

Goghari v. ACM Environmental Corporation

Decision Summary

Court	B.C. Court of Appeal
Citation	2016 BCCA 158
Result	Appeal Dismissed
Judges	Madam Justice Saunders Madam Justice MacKenzie Mr. Justice Willcock
Date of Judgment	April 8, 2016
WCAT Decision(s) Reviewed	WCAT-2012-02679

Keywords

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

Summary

Mr. Goghari was terminated from his employment. He filed a discriminatory action complaint with the Workers' Compensation Board (the Board), alleging that his employer had dismissed him for reasons prohibited by section 151 of the *Workers Compensation Act*, specifically, in response to his complaints that unsafe equipment had created occupational health-related problems. The employer denied that it had taken discriminatory action and said that Mr. Goghari was laid off because of a slowdown in work, his lack of productivity, and the availability of another employee to do his work.

The Board found that Mr. Goghari had not established a *prima facie* case of discriminatory action and dismissed his complaint. Mr. Goghari appealed to WCAT.

WCAT held an oral hearing. Prior to the hearing, Mr. Goghari requested orders for the employer's president and chief operating officer to testify, and an order for disclosure of the employer's business records. In a preliminary decision, WCAT ordered only one witness (the president) to testify. It found that Mr. Goghari had not established the necessity of the second witness. WCAT denied the request for the production of business records as being overly broad.

WCAT left it open to Mr. Goghari to renew his requests at the oral hearing. He did not

renew his requests at the hearing, but repeated his requests in his written submission provided to WCAT at the end of the hearing. In its decision, WCAT confirmed its preliminary denial of the requests, noting that Mr. Goghari had not offered any new reasons in support of his requests in his written submission.

As for the merits of the appeal, WCAT found that there was a potential for termination related to safety concerns, due to the temporal connection between a safety complaint Mr. Goghari made and his termination. Thus, Mr. Goghari established a *prima facie* case of discriminatory action. WCAT then found that the employer rebutted the *prima facie* case. WCAT accepted that the employer terminated Mr. Goghari due to overstaffing and a slowdown in work. Therefore, Mr. Goghari had not established his complaint of discriminatory action under the *Act*. WCAT dismissed Mr. Goghari's appeal.

Reasons of BC Supreme Court

On judicial review, Mr. Goghari argued that WCAT's decision was procedurally unfair, and patently unreasonable.

With respect to procedural fairness, Mr. Goghari argued that the WCAT panel had (1) unfairly refused his requests for orders for witness attendance and document production, had (2) improperly denied Mr. Goghari the opportunity to make submissions regarding the evidence that had been led at the oral hearing, and (3) had asked questions of Mr. Goghari that demonstrated a reasonable apprehension of bias against him.

With respect to patent unreasonableness, Mr. Goghari argued that WCAT had (1) failed to take the Board's decision into account, (2) had failed to consider Mr. Goghari's prior health and safety complaints in addressing the question of the motivation for the termination, and (3) had arrived at a conclusion (i.e. that the reason for the termination was a slowdown in business) that lacked an evidentiary foundation.

The court rejected all of Mr. Goghari's arguments. With respect to procedural fairness, it found that he 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 his 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.

WCAT had not erred by not ordering the production of the employer's business records. There was no error in the WCAT conclusion that the breadth of the original request was in the nature of a fishing expedition and the necessity of the documents to establish Mr. Goghari's case was neither explained nor apparent.

The court also determined that the petitioner was not denied an opportunity to make submissions on credibility.

There was no bias demonstrated by the vice chair's examination of Mr. Goghari. 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 court rejected the argument that WCAT's conclusion regarding the employer's slowdown in business was without evidentiary foundation. There was some evidence to support the tribunal's conclusion, and the tribunal's finding in this regard was not patently unreasonable.

Reasons of BC Court of Appeal

On appeal, Mr. Goghari argued that WCAT was obliged to review the Board's decision. Specifically, WCAT was obliged to review each finding in the Board's decision. WCAT failed to do so, and instead conducted a *hearing de novo*. In conducting this type of proceeding, it exceeded its jurisdiction.

Mr. Goghari also argued that WCAT had been procedurally unfair in denying his requests to order a second witness to attend the oral hearing for purposes of cross-examination, and to order the employer to produce various categories of business documents.

Willcock J.A. (Saunders and MacKenzie JJ.A. concurring) rejected these arguments.

The court said that WCAT is not required to conduct an appeal in the nature of a review of the Board's decision and to expressly address the Board's findings. The appeal provisions in Part 4 of the *Act* give a broad scope to WCAT in the conduct of an appeal. The word "appeal" in a statute creating an administrative tribunal is not a term of art. The manner in which WCAT conducted the appeal was within its legislative mandate. Thus, no error on the part of WCAT or the judge was established.

Even if one accepted the appellant's argument that WCAT's role was to decide whether the original decision was wrong, WCAT did review the Board's decision. It referred to the Board's findings, the evidence submitted to the Board, and concluded its analysis by confirming the Board's decision. WCAT described the Board's finding that the appellant had not established a *prima facie* case, and set out its reasons for coming to a different

conclusion (i.e. that a *prima facie* case had been made out). WCAT then described in detail the reasons for its conclusion that the employer had rebutted the *prima facie* case, founded largely upon *viva voce* evidence that was not available to the Board. It was implicit in the reasons for its decision that WCAT had considered and rejected the Board's conclusions. The reasons that WCAT gave for rejecting the Board's conclusions are sufficient.

With respect to procedural fairness, the court found that WCAT has a broad discretion to admit or compel evidence, as well as a broad discretion as to how it will fulfill the requirements of procedural fairness. There will be most often a range of different procedures that meet the requirements. An appeal cannot be founded upon the argument that another reasonable outcome was available to the tribunal.

In the instant case, WCAT had denied Mr. Goghari's procedural requests in a preliminary decision, but advised him that he could renew his requests at the hearing. Neither request was renewed, despite the presence of the second witness at the hearing, and despite the reference to certain documents [at the hearing]. The tribunal cannot be faulted for failing to pursue requests the appellant himself did not renew during the hearing. In written submissions to the tribunal submitted at the conclusion of the hearing, the appellant did renew his requests. Despite the fact that the request was renewed after the hearing, WCAT again considered the request in light of section 247(1) of the *Act* and the *WCAT Manual of Rules of Practice and Procedures*. Noting that the late request provided no new reasons in support of the request, the tribunal dismissed the renewed application. The court found that the tribunal could not be said to have unfairly done so.

The court dismissed the appeal.