

Henthorne v. British Columbia Ferry Services Inc.

Decision Summary

Court	B.C. Supreme Court
Citation	2011 BCSC 409
Result	Judicial Review Dismissed
Judge	Madam Justice Ross
Date of Judgment	April 1, 2011
WCAT Decision(s) Reviewed	WCAT-2010-00733 WCAT-2010-01612

Keywords:

Judicial Review – Discriminatory Action – Section 151 of the Workers Compensation Act – Tribunal Standing - Standard of Review – Patent Unreasonableness – Findings of Fact

Summary:

The petitioner was dismissed by the respondent employer following the sinking of a motor vessel. He filed a complaint with the Workers' Compensation Board, operating as WorkSafeBC, (Board) alleging his dismissal was contrary to section 151 of the *Workers Compensation Act* (Act) prohibiting discriminatory action by employers against workers. The petitioner alleged he was dismissed because he had raised safety concerns at the respondent employer's inquiry into the sinking of the vessel. The safety concerns raised by the petitioner did not relate to the causes of the loss of the vessel.

An officer of the Board upheld the petitioner's complaint and ordered the respondent employer to reinstate his employment. The employer appealed to WCAT. WCAT allowed the appeal finding that the respondent employer's dismissal of the petitioner was not tainted by anti-safety animus.

The petitioner made an application for judicial review. He raised two issues: (1) was it patently unreasonable for WCAT to find that the respondent employer had discharged the reverse onus under section 152(3) of the Act by calling only two witnesses and not calling all of the decision makers; and (2) was it patently unreasonable for WCAT to conclude that the respondent employer discharged its burden of proof in light of what was alleged to be an admission of anti-safety animus by one of the witnesses.

The petitioner also challenged WCAT's standing to make submissions because there were two parties adverse in interest who could make full argument.

On the issue of standing, the Court followed *B.C. Teachers' Federation, Nanaimo District Teachers' Association v. Information and Privacy Commissioner (B.C.)*, 2005 BCSC 1562, *Buttar v. Workers' Compensation Appeal Tribunal*, 2009 BCSC 1228, and *Lang v. British Columbia (Superintendent of Motor Vehicles)*, 2005 BCCA 244. The Court found that issues regarding the taint principle lay at the heart of WCAT's expertise and WCAT was entitled to make its submissions. The Court adopted the detailed analysis from *Buttar* and found that WCAT did not cross the line that separates demonstrating that the decision was not patently unreasonable from arguing the merits. Finally, the Court noted the issue was largely academic as the employer had adopted WCAT's submissions.

On standard of review, the Court cited the *Administrative Tribunals Act* and followed the decisions in *Emergency and Health Services Commission v. Wheatley*, 2010 BCSC 1769, *Viking Logistics Ltd. v. British Columbia (Workers' Compensation Board)*, *Buttar v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2009 BCSC 1228, *Manz v. Sundher*, 2009 BCCA 92, *Speckling v. British Columbia (Workers' Compensation Appeal Tribunal)*, [2003] B.C.J. No. 2244, and *Jensen v. Workers' Compensation Appeal Tribunal*, 2010 BCSC 266. The Court found that the correct standard of review was patent unreasonableness.

On the first issue, the Court found there was some evidence that the employer's decision makers adopted a recommendation by one of the employer's witnesses (a manager) for dismissal and therefore that recommendation reflected the mindset of the corporate entity. The Court referred to passages from the Record of proceedings before WCAT to illustrate the point.

On the second issue, the Court found that WCAT conducted a meticulous review of the evidence and submissions and reached its findings weighing the totality of the evidence. The Court was satisfied that WCAT understood the whole of the management witness' testimony and did not ignore it. Again, the Court referred to passages from the transcript of the witness' testimony to illustrate the point.