

Goghari v Saarela

Decision Summary

Court	B.C. Supreme Court
Citation	2014 BCSC 1667
Result	Petition Dismissed
Judge	Madame Justice Dillon
Date of Judgment	September 2, 2014
WCAT Decision(s) Reviewed	WCAT-2012-02679

Keywords

Judicial review – Procedural fairness – Failure to compel cross examination – Refusal of request for document disclosure – Denial of opportunity to make submissions – Apprehension of bias – Patent unreasonableness – Section 151 of the Act – Discriminatory action – Occupational health and safety – Section 247(1) of the Act – Power to order persons to attend a hearing to give evidence – Power to order disclosure of documents

Summary

The petitioner sought an order to quash a decision of the Workers' Compensation Appeal Tribunal (WCAT), claiming the decision was patently unreasonable and procedurally unfair.

The petitioner was hired as a laboratory manager. In 2010 the worker sent a "without prejudice" email to his employer outlining concerns about a lack of raise and bonus, work demands, and health and safety concerns. The email stated that if the employer was not satisfied with the petitioner's work, they should fire him. The petitioner was terminated on the same day, with downturn in business cited as cause.

The petitioner filed a discriminatory action complaint alleging that his employment had been terminated contrary to section 151 of the *Workers Compensation Act*. The Workers' Compensation Board (Board) found that while the petitioner had been terminated by his employer, the termination was a response to the "without prejudice" email which primarily raised bonus and salary issues.

In his appeal to WCAT the petitioner requested an oral hearing, orders for two witnesses to testify, and an order for disclosure of the employer's business records. WCAT granted the oral hearing and ordered only one witness to testify. WCAT denied the request for the production of business records as being overly broad.

WCAT left it open for the worker to renew his request regarding the testimony of the

second witness, and to demonstrate the need for disclosure of the requested business records. The petitioner did not renew his request for the second witness or the production of documents. WCAT ultimately found that the petitioner's termination was due to a slowdown in work, and was not related to a prohibited ground in section 151 of the *Act*.

Before the Court, the petitioner argued that WCAT's decision was unfair because the request to cross-examine the second witness and the request for document production were improperly refused, because he was denied an opportunity to make submissions, and because WCAT demonstrated bias. The petitioner also contended that the decision was patently unreasonable for failing to consider his prior health and safety concerns, and in concluding that his termination was due to a slowdown in business.

Reasons of the Court

The Court first determined that the petitioner was not denied an opportunity to cross examine the second witness. WCAT's section 247(1) power to order persons to give evidence at a hearing requires the requesting party to provide information about the relevance of the evidence. The petitioner did not distinguish between the two witnesses or state why relevant information could not be obtained from only one of them. The petitioner did not renew his request at the hearing, and a later written renewal of the request, that did not address the concerns originally raised by WCAT, was insufficient to create a circumstance where the petitioner was denied the right to cross-examination.

In requesting an order for the disclosure of business records, the petitioner did not attempt to demonstrate that the information requested was relevant and could not be tested in another manner. The necessity of the requested documents was not explained, and the employer presented other evidence to show that the company had suffered a slowdown in work. The tribunal was at liberty to accept and interpret that evidence, and did not act unfairly. The Court also determined that the petitioner was not denied an opportunity to make submissions on credibility.

The petitioner alleged that the Vice Chair's extensive cross-examination exceeded appropriate limitations. The Court outlined WCAT's adjudicative and inquisitorial function, and determined there was no bias demonstrated by the Vice Chair's examination. The panel was seeking to clarify matters raised. This inquiry was complicated by interpretation problems and the petitioner's conflicting evidence. The Court also rejected the petitioner's allegation of bias stemming from a discussion which took place between the vice chair and the employer during a break in the hearing while the petitioner was absent. The discussion was on the record and was innocuous.

The petitioner argued that WCAT did not take into account the Board's decision, but the Court found that WCAT did not unduly stray from the decision's background. The Court also found that WCAT did consider the petitioner's prior health and safety concerns, but that the panel simply did not find a sufficient connection between those concerns, and the petitioner's termination.

The petitioner's final contention was that WCAT's conclusion regarding the employer's slowdown in business was without evidential foundation. The Court found that there was some evidence to support the tribunal's conclusion, and the tribunal's finding in this regard was not patently unreasonable.

Long Version:

The petitioner sought an order to quash a decision of the Workers' Compensation Appeal Tribunal (WCAT), claiming that the decision was patently unreasonable and procedurally unfair.

The petitioner was hired as a laboratory manager to replace a retiring senior employee. During the course of his employment, the petitioner was denied a bonus and raise for failure to meet work expectations. He also raised some health and safety concerns. In 2010 the worker sent a "without prejudice" grievance email outlining concerns about the lack of raise and bonus, work demands, and health and safety concerns. The email stated that if the employer was not satisfied with his work, the employer should fire him. The petitioner's employment was terminated on the same day. Downturn in business, particularly in light of the senior employee's decision to stay on, was cited as cause.

The petitioner filed a discriminatory action complaint alleging that his employment had been terminated for raising occupational health and safety concerns, an action prohibited by section 151 of the *Workers Compensation Act*. The Workers' Compensation Board (Board) found that while the petitioner had been terminated, the termination was a response to the "without prejudice" email which was primarily regarding bonus and salary issues. The Review Division upheld the Board decision.

In his appeal to WCAT the petitioner requested an oral hearing, the testimony of two witnesses, and disclosure of the employer's business records. WCAT granted the oral hearing and required only one witness to testify. The request for the production of business records was denied for being too broad.

WCAT left it open for the worker to renew his request for the second witness, and to demonstrate the need for disclosure of the requested records. However, the petitioner did not properly renew his application for the second witness' testimony or for the production of documents. WCAT confirmed its determination to decline the production of the records. WCAT found that the petitioner's termination was due to a slowdown in work, and was not related to grounds prohibited by section 151 of the *Act*.

Before the Court, the petitioner argued that WCAT's decision was unfair because his request to cross-examine the second witness and the request for document production were improperly refused, because he was denied an opportunity to make submissions, and because WCAT had demonstrated bias. The petitioner also contended that the decision was patently unreasonable for failing to consider his prior health and safety concerns, and in concluding that his termination was due to a slowdown in business.

Reasons of the Court

The Court first addressed the petitioner's procedural fairness concerns, determining that the petitioner was not denied an opportunity to cross examine the second witness. WCAT's section 247(1) power to order persons to give evidence at a hearing requires the requesting party to provide information about the relevance of the evidence, and to address whether there is another way of testing the evidence. The applicant did not

distinguish between the two witnesses or state why relevant information could not be obtained from only one of them. The request was not renewed at the hearing even though the second witness was available to testify. A later written renewal of the request, without addressing the concerns originally raised by WCAT, was insufficient to create a circumstance where the petitioner was denied the right to cross-examination.

Regarding the refusal for disclosure of business records, the petitioner did not attempt to demonstrate that the information was relevant and could not be tested in another manner. The necessity of the documents was not explained, and other evidence was presented to establish that the former employer had suffered a slowdown in work. The tribunal was at liberty to accept and interpret the evidence presented, and did not act unfairly. The Court also determined there was no denial of an opportunity to make submissions on credibility.

The petitioner also alleged that the Vice Chair's extensive cross-examination exceeded appropriate limitations. The Court outlined WCAT's adjudicative and inquisitorial function, and determined there was no bias demonstrated by the Vice Chair's examination. The panel was seeking to clarify matters raised, an inquiry complicated by interpretation problems and the petitioner's conflicting evidence. The Court also rejected the petitioner's allegation of bias stemming from a discussion which took place while the petitioner was absent. The discussion was on the record, innocuous, and did not contain anything that a reasonably informed person would consider to indicate bias.

The petitioner argued that WCAT did not take into account the Board's decision, but the Court found that WCAT did not stray from the background of the Board's decision. The Court also rejected the argument that WCAT refused to consider the petitioner's prior health and safety concerns, finding that the Vice Chair considered this evidence but concluded it did not raise a connection to termination. The petitioner had established a *prima facie* case that his termination was related to health and safety concerns, but the employer had proved that no part of the decision was related to such factors.

The Court also rejected the petitioner's argument that WCAT's conclusion regarding the employer's slowdown in business was without evidential foundation. The Court found evidence to support the tribunal's finding that the employer suffered a downturn in business, and the finding was not patently unreasonable.