

Emergency and Health Services Commission v. Wheatley

Decision Summary

Court	B.C. Supreme Court
Citation	2010 BCSC 1769
Result	Judicial Review dismissed
Judge	Mister Justice Ehrcke
Date of Judgment	December 9, 2010
WCAT Decision(s) Reviewed	2008-03840

Keywords:

Section 151 of the Workers Compensation Act – Discriminatory action – Standard of Review for discriminatory action decisions

In this judicial review the Court considered a decision by the Workers' Compensation Appeal Tribunal (WCAT) which found that the employer had engaged in discriminatory action against one of its employees contrary to section 151 of the *Workers Compensation Act* (Act).

The employee, a paramedic, requested accommodation in relation to his employer's requirement that its paramedics wear an N95 respirator that required them to be clean-shaven. The accommodation was requested on the basis that, because of a skin condition, the employee experienced skin irritation from frequent shaving, and accordingly he wished to use a different type of respirator. He also queried the adequacy of the N95 respirator. Following this, the employer placed the employee on the Short Term Illness and Injury Plan (STIIP) with a consequent 25% reduction in his income. Letters and a meeting followed in January 2006, and the employee was suspended from work during the period of March 28 - 31, 2006.

The employee brought a discriminatory action claim against his employer under section 151 of the Act. The Workers' Compensation Board, operating as WorkSafeBC (Board), found that the employer had engaged in discriminatory action contrary to s. 151 of the Act. The Board's decision was confirmed by WCAT.

The Court dismissed the application for judicial review. The Court found that it was not patently unreasonable for WCAT to find that the employee had made out a *prima facie* case of discriminatory action in contravention of s. 151 of the Act, which was not rebutted by the employer. In coming to this conclusion the Court noted that it was not patently unreasonable for WCAT to conclude that:

- Placing the employee on STIIP resulted in a 25% reduction in his income, and this fell within the definition of "discriminatory action" in s. 150 of the Act;
- Placing the employee on STIIP the day after the employee expressed his concerns about the adequacy of N95 respirators was at least in part motivated by the safety concerns raised by the employee with respect to that type of respirator; and,

- The letters to the worker, and suspension of the worker, in January and March of 2006 were contrary to the Act's prohibition against discrimination, which includes prohibitions against coercion, intimidation and suspension.

The Court further found, contrary to the Petitioner's argument that there is a spectrum within the standard of patent unreasonableness, decisions of WCAT with respect to the issue of discriminatory action under sections 150-153 of the Act are not subject to a lower level of deference than other WCAT decisions.