference to the Tribunal's decisions. In *Victoria Times Colonist Group Inc. v. C.E.P.*, Local 25-G, 2008 BCSC 109, aff'd 2009 BCCA 229, Ballance J. held at para. 65:

When reviewing for patent unreasonableness, the court is not to ask itself whether it is persuaded by the tribunal's rationale for its decision; it is to merely ask whether, assessing the decision as a whole, there is any rational or tenable line of analysis supporting the decision such that the decision is not clearly irrational or whether the decision is so flawed that no amount of curial deference can justify letting it stand. This is so regardless of whether the court agrees with the tribunal's conclusion or finds the analysis persuasive. Even if there are aspects of the reasoning which the court considers flawed or unreasonable, so long as they do not affect the reasonableness of the decision taken as a whole, the decision is not patently unreasonable.

- [32] This case predated the Supreme Court of Canada's decisions in *Dunsmuir* and *Khosa*; however, in upholding Ballance J.'s decision, Mackenzie J.A. held that neither of those decisions compromised the standard of review she applied. More recently, in *Canwood*, Harris J. held at para. 93 that the decision under review must be "clearly irrational" or "evidently not in accordance with reason" to meet the standard of patent unreasonableness. In *U.S.W. v. Auyeung*, 2011 BCCA 527 at para. 70, Chiasson J.A. quoted with approval the following observation of Holmes J. in *Viking Logistics Ltd. v. British Columbia (Workers' Compensation Board)*, 2010 BCSC 1340:

Standing at the upper end of the 'reasonableness' spectrum, the 'patently unreasonable' standard in s. 58(2)(a) nonetheless requires that the decision under review be defensible in respect of the facts and the law. It is in the inquiry into whether the decision is so 'defensible' that the decision will enjoy the high degree of deference the legislator intended.

- [33] In sum, when applying the patent unreasonableness standard a court must determine whether the decision under review, taken as a whole, is defensible in respect of the facts and law in the sense that it is not clearly irrational or fundamentally flawed, even though the court may disagree with its conclusions or find its analysis unpersuasive.

[34] Where Mr. Ma raises issues of natural justice and procedural fairness, s. 58(2)(b) of the ATA stipulates that the court must determine whether the Tribunal acted fairly in all of the circumstances. As Sigurdson J. noted in *James v. British Columbia (Labour Relations Board)*, 2006 BCSC 784 [James] at para. 70:

The obligation of procedural fairness and natural justice is flexible. In *British Columbia (Securities Commission) v. Pacific International Securities Inc.* (2002), 2 B.C.L.R. (4th) 114, 2002 BCCA 421 (B.C. C.A.), the Court of Appeal recognized that flexibility in the following statement at ¶6:

It is now settled law that all administrative tribunals must provide procedural fairness: see *Nicholson Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311; *Martineau v. Matsqui Disciplinary Board*, [1980] 1 S.C.R. 602 at 623-24; *Moreau-Bérubé v. New Brunswick (Judicial Council)* (2002), 209 D.L.R. (4th) 1 at para. 75 (S.C.C.). However, administrative tribunals are the masters of their own procedure and, unlike courts, need not be shackled by all of the requirements of natural justice; rather, they are entitled to devise flexible procedures adapted to their needs in order to "achieve a certain balance between the need for fairness, efficiency and predictability of outcome": *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at 685.

[35] It should be noted that the adequacy of a decision-maker's reasons (as opposed to the question of whether they provided any reasons at all) is not a question of procedural fairness or a stand-alone basis for quashing a decision, but rather forms part of the substantive review of the decision: *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62 [N.L.N.U.]; *Lysohirka v. British Columbia (Workers' Compensation Board)*, 2012 BCCA 457 at para. 58. Thus, in this case the adequacy of the Tribunal's reasons must be assessed as part of the determination of whether its decisions were patently unreasonable. In this respect I am mindful of the Supreme Court of Canada's statement in *Construction Labour Relations Assn. (Alberta) v. Driver Iron Inc.*, 2012 SCC 65 at para. 3, that "administrative tribunals do not have to consider and comment upon every issue raised by the parties in their reasons. For reviewing courts, the issue remains whether the decision, viewed as a whole in the context of the record, is reasonable."

ANALYSIS

[36] To be clear, this is a judicial review of the Tribunal's Appeal and Reconsideration Decisions, not the Director's Determination. However, the Reasons for Determination inform the court's review of the Tribunal's decisions: *Canwood* at para. 91; *ICN* at para. 48.

[37] With respect to Mr. Ma's first main argument, that the Tribunal unfairly or unreasonably upheld the Director's Determination despite the fact that there was no confirmatory documentation to support Right Trucks' evidence, this appears to touch on an exercise of the Director's discretion. Section 84(1)(b) of the Act provides:

84(1) For the purposes of this Act, the director may make an order requiring a person to do either or both of the following:

(b) produce for the director a record or thing in the person's possession or control.

[38] In relation to this issue, as noted, Mr. Thornicroft stated that it is up to the parties to determine what evidence they will present at a complaint hearing, and that a party's failure to present certain evidence can sometimes result in an adverse inference being drawn against that party. For his part, Mr. Stevenson stated that the Director's findings were "reasonable and were based on the evidence provided." While it is somewhat disconcerting that Right Trucks apparently reneged on its agreement to provide financial statements after the complaint hearing, it was not patently unreasonable of the Tribunal to conclude that the Director nevertheless had sufficient evidence to conclude that Right Trucks' decision to reduce Mr. Ma's hours was not motivated by his taking parental leave. In particular, I note that there was no dispute that the accounting position was going to be reduced from full time to part time in September 2013 whether it was occupied by Mr. Ma or Mr. Leung. In addition, the new accountant Mr. Boulding only began working full time when he took on additional responsibilities not normally associated with the accounting position. In light of this, I cannot conclude that the Tribunal's Appeal and Reconsideration Decisions were patently unreasonable in concluding that a hearing was not necessary to uphold the Director's decision not to order disclosure from Right Trucks and to base the Determination on factual findings grounded in the evidence actually presented by the parties.

[39] Mr. Ma sought to frame this issue as one of procedural fairness, arguing that there should be a "due diligence" requirement on the ESB and the Tribunal to check records or conduct a "critical analysis of the evidence" before making a decision. However, given the comments from the James decision referred to above concerning the flexibility that must be afforded to administrative tribunals in terms of their obligation to provide procedural fairness, I find that the Tribunal and the Director acted fairly in all of the circumstances in not requiring Right Trucks to provide documentary confirmation of its evidence at the complaint hearing. The Act provides that the Director may order the production of records in certain circumstances. I cannot agree with Mr. Ma's submission that the ESB's procedures are unfair because they do not require such production in all cases. Mr. Ma's point that employers will generally have an advantage over employees in terms of the documentary evidence they are able to marshal is well taken; however, an outstanding requirement for employers to bolster their evidence with supporting documentation would unduly limit the ESB's ability to maintain efficiency in its processes.

[40] I turn now to Mr. Ma's second main argument, that it was unreasonable and unfair of the Tribunal not to admit his new evidence on appeal, and that the Tribunal members failed to adequately explain this decision. Mr. Stevenson found that this evidence was not admissible because it was reasonably capable of being presented during the complaint process and was not shown to be credible or probative. Mr. Thornicroft reached the same conclusion. In my view, the Tribunal's decisions in this respect were neither patently unreasonable nor unfair

in all of the circumstances. A significant portion of the written evidence Mr. Ma sought to admit on appeal - that is, the evidence responding to what Mr. Gray said at the mediation and during the complaint hearing - consisted of argument which substantially repeated the same points he made during the complaint process and in his submissions on appeal. In this sense it failed to meet the criteria for admitting new evidence on appeal to the Tribunal. The other additional written evidence that he sought to introduce was not probative in the sense of being capable of resulting in a different conclusion because it did not address the Director's key finding - which was not disputed - that the accounting position was going to be reduced from full time to part time regardless of whether it was filled by Mr. Leung or Mr. Ma. The same is true of the email correspondence Mr. Ma sought to introduce. Of those five emails, three were irrelevant: one was a message he sent to Mr. Gray in an effort to obtain a professional reference; one was an email he sent to his MLA expressing his disappointment with the results of the mediation hearing; and one was an email to the ESB inquiring as to his ability to submit additional evidence after the complaint hearing and before the Director's Determination. The other emails were written to Mr. Ma by two former Right Trucks employees, Mr. Leung and Mr. Torres. These emails were not probative because they also failed to address the Director's finding that the reduction in hours applied to the accounting position rather than any particular individual. In fact, Mr. Leung's email supported this finding by confirming that Mr. Gray told him about the reduction in hours in August 2013. In addition, these emails both predated the complaint hearing by several months and were therefore capable of being produced during the complaint process.

- [41] With respect to the adequacy of the Tribunal members' reasons, while it may have been preferable to engage in a more substantive analysis of the materials, I do not find that the failure to do so rendered the decision not to admit the evidence patently unreasonable. Mr. Stevenson outlined the nature of the evidence Mr. Ma sought to introduce and explained the legal basis on which he determined that it was inadmissible. For the reasons just stated, when viewed in the context of the record as a whole, this aspect of the decisions was not patently unreasonable.
- [42] It is clear that Mr. Ma has spent a great deal of time and effort in his attempts to correct what he sees as mistakes in the Director's Determination. However, for the reasons stated above, and given the high degree of deference that the Tribunal enjoys in respect of its Appeal and Reconsideration Decisions, I am unable to grant his petition. It was not patently unreasonable for the Tribunal to dismiss his appeal without a hearing or to dismiss his application for reconsideration of that decision, nor did the Tribunal fail to act fairly in all of the circumstances.

Disposition

- [43] The petition is dismissed, and the parties shall bear their own costs.

"The Honourable Madam Justice Devlin"

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