

CANADA / JUDGMENT

White v. Baptist Housing Enhanced Living Communities

2022 BCCA 419

COURT

British Columbia Court of Appeal

DECIDED

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2022 BCCA 419 White v. Baptist Housing Enhanced Living Communities COURT OF APPEAL FOR BRITISH COLUMBIA Citation: White v. Baptist Housing Enhanced Living Communities, 2022 BCCA 419 Date: 20221202 Docket: CA48130 Between: Katherine White Appellant (Petitioner) And Baptist Housing Enhanced Living Communities, Adrienne Hodges, Baptist Housing Ministries and Terry Griffing Respondents (Respondents) Before: The Honourable Mr. Justice Harris The Honourable Justice Dickson The Honourable Mr. Justice Grauer On appeal from: An order of the Supreme Court of British Columbia, dated January 31, 2022 (White v. Baptist Housing Enhanced Living Communities, 2022 BCSC 330, Kelowna Docket S132572). Oral Reasons for Judgment The Appellant, appearing in person (via videoconference): K. White Counsel for the Respondents: R.E.K. Truman Place and Date of Hearing: Vancouver, British Columbia December 2, 2022 Place and Date of Judgment: Vancouver, British Columbia December 2, 2022 Summary: This is an appeal of the dismissal of petition for judicial review, arising out of decisions by the Human Rights Tribunal dismissing the appellant's complaints against her employer because they were filed late and/or had no reasonable prospect of success. Held: Appeal dismissed. There was no basis to conclude that the Tribunal decisions were patently unreasonable.

- [1] HARRIS J.A.: Ms. White appeals from the dismissal of her petition for judicial review. Her petition was dismissed on January 31, 2022 in reasons indexed at 2022 BCSC 330. Those reasons fairly and completely summarize the background leading to the judicial review. They reflect the sympathy the judge had for Ms. White's plight, but also apply the legal principles the judge was obliged to follow in dealing with the petition.
- [2] In September 2021, the British Columbia Human Rights Tribunal ("HRT") dismissed Ms. White's complaint alleging discrimination in employment. Those reasons are indexed at 2021 BCHRT 127. In October 2021, her application for reconsideration was dismissed: indexed at 2021 BCHRT 146. Ms. White applied for judicial review of these two decisions.

- [3] Our role, in an appeal of a judicial review decision, is to determine whether the lower court selected and applied the correct standard of review to the administrative decisions. At this stage, the appellate court effectively steps into the shoes of the lower court, and focuses on the administrative decisions to assess whether those decisions met the standard of review.
- [4] The underlying facts relate to injuries Ms. White suffered at work, and the extent to which her claims for disability benefits were accepted by WorkSafeBC and her LTD insurer. Ms. White claimed that what I will refer to collectively as her employer discriminated against her on the basis of her age and physical disability by ignoring a doctor's recommendation that she work modified, lighter, duties as a result of an injury in March 2016. She also claimed discrimination in relation to the payment of disability payments after a second injury in October 2016.
- [5] The HRT dismissed the allegation of ignoring the doctor's recommendation under s. 27(1)(g) of the Human Rights Code, R.S.B.C. 1996, c. 210, because the complaint was filed out of time and it was not in the public interest to accept it. The HRT also concluded the complaint should be dismissed because it had no reasonable prospect of success. This was so because there was no evidence the employer knew of the recommendation at the time.
- [6] The HRT dismissed the complaints about not being paid disability payments and being on an incorrect plan, because there was no reasonable prospect Ms. White could establish she suffered adverse impacts on employment. The core problem was that the issues to do with disability benefits and wages related to decisions made by the LTD insurer and WorkSafeBC. Her employer did not ignore Ms. White's concerns, and encouraged her to appeal those decisions. Furthermore, there was no evidence to support Ms. White's allegation that she was on a wrong plan. Finally, the HRT refused to allow Ms. White to introduce a new issue, not raised in her complaint, about her expected working hours, because it would be unfair to the employer.
- [7] Ms. White sought a reconsideration of the decision. The HRT explained that the power to reconsider is limited to circumstances where fairness or the integrity of the process requires a reconsideration. A reconsideration is not an opportunity to reargue the case, or attempt to rely on new evidence available at the time of the initial submissions. The HRT explained the rationale behind these principles. It concluded that Ms. White attempted to reargue her case by adding new details that were available earlier. Those details would not have altered the result in any event and, in the tribunal member's view, Ms. White had not offered an argument that it was in the interests of fairness or justice for the HRT to reconsider its earlier decision.
- [8] The Supreme Court judge had the benefit of the record before the HRT. That record has not been provided to us, formally at least, as it should have been. I appreciate that Ms. White is representing herself, and the judicial process can be intimidating and difficult to understand, although I note self-represented litigants are offered some pro bono advice. I have, however, as I mentioned during the hearing, been able to access the record

independently, and I have reviewed it. In order to deal with this matter on the merits, I am proceeding as if the record had been provided to us.

- [9] I begin by observing that the judge correctly identified the standard of review applicable to the two decisions subject to judicial review. The decision whether to accept a late-filed claim is discretionary. The decision to dismiss a complaint because it has no reasonable prospect of success is to be given the "highest" level of "curial deference": see *Francescutti v. Vancouver (City)*, 2017 BCCA 242 at paras. 42-43, 46. The standard of review applicable to these discretionary decisions is whether the decision is patently unreasonable: *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [ATA], ss. 59(3) and (4). A patently unreasonable decision is one that is "clearly irrational" or "evidently not in accordance with reason" or "so flawed that no amount of curial deference can justify letting it stand": *Francescutti* at para. 45.
- [10] I do not intend to set out the facts in detail. In not doing so, I mean no disrespect to Ms. White. I have reviewed the record. The evidence and the facts are accurately summarized in both the HRT dismissal of the complaint, and in the reasons dismissing the petition for judicial review. I accept that if the tribunal member had made findings of fact that were not supported by the evidence, or were otherwise unreasonable, the decision to dismiss the complaint based on that error would have been arbitrary in the sense that it would not have been made according to reason and principle, and it would therefore have been patently unreasonable by virtue of s. 59(4)(a) of the ATA. But I have been unable to identify any such error.
- [11] The long and short of it is that Ms. White does not accept the findings of the tribunal member based on the record before her. She has attempted to reargue her case, which really amounts to an argument that the HRT reached the wrong conclusions on the evidence. She wants us to reach a different view of the evidence; to have this Court reweigh and re-evaluate it. That is not our task. We are restricted to assessing whether the conclusions of both decisions are patently unreasonable. And, moreover, we are limited to examining the record before the HRT. Much of the material filed by Ms. White on the appeal, that forms part of the record before us, post-dates the HRT decisions. We cannot consider material, on a case like this, that was not part of the original record. But, in any event, I am unable to detect anything in the later filed material that would, or could, have affected the result.
- [12] The focus of Ms. White's appeal disregards the limitations on our appellate function. The materials placed before us, in Ms. White's appeal books, were almost all dated after the reasons for judgment on the judicial review. She contends, however, in her factum, that two of the affidavits on which the respondent relied before the HRT were not based on the truth, and have been "reversed" to avoid going to a hearing. We have no evidence that would allow us to evaluate that particular contention. Moreover, it appears that if Ms. White wished to contest the veracity of the evidence relied on by the respondent before the HRT, she had the opportunity to do so. The time and place to do so was in the materials filed before the HRT. It is not something we can engage with on appeal.

- [13] Having reviewed the record, it is apparent to me that the assessment of the evidence, and the conclusions drawn from it by the tribunal member, were reasonably open to her. There is no basis to conclude that either the tribunal member's findings, or exercise of discretion, were patently unreasonable.
- [14] There is no dispute that the underlying foundation of Ms. White's complaints relates to decisions about her eligibility for disability benefits and pay by WorkSafeBC and her LTD insurer. The evidence supports the view that her employer encouraged Ms. White to appeal those decisions. I can see no basis to interfere with the HRT's assessment that Ms. White's employer was unaware of the doctor's recommendation in March 2016. Indeed, the evidence suggests quite clearly that they were not. There was no evidence that she was on the wrong plan.
- [15] The judge said this in analysing the petition:
- [36] The petitioner is clearly unhappy with the predicament in which she finds herself. She is adamant that her back problems arise from her workplace injury and believes that if neither WorkSafeBC or the long-term disability insurer will provide the coverage she wants, then her employer should bear responsibility. She blames her employer for not putting her on modified work duties in the spring of 2016, although it is not clear how she expects the employer to have known about the recommendations of the doctor at the walk-in clinic she attended when she herself was not aware of them.
- [37] As noted above, the petition lists the following as the orders sought:
- (1) lost wages;
 - (2) sick hours; and
 - (3) 90% instead of 66.8% LTD benefits.
- [38] The petitioner has clearly had a series of negative results in her dealings with WorkSafeBC, Canada Pension Plan, and the disability insurer. However, the decisions made by those bodies are not at issue in this proceeding. This proceeding deals with her human rights complaint against her employer.
- [16] I agree with that assessment of the nature of the problems Ms. White has faced.
- [17] The decision not to accept a late filing is, as noted, discretionary. There is no proper basis to dispute that the complaint related to the March 2016 recommendation was filed late. The issue, then, was whether it was nonetheless in the public interest to accept the complaint. The tribunal member was entitled to consider such matters as the length of the delay, the reasons for the delay, and the public interest in the complaint itself. The HRT decided that it was not in the public interest to accept the late-filed complaint because: (a) the delay was 16 months beyond the one-year time limit; and (b) there was no evidence the petitioner's ability to complain about any of the 2016 issues was affected by her discussions with her employer or her participation in the application to the WorkSafeBC Review Division, which concluded

in March 2021: see paras. 78-83 of 2021 BCHRT 127. As well, the fact that a complainant is attempting to resolve issues through other means does not stop the time for filing a complaint from running.

- [18] I can see no basis on which we could conclude that the tribunal member's exercise of her discretion was patently unreasonable. This decision, and the conclusion that there was no reasonable possibility that Ms. White could demonstrate an adverse effect on her employment, are part of the gatekeeping function of the HRT to ensure that only complaints of sufficient merit will proceed to a hearing. Decisions of this kind, as this Court has said and I have noted, attract the highest level of curial deference: see *Lee v. British Columbia Hydro and Power Authority*, 2004 BCCA 457; *Routkovskaia v. British Columbia (Human Rights Tribunal)*, 2012 BCCA 141. See also *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30 at para. 20.
- [19] Finally, I can uncover no basis on which the tribunal member's reconsideration decision can be said to be patently unreasonable. The tribunal member articulated well-settled principles governing the exercise of discretion to reconsider an earlier decision, and applied them to the circumstances before her. This decision is discretionary and entitled to deference.
- [20] Although, on an appeal such as this, this Court owes no deference to the judicial review judge, I will say that I agree with his analysis of the issues before him. Like him, I have not been persuaded that Ms. White has demonstrated a reviewable error in either HRT decision.
- [21] Accordingly, I would dismiss the appeal.
- [22] DICKSON J.A.: I agree.
- [23] GRAUER J.A.: I agree.
- [24] HARRIS J.A.: The appeal is dismissed. "The Honourable Mr. Justice Harris"

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