COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Maung v. British Columbia (Workers' Compensation Appeal Tribunal),* 2023 BCCA 371

Date: 20230906
Docket: CA48418

Between:

Albert Thuya Lwin Maung

Appellant
(Petitioner)

And

Workers' Compensation Appeal Tribunal

Respondent
(Respondent)

Before: The Honourable Madam Justice Newbury
The Honourable Justice Dickson
The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated July 13, 2022 (*Maung v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2022 BCSC 1558, Vancouver Docket S111219).

Oral Reasons for Judgment

The Appellant, appearing in person:	A.T.L. Maung
Counsel for the Respondent:	I.D. Morrison
Place and Date of Hearing:	Vancouver, British Columbia September 6, 2023
Place and Date of Judgment:	Vancouver, British Columbia September 6, 2023

Summary:

Mr. Maung appeals an order dismissing his petition for judicial review regarding a complaint that his employer fired him because he raised concerns about workplace bullying and harassment. The Workers' Compensation Board ("WCB") dismissed the complaint. The Workers' Compensation Appeal Tribunal ("WCAT") dismissed the appeal from that decision. The trial judge dismissed his petition for judicial review on the basis that the WCAT Decision was not patently unreasonable and that the appeal was not conducted in a procedurally unfair manner. Held: Appeal dismissed. The trial judge did not err in his analysis of the substantive merits of the WCAT Decision. It is not the role of this Court or the reviewing judge to second guess WCAT's conclusions drawn from the evidence. Mr. Maung has not demonstrated any breach of procedural fairness on the part of WCAT.

DICKSON J.A.:

Introduction

[1] The self-represented appellant, Albert Maung, appeals from an order dismissing his petition for judicial review. The underlying proceedings concerned a complaint that his employer fired him because he raised concerns about workplace bullying and harassment, which constituted a prohibited action contrary to s. 48 of the *Workers Compensation Act*, R.S.B.C. 2019, c. 1 [*Act*].

[2] The Workers' Compensation Board ("WCB") dismissed Mr. Maung's prohibited action complaint. The Workers' Compensation Appeal Tribunal ("WCAT") dismissed his appeal from that decision. Mr. Maung then brought a petition for judicial review of the WCAT decision, which Justice Brongers dismissed on the basis that the WCAT decision was not patently unreasonable and WCAT conducted the appeal in a procedurally fair manner.

[3] On appeal, Mr. Maung submits the judge erred in reaching both conclusions. Mr. Maung's employer did not participate in the appeal in this Court or the judicial review proceeding in the court below. In accordance with the principles outlined in *C.S. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2019 BCCA 406 at paras. 47–48, WCAT made submissions on appeal in support of its own decision.

[4] For the reasons that follow, I would dismiss the appeal.

Background

[5] Mr. Maung was employed as a banquet server at a hotel (the "Employer"). On January 14, 2018, he witnessed his supervisor eating food he had charged to a customer. In response, Mr. Maung sent the supervisor two emails regarding the theft he observed. However, he did not advise management of the theft.

[6] On February 4, 2018, the supervisor assaulted Mr. Maung. The next day, the supervisor, an assistant manager and Mr. Maung met to discuss the assault. At the meeting, the supervisor confessed, apologized and promised not to do it again. Unsatisfied, Mr. Maung sent further emails to the supervisor and others regarding the incident.

[7] On February 19, 2018, Mr. Maung formally reported the assault to the Employer's human resources department, which investigated. Based on its investigation, the Employer disciplined the supervisor by suspending him for a week for fraudulently obtaining food and assault. The Employer also disciplined Mr. Maung by giving him a written warning for failing to report the incidents in a timely manner and for sending inappropriate emails to the supervisor.

[8] On March 19, 2018, Mr. Maung met with two of the Employer's managers, who advised him that disciplinary action had been taken against the supervisor. They also provided Mr. Maung with the written warning regarding his own conduct, but he refused to review the Employer's policies or sign a written acknowledgement of the warning.

[9] On March 20, 2018, Mr. Maung wrote an email to the Employer's general manager indicating his dissatisfaction with how the Employer was handling the situation. The general manager replied that he supported the decisions made by the human resources department and considered the matter closed. In response, Mr. Maung sent another email inquiring about possible next steps.

[10] On April 5, 2018, the Employer informed Mr. Maung that he was being terminated without cause.

[11] On April 11, 2018, Mr. Maung met with an Occupational Safety Officer in the compliance section of the WCB to discuss the events of the preceding few months in his workplace. The Officer investigated and issued an inspection report requiring the Employer to amend its bullying and harassment policy and provide training to the staff. The Officer also informed Mr. Maung regarding the prohibited action complaint process.

Statutory Scheme

[12] The *Act* provides for a no-fault insurance scheme under which the WCB pays compensation for personal injury or death arising out of or in the course of a worker's employment. The WCB is an expert administrative body responsible for adjudicating and administering benefits to workers and their surviving dependents in accordance with the *Act*.

[13] The *Act* also deals with occupational health and safety. The purpose of the occupational health and safety provisions is to benefit all citizens of British Columbia by promoting occupational health and safety in the workplace: s. 14. In fulfilling that purpose, the WCB has enacted the *Occupational Health and Safety Regulation*, B.C. Reg. 296/97 [*Regulation*].

[14] Section 3.10 of the *Regulation* provides:

> Whenever a person observes what appears to be an unsafe or harmful condition or act the person must report it as soon as possible to a supervisor or to the employer, and the person receiving the report must investigate the reported unsafe condition or act and must ensure that any necessary corrective action is taken without delay.

Prohibited Action Complaints

[15] Under the *Act*, workers have a statutory right to complain to and seek remedies from the WCB if they feel employers have retaliated against them for having exercised their rights or carried out their duties in relation to occupational health and safety. Section 47 defines "prohibited action" as including any act or omission by employers that adversely affects workers with respect to any term or

condition of employment. An employer must not take a prohibited action against a worker for exercising or carrying out any occupational health and safety right or duty: s. 48.

[16] A worker who feels that an employer has violated s. 48 of the *Act* can make a written complaint to the WCB within one year of the alleged prohibited action. The burden of proof is on the employer where a worker considers an employer has taken or threatened to take prohibited action against the worker: s. 49(4). Upon receiving a prohibited action complaint, the WCB must investigate: s. 50. If the WCB finds a contravention has occurred, it can make remedial orders, including reinstatement and the payment of wages.

Appeals of WCB Decisions on Prohibited Action Complaints

[17] Pursuant to s. 289 of the *Act*, WCB decisions made in relation to prohibited action complaints can be appealed directly to WCAT. WCAT is a separate and independent administrative body continued by s. 278 of the *Act*. It is headed by a Chair, and its decision-makers are called "Vice Chairs".

[18] WCAT has created rules of procedure called the *Manual of Rules and Practice and Procedure*. Section 297(1) of the *Act* provides:

> Subject to any rules, practices or procedures established by the chair, the appeal tribunal may conduct an appeal in the manner it considers necessary, including conducting hearings in writing or orally with the parties present in person, by teleconference or videoconference facilities or by other electronic means.

[19] Section 298 of the *Act* provides as follows regarding the admission of evidence:

> 1) The appeal tribunal may receive and accept information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law.
> 2) Despite subsection (1), the appeal tribunal may exclude anything unduly repetitious.

[20] WCAT decisions are final and are protected by a privative clause: s. 309. Accordingly, such decisions are subject to judicial review under s. 58 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*].

Procedural History

WCB Complaint

[21] After the Occupational Safety Officer advised him of the complaint process, Mr. Maung submitted a prohibited action complaint to the WCB. As he did not sign the complaint, the WCB closed its file and advised Mr. Maung that he had one year from the date of the alleged prohibited action to pursue a complaint.

[22] On April 5, 2019, Mr. Maung filed a signed complaint alleging the Employer had committed a prohibited action by dismissing him in retaliation for having raised a health and safety issue, namely, the fact that the supervisor had assaulted him. After an unsuccessful attempt at mediation, the WCB adjudicated the complaint based on written evidence provided by Mr. Maung and the Employer.

WCB Decision

[23] On February 10, 2021, the WCB dismissed Mr. Maung's complaint.

[24] The WCB adjudicator found that Mr. Maung had made out a *prima facie* case by showing he had exercised an occupational health and safety duty in reporting the assault and shortly thereafter the Employer warned and fired him. Then the adjudicator asked whether the Employer had successfully rebutted the *prima facie* case by demonstrating on a balance of probabilities that its impugned actions were not motivated by Mr. Maung having raised occupational concerns.

[25] Dealing first with the warning, the adjudicator noted that Mr. Maung did not report the assault when it occurred. Instead, he wrote a series of increasingly demanding and "strident" emails to the supervisor and assistant manager. The adjudicator found the Employer issued the written warning because Mr. Maung failed

to follow its policy on reporting theft and because of the "email badgering", not in retaliation for exercising his right under the *Act* to report the assault.

[26] As to the termination of Mr. Maung's employment, the adjudicator acknowledged Mr. Maung's submission regarding the inadequacy of the Employer's bullying and harassment policy, but emphasized a prohibited action complaint deals with retaliation, not challenges to the adequacy of an employer's policies. The adjudicator was not persuaded that Mr. Maung's dismissal resulted from an inadequate bullying and harassment policy and noted that he persisted in sending emails to the general manager after refusing to sign the warning. Based on the totality of the evidence, the adjudicator was satisfied that Mr. Maung's dismissal resulted from his response to the written warning and that the Employer was "not motivated in any way to take prohibited action against [him] because [he] reported being assaulted by the supervisor": WCB Decision at para. 47.

WCAT Appeal

[27] On March 2, 2021, Mr. Maung appealed the WCB Decision. The appeal was conducted orally by teleconference on September 7, 2021. Mr. Maung represented himself. The Employer was represented by counsel. The hearing was scheduled for one hour. Mr. Maung was the only witness.

[28] Prior to the hearing, the WCB provided its file materials to WCAT and Mr. Maung provided written submissions and various materials. Mr. Maung also requested a longer hearing and an order requiring the Employer to produce video recordings of the assault and two subsequent meetings. On July 12, 2021, WCAT returned apparently irrelevant emails to Mr. Maung, declined to order production of video recordings on the basis they were not relevant to disputed matters and confirmed the allotted time appeared to be sufficient. It also advised Mr. Maung that the rulings on the evidentiary issues were preliminary and he could address them further at the hearing.

[29] On July 12, 2021, Mr. Maung emailed a submission to WCAT. The next day, he sent an email disputing WCAT's preliminary rulings and expressing concern that the Vice Chair may be corrupt or biased. On July 15, 2021, WCAT sent a responsive letter which included, among other things, assurances that Mr. Maung would have ample opportunity to address the relevant evidence and issues at the oral hearing, and noting that, while his assertion regarding bias appeared to be unfounded, he could address it further at the hearing. Thereafter, Mr. Maung sent further materials and additional emails.

[30] When the hearing commenced on September 7, 2021, Mr. Maung expressed concern about going ahead because he had been unable to review some documents and was unclear on certain procedural points. When the Vice Chair asked if he wanted an adjournment, Mr. Maung did not request one and the hearing proceeded as scheduled. In the course of the hearing, the Vice Chair declined to vary the prior rulings. The oral hearing lasted for approximately 1.5 hours.

[31] After the hearing, WCAT sent Mr. Maung a letter confirming that he had two more weeks within which to provide any further evidence, submissions or arguments. Thereafter, both parties made written submissions.

WCAT Decision

[32] On November 15, 2021, WCAT rendered its decision. After summarising the law, the background and the evidence, the Vice Chair explained the irrelevancy of certain materials Mr. Maung had submitted and wanted disclosed to the Employer, as well as the irrelevancy of the video recordings. Then he turned to his findings and his reasons for reaching them.

[33] At the outset, the Vice Chair emphasized the limited nature of the question for determination, namely, whether the Employer's actions were motivated by Mr. Maung raising issues with workplace health and safety. Like the WCB, he found that Mr. Maung had established a *prima facie* case and asked whether the Employer had rebutted that case by establishing on a balance of probabilities that the

discipline and termination of Mr. Maung's employment were not motivated by the fact he had reported the unsafe working conditions. Like the WCB, he concluded that Mr. Maung's termination was due to his failure to follow the Employer's reporting policies and for having sent inappropriate emails.

[34] On December 24, 2021, Mr. Maung filed a petition for judicial review of the WCAT decision.

Judicial Review: 2022 BCSC 1558

[35] The judge reviewed the salient background and the WCB and WCAT decisions. He noted the petition indicated Mr. Maung challenged the WCAT Decision on two main grounds: 1) that he was denied procedural fairness; and 2) that the WCAT Decision was substantively flawed and should be set aside for failure to satisfy the applicable standard of review. He identified five arguments that related to procedural fairness: 1) WCAT's refusal to require the Employer to produce the video recordings; 2) the allegedly insufficient length of the hearing; 3) the fact the hearing was not adjourned; 4) WCAT's alleged bias; and 5) WCAT's refusal to consider and forward certain evidence to the Employer. As to the substantive decision, the judge stated Mr. Maung's fundamental position was that WCAT misapplied the law and assessed the evidence in a manner that was patently unreasonable.

[36] Before addressing Mr. Maung's arguments, the judge reviewed the relevant statutory provisions and standards of review. Regarding the latter, he noted that for a finding of law or of fact the standard is patent unreasonableness, and for questions of procedural fairness the standard is fairness. He then turned to Mr. Maung's arguments on procedural fairness and addressed them as follows:

- As to the video recordings, as the assault and subsequent meetings were undisputed, the recordings were not relevant to the issue of whether the Employer engaged in a prohibited action, so it was not procedurally unfair for WCAT to refuse to require the Employer to produce them;

- As to the length of the hearing, it lasted longer than scheduled, the parties made post-hearing submissions and Mr. Maung provided no explanation of what additional evidence or argument he would have provided had he been given more time, so the duration of the hearing was not procedurally unfair;

- As to an adjournment, when Mr. Maung was asked whether he was seeking an adjournment, he did not request one, so the fact the hearing proceeded was not procedurally unfair;

- As to the alleged bias, there was no evidence or justification for the allegation, which was completely unfounded and should not have been made; and

- As to the materials that were not forwarded to the Employer, they were irrelevant as they did not address how and why Mr. Maung was disciplined and dismissed, so WCAT's failure to forward them to the Employer was not procedurally unfair.

[37] The judge also rejected Mr. Maung's arguments on the substantive merits of the WCAT Decision. In particular, he rejected Mr. Maung's assertion that the case should not have been determined on a balance of probabilities, finding that it was not patently unreasonable for WCAT to apply the ordinary civil standard of proof. He also found WCAT's conclusion that there was no causal connection between the fact the Employer disciplined and terminated Mr. Maung and the fact that Mr. Maung reported unsafe conditions at work was not patently unreasonable based on the record, including the emails and submissions. Specifically, the judge stated, the WCAT decision "is not clearly irrational, nor is it unsupported by any evidence": at para. 52.

[38] Based on all of the foregoing, the judge dismissed Mr. Maung's petition for judicial review.

On Appeal

[39] It appears from Mr. Maung's factum that he relies on this appeal on substantially the same arguments he advanced in the court below. At the oral hearing this morning, he also described some additional concerns.

[40] Emphasizing that he is not legally trained or entirely clear on the relevant legal concepts, Mr. Maung advised that he seeks "liberation" from what he perceives as the chronic bullying and harassment he experienced in his former workplace throughout the course of his employment. From his perspective, the Employer tolerated such conduct and is thus responsible for what took place. Mr. Maung advised further that he also seeks improvement of the workplace culture and protection for its employees from bullying and harassment going forward, together with a genuine apology from the Employer regarding his experiences and, if possible, compensation.

Discussion

Standards of Review

[41] This Court's role on appeal is to determine whether the judge identified the correct standards of review and applied them correctly to the WCAT Decision and the proceedings. The focus of analysis is on the administrative decision rather than the decision of the reviewing judge, although the judge's reasons may be instructive and worthy of respect: *Vandale v. Workers' Compensation Appeal Tribunal*, 2013 BCCA 391 at para. 43; *R.N.L. Investments Ltd. v. British Columbia (Agricultural Land Commission)*, 2021 BCCA 67 at para. 56.

[42] As to the underlying WCAT Decision, the applicable standard of review is patent unreasonableness: s. 58(2)(a), *ATA*; *Vandale* at para. 43; s. 296, *Act*. This is a highly deferential standard which is met when an administrative decision "is so flawed that no amount of curial deference can justify letting it stand": *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 at para. 52. In particular, it is not for the court on review or appeal to reweigh evidence or second guess conclusions drawn from

the evidence and substitute different findings. As stated in *Speckling v. British Columbia (Workers' Compensation Board)*, 2005 BCCA 80, "[o]nly if there is no evidence to support the findings, or the decision is 'openly, clearly, evidently unreasonable', can it be said to be patently unreasonable": at para. 37.

[43] The salient question regarding the rules of natural justice and procedural fairness, is whether, in the circumstances, WCAT acted fairly: s. 58(2)(b), *ATA.* Procedural fairness is comprised of two key rights, namely, the right to be heard and the right to an impartial hearing: *Therrien (Re)*, 2001 SCC 35 at para. 82. The object of procedural fairness is to achieve a balance between the need for fairness, efficiency, and predictability of outcome: *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at 685. Where a reviewing court concludes that the procedures met the requirements of procedural fairness, it will not interfere with a tribunal's choice of procedures: *Seaspan Ferries Corporation v. British Columbia Ferry Services Inc.*, 2013 BCCA 55 at para. 52.

[44] This Court will only allow the appeal if the WCAT Decision is patently unreasonable or WCAT conducted the proceedings unfairly.

Did the Judge Identify the Correct Standards of Review?

[45] The judge identified the correct standards of review at paras. 36–39 of his reasons, as outlined above.

Did the Judge Correctly Apply the Standards of Review to the WCAT Decision and Proceedings?

[46] As WCAT submits, the judge's analysis of the substantive merits of the WCAT Decision is instructive and worthy of respect on appeal. The same is true of his analysis of whether the WCAT proceedings were conducted fairly.

[47] In my view, the judge's analyses are error-free and persuasive. As he clearly explained, it is not the role of a reviewing judge to second guess WCAT's conclusions drawn from the evidence. Nor is that the role of this Court. Moreover, as

the judge also explained, Mr. Maung has not demonstrated any breach of procedural fairness on the part of WCAT in its conduct of the WCB appeal.

[48] Mr. Maung's desire for improvement in the bullying and harassment policies of the Employer is understandable and laudable. As I have explained, as a result of his meeting with the WCB Occupational Safety Officer an investigation was conducted and the Employer was required to amend its bullying and harassment policy and provide training to the staff. In other words, Mr. Maung achieved this important goal. As to the other forms of relief that Mr. Maung seeks, while his wishes are perhaps understandable, this Court is not legally empowered to grant them. As he has now expressed his concerns clearly and emphatically, hopefully he can now put this unfortunate matter behind him.

Conclusion

[49] I would dismiss the appeal.

[50] **NEWBURY J.A.**: I agree.

[51] **SKOLROOD J.A.**: I agree.

[52] **NEWBURY J.A.**: The appeal is dismissed.

"The Honourable Justice Dickson"