Henthorne v. British Columbia Ferry Services Inc. and Workers' Compensation Appeal Tribunal

Decision Summary

Court	B.C. Court of Appeal
Citation	2011 BCCA 476
Result	Appeal Dismissed
Judge	**Madam Justice Newbury**, Mr. Justice Groberman, Madam Justice Garson
Date of Judgment	November 24, 2011
BCSC Decision Appealed	2011 BCSC 409

Keywords:

Appeal - Judicial Review – Tribunal Standing - Standard of Review – Patent Unreasonableness – Findings of Fact – Discharge of Reverse Onus - Section 152(3) of the Workers Compensation Act

Summary:

The petitioner was dismissed by BC Ferries 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), which prohibits discriminatory action by employers. The petitioner alleged he was fired because he had raised safety concerns at the 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.

A Board officer upheld the petitioner's complaint and ordered the employer to reinstate his employment. The employer appealed to the Workers' Compensation Appeal Tribunal (WCAT). WCAT allowed the appeal finding that the employer's dismissal of the petitioner was not tainted by anti-safety animus.

The petitioner applied for judicial review. He raised two issues before the chambers judge at the B.C. Supreme Court: (1) was it patently unreasonable for WCAT to find that the 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 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 BCWC 1562. 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 in its submissions and did not argue correctness. 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.

The Court found there was some evidence that the 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 Judge referred to passages from the transcript of the witness' testimony to illustrate her point.

The petitioner appealed the BC Supreme Court's finding that it was not patently unreasonable for WCAT to find it was sufficient to hear from the key persons involved in making the recommendation to dismiss the petitioner from employment and that it was unnecessary to hear from all of the decision makers. The petitioner (appellant) argued that the application of the taint principle required evidence from all persons involved in making the decision to dismiss, in order for the employer to discharge its reverse onus under section 152(3) of the Act of demonstrating that the decision to dismiss was not tainted by anti-safety animus.

The petitioner also moved to strike the WCAT Factum as offending the rule in *Northwestern Utilities Ltd. V. Edmonton,* [1979] 1 S.C.R. 684, on tribunal standing.

On the motion to strike the Court reviewed the developing law in other jurisdictions that the approach to standing should be more flexible and was not determined by the application of an *a priori* rule set out in *Northwestern Utilities*. The Court noted the Supreme Court of Canada has itself without objection permitted administrative tribunals to participate fully in court hearings. The Court noted that the rule may be due for re-evaluation by the Supreme Court of Canada, but until that happens, the law in BC was in favour of applying *Northwestern Utilities* subject to encroachments set out in *Canadian Association of Industrial, Mechanical and Allied Workers, Local 14 v. Paccar of Canada Ltd.,* [1989] 2 S.C.R. 983. The Court went on to apply the more flexible approach in *Ontario (Children's Lawyer v. Ontario (Information and Privacy Commissioner)* (2005), 75 O.R. (3d) 309 in the alternative and found the approach would not permit WCAT to make the submissions it did. Essentially, the Court found that WCAT's Factum was superfluous as the other respondent had made extensive and helpful submissions.

Madam Justice Newbury characterized the main question as having two components: whether evidence from two witnesses could in law discharge the reverse onus and whether the onus was in fact discharged. Madam Justice Newbury characterized the first as a question of law and the second as a question of fact. The Majority disagreed and characterized both questions as questions of law to be answered correctly by the Chambers Judge. In other words, the questions of law were whether the Chambers Judge was correct in her finding that: (1) WCAT was not patently unreasonable in concluding that hearing from two witnesses could discharge the onus under the Act; and, (2) WCAT was not patently unreasonable in concluding that the onus was in fact discharged. The Court found that the Chambers Judge made no errors and dismissed the appeal.