COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Pereira v. British Columbia (Workers' Compensation Appeal Tribunal),* 2024 BCCA 158

Date: 20240426
Docket: CA49224

Between:

Corinne Pereira

Appellant
(Petitioner)

And

Workers' Compensation Appeal Tribunal and Dexterra Group Inc.

Respondents
(Respondents)

Before: The Honourable Madam Justice Stromberg-Stein
The Honourable Justice Skolrood
The Honourable Justice Winteringham

On appeal from: An order of the Supreme Court of British Columbia, dated July 20, 2023 (*Pereira v. British Columbia (Workers' Compensation Appeal Tribunal)*, Terrace Docket 21571).

The Appellant, appearing on her own behalf:	
Counsel for the Respondent, Workers' Compensation Appeal Tribunal:	T.J.H. Martiniuk
Counsel for the Respondent, Dexterra Group Inc.	L. Chang
Place and Date of Hearing:	Vancouver, British Columbia April 9, 2024
Supplemental Written Submissions by the Appellant Received:	April 9, 2024
Place and Date of Judgment:	Vancouver, British Columbia April 26, 2024

Written Reasons by:
The Honourable Madam Justice Stromberg-Stein

Concurred in by:
The Honourable Justice Skolrood
The Honourable Justice Winteringham

Summary:

The appellant's employment was terminated in circumstances which the appellant alleged constituted a prohibited action under the Workers Compensation Act. The appellant brought a prohibited action complaint against her employer and grieved the termination of her employment through her union. The grievance was settled between the union and the employer. The Workers' Compensation Board found it had no authority to consider the prohibited action complaint on the grounds that it had been addressed by the grievance. The Workers' Compensation Appeal Tribunal dismissed the appellant's appeal and request for reconsideration. The appellant's application for judicial review was dismissed. Held: Appeal dismissed. It was not patently unreasonable for the Workers' Compensation Appeal Tribunal to find that the grievance and settlement agreement appropriately dealt with the substance of the prohibited action complaint.

Reasons for Judgment of the Honourable Madam Justice Stromberg-Stein:

Introduction

[1] The appellant, Corinne Pereira, brought a prohibited action complaint to the Workers' Compensation Board (the "Board"), which operates as WorkSafeBC, pursuant to s. 49 of the *Workers Compensation Act,* R.S.B.C. 1996, c. 1 [*Act*], with respect to the termination of her employment, which she says was in retaliation for her raising safety concerns.

[2] The Board found that it had no authority to consider the prohibited action complaint because Ms. Pereira had elected to address the complaint through a grievance under a collective agreement, which resulted in a settlement agreement between Ms. Pereira's union and the employer. The Workers' Compensation Appeal Tribunal ("WCAT") upheld the Board's decision on appeal and refused Ms. Pereira's request for reconsideration on jurisdictional grounds. Ms. Pereira's application for judicial review of the WCAT decisions was dismissed.

[3] Ms. Pereira seeks orders from this Court to enable her to continue to pursue her prohibited action complaint before the Board.

[4] I will address two preliminary matters.

[5] First, Ms. Pereira was not in attendance at the hearing of this appeal. She had requested and been granted permission to appear by Zoom. The day before the hearing, Ms. Pereira contacted the Registry to request that if she was unable to attend the appeal due to work commitments, that she be permitted to participate by way of a supplemental written submission. The Registrar wrote to Ms. Pereira directing that she make a formal request by filing a requisition and attaching her signed confirmation that she was content to rely on the written record. The Registrar wrote that she could file and serve a supplemental written submission by 9:00 AM the day of the hearing, not exceed five single-spaced pages, and not to raise any new issues.

[6] On the day of the hearing, Ms. Pereira delivered her supplemental written submission and filed a requisition with the Registry indicating, as relief sought, "[t]o have the appeal determined based on the filed record by consent of all the parties." At the hearing, the respondents were present and confirmed their consent to Ms. Pereira's request and that they had received her supplemental written submission. The respondents elected to rely on their written submissions in lieu of oral argument.

[7] The Court was content to proceed in this manner and the appeal has been determined on the basis of the filed materials, including Ms. Pereira's supplemental written submission.

[8] The second preliminary matter concerns Ms. Pereira's application to adduce fresh evidence, which consists of a decision of the Labour Relations Board dated January 16, 2024. This is not evidence and the application is unnecessary for Ms. Pereira to rely on the decision. Ms. Pereira's fresh evidence application is therefore dismissed.

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

Background

[10] There is a lengthy background underlying this appeal, which involves several decisions of the Labour Relations Board ("LRB"), judicial reviews of those decisions and an appeal to this Court. In addition, Ms. Pereira has brought a number of other actions arising out of the same factual matrix, which include a wrongful dismissal action, defamation actions and a private prosecution. Given that this is not an opportunity to relitigate the outcome of any of these prior matters, it is unnecessary to discuss them further. However, the LRB proceedings are relevant because they concern union grievance proceedings which WCAT found had appropriately dealt with the substance of Ms. Pereira's complaint and appeal, within the meaning of s. 31(1)(g) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*].

[11] The LRB proceedings and underlying factual background were discussed at length by Justice Punnett on judicial review: *Pereira v. British Columbia Labour Relations Board*, 2022 BCSC 1205. They were also discussed by Justice DeWitt-Van Oosten in this Court's judgment dismissing Ms. Pereira's appeal: *Pereira v. British Columbia (Labour Relations Board)*, 2023 BCCA 165. I will rely on these decisions for their discussion of the LRB proceedings.

[12] What follows is a brief background for the purposes of this appeal.

[13] In May 2019, Ms. Pereira began employment at Crossroads Lodge in Kitimat B.C., operated by Horizon North Camp & Catering Inc. ("Horizon North"). The respondent, Dexterra Group Inc. ("Dexterra") is the parent company of Horizon North.

[14] At all material times, Ms. Pereira was covered by a collective agreement between Horizon North and UNITE HERE, Local 40 (the "Union"). The collective agreement contains a clause that establishes a grievance procedure for disputes.

[15] In May and June 2020, Ms. Pereira received a verbal warning, a written warning, and a three-day suspension from Horizon North, in response to complaints from other Horizon North employees. The Union grieved all three disciplines (the

"Discipline Grievance"), which was eventually settled between the Union and Horizon North. Ms. Pereira's position was that she was the subject of workplace bullying and harassment and was unfairly disciplined for raising the issue with her employer.

[16] On September 23, 2020, Horizon North terminated Ms. Pereira's employment for continuing violations of its respectful workplace policy. In response, Ms. Pereira pursued a grievance through the Union (the "Termination Grievance") and filed a prohibited action complaint (the "Prohibited Action Complaint").

[17] In October 2020, the Union, Horizon North, and Ms. Pereira attended a step 2 grievance meeting concerning the Termination Grievance. No resolution was reached at the meeting, and the Union referred the Termination Grievance to arbitration, with dates set for March 2 and 3, 2021.

[18] On October 23, 2020, Ms. Pereira filed an unfair representation complaint with the LRB pursuant to s. 12 of the *Labour Relations Code*, R.S.B.C. 1996, c. 244, alleging the Union had failed to adequately represent her interests in the Discipline Grievance.

[19] On February 16, 2021, a case management conference was held before the arbitrator. The Union and Horizon North agreed to use the arbitration dates for mediation.

[20] On March 1, 2021, one day prior to the first scheduled day of mediation, Ms. Pereira sent an email to the Union and counsel for North Horizon setting out what she referred to as a "starting point" for settlement discussions. She indicated she had retained legal counsel who would be reviewing any settlement offers.

[21] On March 2, 2021, the Union, Ms. Pereira, and Horizon North attended the first scheduled day of mediation. The second day of mediation was cancelled by agreement of the Union and Horizon North.

[22] On March 12, 2021, the Union and Horizon North entered into a settlement agreement (the "Settlement Agreement"). In exchange for Horizon North providing settlement funds to Ms. Pereira, the Union agreed to withdraw the Termination Grievance and release Horizon North from any further actions on behalf of Ms. Pereira in respect of Ms. Pereira's employment at Horizon North. The Settlement Agreement stated that it constituted "full settlement of any existing or possible claims arising from Ms. Pereira's employment…including the [Termination Grievance] and the Prohibited Action Complaint."

[23] Ms. Pereira opposed the settlement and informed her Union representation that she "wasn't accepting it". After the settlement funds were sent to Ms. Pereira, she posted a video on social media of herself burning the settlement cheques.

[24] The Union dismissed Ms. Pereira's internal appeal of its decision to settle the Termination Grievance. In a letter sent to Ms. Pereira, the Union set out its opinion that it did not believe there was any likelihood of "winning your grievance", which was the Union's reason for settling with the employer.

[25] On March 19, 2021, the LRB dismissed Ms. Pereira's unfair representation complaint concerning the Discipline Grievance: 2021 BCLRB 44. On May 28, 2021, the LRB denied Ms. Pereira's application for reconsideration: 2021 BCLRB 89. Ms. Pereira filed a petition for judicial review.

[26] On June 6, 2021, Ms. Pereira filed an unfair representation complaint with the LRB pursuant to s. 12 of the *Labour Relations Code* alleging that the Union had failed to adequately represent her interests in the Termination Grievance. She sought an order from the LRB to require the Union to advance the Termination Grievance to arbitration.

[27] On September 20, 2021, the LRB dismissed Ms. Pereira's unfair representation complaint concerning the Termination Grievance: 2021 BCLRB 150.

[28] On December 15, 2021, the LRB dismissed Ms. Pereira's application for reconsideration: 2021 BCLRB 195.

[29] On January 10, 2022, Ms. Pereira filed a petition for judicial review of the LRB reconsideration decision concerning the Termination Grievance. This petition was joined with Ms. Pereira's previously filed petition for judicial review of the LRB's reconsideration decision concerning the Discipline Grievance.

[30] On July 15, 2022, Justice Punnett dismissed both petitions for judicial review, with reasons indexed at 2022 BCSC 1205.

[31] Ms. Pereira appealed the orders of Justice Punnett dismissing her petitions for judicial review. On April 19, 2023, this Court dismissed Ms. Pereira's appeal: 2023 BCCA 165. Ms. Pereira's application for leave to appeal to the Supreme Court of Canada was dismissed with costs to the respondent: 2023 CanLII 122403 (S.C.C.).

[32] Earlier, on January 4, 2022, an Investigations Legal Officer for the Board wrote to Ms. Pereira informing her that the Prohibited Action Complaint could not proceed because it had been resolved by the Termination Grievance. On January 24, 2022, Ms. Pereira appealed that decision to WCAT.

[33] On February 7, 2022, a WCAT assessment officer wrote to Ms. Pereira setting out WCAT's provisional decision that her appeal should be summarily dismissed under s. 31(1)(g) of the *ATA* as the Prohibited Action Complaint had been "appropriately dealt with in another proceeding". Between February and April 2022, Ms. Pereira and Dexterra provided written submissions to WCAT in response to the provisional decision.

Procedural History

The Prohibited Action Complaint Decision

[34] On September 22, 2022, WCAT dismissed Ms. Pereira's appeal from the dismissal of her Prohibited Action Complaint, pursuant to s. 31(1)(g) of the *ATA* (the "PAC Decision").

[35] The Vice Chair stated the issue as follows:

> [5] Should the worker's appeal be dismissed on the basis the alleged prohibited action was dealt with through a grievance procedure and therefore the Board and WCAT have no jurisdiction to consider the complaint, in accordance with section 49(2) of the Act?

[36] The Vice Chair reviewed s. 49(2) of the *Act* and the associated *Prevention Manual* Policy P2-50-1. Policy P2-50-1 provides in part that "a worker is required to choose one of the two processes for a prohibited action complaint." The two processes are, under s. 49(2) of the *Act*, "the grievance procedure under a collective agreement…or by complaint".

[37] After reviewing the complaint documents, the Vice Chair concluded that the Prohibited Action Complaint was directed at the termination of Ms. Pereira's employment.

[38] Ms. Pereira submitted that the Termination Grievance was not a "procedure" within the meaning of that term in s. 49(2) of the *Act*, and that the Termination Grievance had not dealt with her Prohibited Action Complaint because it did not resolve the issues she raised concerning the termination of her employment.

[39] The Vice Chair rejected Ms. Pereira's arguments, finding that the Settlement Agreement "directly addresse[d] the prohibited action pertaining to the…termination", and that Ms. Pereira's "objection to the union's acceptance of the settlement agreement had no bearing on whether or not the matter had been dealt with or whether WCAT had jurisdiction over the prohibited action complaint." The Vice Chair adopted the following excerpt from a 2016 WCAT decision concerning union ownership over grievance proceedings:

> Indeed, it is well-understood in the context of labour relations that a grievance "belongs" to the union. A member is not, as a legal matter, even required to accept a settlement once agreed to by the union and employer. In this sense, it might well be concluded that the matter had in fact been fully resolved once the union and employer agreed to settle the grievance.
>
> …
>
> In my view, "changing horses" at such a late point in the grievance proceeding is not to be permitted under section 152 [now s. 49] of the Act.

> Where all the parties have gone to considerable lengths to facilitate a conclusion of the grievance and where the shape of that outcome is clear, it seems to me that the matter has, at least in this case, been "dealt with" such that the worker cannot change forum in an effort to secure a more advantageous outcome. To do so is inefficient, expensive, time-consuming, and does nothing to further the protection of workers who raise safety concerns in the workplace.
>
> [Internal footnotes omitted.]

[40] In conclusion, the Vice Chair stated:

> [48] … I find this matter was clearly and definitively dealt with by the arbitrator's settlement agreement. The fact the worker was dissatisfied with the agreement does not render it void, nor does her dissatisfaction permit her to pursue a prohibited action complaint under the Act.
>
> …
>
> [51] It is clear from the worker's submissions and the decisions of other administrative tribunals and the court that she did not agree with the settlement reached by her union. Nonetheless, it has been consistently determined that the settlement agreement was a legitimate proceeding that resolved the dispute regarding her termination.
>
> …
>
> [53] I find the worker's prohibited action complaint was resolved through a grievance procedure. I therefore have no jurisdiction to consider her appeal and I dismiss it in accordance with section 31(1)(g) of the ATA.

The Reconsideration Decision

[41] In September 2022, Ms. Pereira filed a petition seeking judicial review of the PAC Decision. She also applied to WCAT for reconsideration of the PAC Decision.

[42] Between February and April 2023, Ms. Pereira and Dexterra provided written submissions to WCAT concerning the application for reconsideration.

[43] Ms. Pereira raised several matters. She argued there was new evidence which satisfied the test for granting leave for reconsideration. She maintained the PAC Decision was procedurally unfair because the Vice Chair had demonstrated bias by pre-judging the dispute, as evidenced in an email sent by the Vice Chair to the WCAT appeal coordinator. She argued the PAC Decision contained a jurisdictional error because the Vice Chair had failed to apply s. 49(4) of the *Act*, which Ms. Pereira claimed imposes a mandatory burden on an employer to establish

that there has been no prohibited action. Finally, she argued the Vice Chair erred in failing to consider the reasons for her disagreement with the Settlement Agreement, which included allegations of fraud against the Union and Horizon North.

[44] The Vice Chair rejected Ms. Pereira's allegation of bias, concluding that no reasonable person would view the impugned email as sufficient evidence of prejudgement or bias.

[45] The Vice Chair also rejected Ms. Pereira's allegation that WCAT erred in failing to consider Ms. Pereira's reasons for disagreeing with the Settlement Agreement. The Vice Chair treated this as an allegation of fettering of discretion. In the Vice Chair's view, the limitations in s. 49(2) of the *Act* and its corresponding policy in the *Prevention Manual* were clear, and provided that WCAT lacked the authority to review LRB proceedings where a worker had elected to address their prohibited action complaint through a grievance, resulting in settlement. The Vice Chair noted:

> [51] There is no permissive language in section 49(2) of the Act or the policy; both are definitive that a worker must choose the complaint stream they wish to pursue for the prohibited action complaint. If the union declines to represent a worker regarding an employer's prohibited action, the worker can pursue a complaint under the Act. If the union agrees to represent a worker and reaches a settlement, as explained in the impugned decision, the matter has been dealt with even if the worker disagrees with the settlement.

[46] In a similar vein, the Vice Chair rejected Ms. Pereira's argument that WCAT had committed a jurisdictional error by failing to require the employer to rebut the presumption of a prohibited action under s. 49(4) of the *Act*:

> [59] I reject this argument. Once a worker engages in the grievance process through a collective agreement, the Board and WCAT have no authority to supervise, monitor, or oversee that process. The Act does not extend to labour relations matters. If the worker disagrees with her union's actions in that process, she must pursue a resolution through a complaint under section 12 of the Labour Relations Code.
>
> [60] Similarly, although a worker's union can participate as a representative at the Board and WCAT on a prohibited action complaint, the union has no authority under the Act to supervise, monitor, or direct the process.

> [61] Subsection 49(4) does provide that like a worker proceeding with a complaint under the Act, when a worker proceeds through a grievance forum and seeks a finding on the prohibited action, an arbitrator must assess whether the employer (or union) has rebutted the presumption. Generally, grievance proceedings result in a mutually agreeable settlement rather than a finding of prohibited action. The different processes are discussed above in the referenced section of policy P2-50-1 of the *Prevention Manual*.
>
> [62] I find therefore that I did not have authority to consider the correctness of the grievance proceedings, and there was no error in not considering whether the employer had rebutted the presumption under section 49(4) of the Act as part of the union grievance procedure.

[47] Finally, the Vice Chair rejected Ms. Pereira's new evidence application. The new evidence was an email from the Vice Chair to the WCAT appeal coordinator dated March 21, 2022. The email was before the Vice Chair when the PAC Decision was made and was duplicative of correspondence previously sent to Ms. Pereira.

[48] On June 7, 2023, WCAT dismissed Ms. Pereira's application for reconsideration (the "Reconsideration Decision").

The Judicial Review

[49] On June 13, 2023, Ms. Pereira amended her petition for judicial review of the PAC Decision to also seek judicial review of the Reconsideration Decision.

[50] At the judicial review hearing, Ms. Pereira abandoned all of her arguments raised in the petition except those related to whether the Prohibited Action Complaint had been appropriately dealt with by the Termination Grievance, which Ms. Pereira argued was an issue of jurisdiction which turned on the proper interpretation of s. 31(1)(g) of the *ATA* and ss. 49(2) and (4) of the *Act*.

[51] On July 20, 2023, Justice Weatherill dismissed the petition for judicial review and provided brief oral reasons: *Pereira v. Workers' Compensation Appeal Tribunal* (20 June 2023), Terrace L21571 (B.C.S.C.). Justice Weatherill observed that "many of [Ms. Pereira's] submissions…were neither raised before WCAT nor in her petition", and stated that "[r]egardless, I find that her submissions in totality are devoid of merit." He "agree[d] with the written and oral submissions of the

respondents in their entirety", and viewed them as "a complete answer to the issues raised by the petitioner."

On Appeal

[52] Ms. Pereira challenges the order dismissing her petition for judicial review. The issue before this Court is whether the chambers judge correctly identified and applied the standard of review, which in turn requires consideration of WCAT's decision to summarily dismiss Ms. Pereira's appeal under s. 31(1)(g) of the *ATA* on the basis that the Board lacked authority to consider Ms. Pereira's Prohibited Action Complaint.

Standard of Review

[53] In *Maung v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2023 BCCA 371, Justice Dickson discussed the standard of review that applies in an appeal from a judicial review of a WCAT decision:

> [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.

[54] I agree with the respondents that the matters in issue in the judicial review were within the scope of WCAT's exclusive jurisdiction as set out in ss. 308 and 309

of the *Act*, and therefore the standard of review of patent unreasonableness described in *Maung* applies.

[55] The burden falls on Ms. Pereira to demonstrate that the chambers judge failed to correctly identify and apply the standard of review. In other words, Ms. Pereira must establish that the PAC Decision and Reconsideration Decision were patently unreasonable.

Discussion

[56] From my review and consideration of Ms. Pereira's submissions, including her supplemental written submission, I understand Ms. Pereira to raise the following arguments on appeal. She maintains:

a) Section 49(2) of the *Act* does not impose an absolute bar on a worker proceeding with a prohibited action complaint before the Board after filing a grievance because the Board has concurrent jurisdiction over prohibited action complaints.

b) The Termination Grievance did not proceed to arbitration, and therefore was not a "proceeding" within the meaning of s. 31(1)(g) of the *ATA*. Even if the Termination Grievance and resulting Settlement Agreement were "legitimate", they did not address the alleged Prohibited Action Complaint under the *Act*, which means that the LRB and court decisions concerning the adequacy of the Union's representation of Ms. Pereira in the Termination Grievance were irrelevant.

c) The meaning of the term "appropriately dealt with" in s. 31(1)(g) of the *ATA* was not addressed by WCAT. Interpreting the meaning of "appropriately dealt with" requires regard to the purpose of a prohibited action complaint under the *Act*. Section 49(4) of the *Act* provides specific directions for dealing with prohibited action complaints, by requiring that an employer satisfy their burden of proving that there has been no prohibited action. Therefore, the substance of the Prohibited Action Complaint was not "appropriately dealt

with" by the Termination Grievance, because the complaint was not adjudicated and the employer was not held to its onus under s. 49(4).

Preliminary Issue

[57] Dexterra raises a preliminary issue concerning whether the meaning of the term "appropriately" under s. 31(1)(g) of the *ATA* was argued before WCAT. Dexterra says WCAT was not given an opportunity to explain its interpretation of "appropriately" in s. 31(1)(g) of the *ATA*, and therefore the issue is not properly before this Court. Nor, in Dexterra's submission, did Ms. Pereira raise arguments concerning the effect of WCAT's concurrent jurisdiction over prohibited action complaints.

[58] I agree that Ms. Pereira did not raise any specific argument concerning the proper interpretation of "appropriately" under s. 31(1)(g) of the *ATA*, nor the issue of concurrent jurisdiction. As a general principle, "a judge should not find a decision to be patently unreasonable based on a submission the Tribunal never heard": *Gorenshtein v. British Columbia (Employment Standards Tribunal),* 2016 BCCA 457 at para. 47.

[59] However, in deciding to summarily dismiss Ms. Pereira's appeal under s. 31(1)(g) of the *ATA*, WCAT was required, at least implicitly, to be satisfied that the requirements of s. 31(1)(g) were made out. In my view, Ms. Pereira's arguments concerning s. 31(1)(g) can be addressed simply by asking whether the interpretation and application of s. 31(1)(g) that is implicit in the WCAT decisions—that is, that the Termination Grievance appropriately dealt with the substance of Ms. Pereira's complaint—was patently unreasonable.

[60] I also view it as preferable to address Ms. Pereira's arguments concerning concurrent jurisdiction on their merits. The crux of Ms. Pereira's argument is that she should have been permitted to continue pursuing the Prohibited Action Complaint before the Board. The WCAT decisions turned on WCAT's determination that because the termination of Ms. Pereira's employment was addressed by the Termination Grievance, the Board no longer had (or should decline) jurisdiction over

the complaint. In my view, this engages considerations relating to the concurrent jurisdiction over prohibited action complaints.

[61] I will proceed by discussing the applicable legal framework, followed by the arguments raised on appeal.

Prohibited Action Complaints

[62] The *Act* creates a statutory right for workers to complain to and seek a remedy from the Board if they feel their employer has retaliated against them for exercising their rights or carrying out their duties in relation to occupational health and safety.

[63] Section 47 defines "prohibited action" as including any act or omission by an employer that adversely affects a worker with respect to any term or condition of employment, including dismissal, discipline, or reprimand.

[64] Section 48 provides that an employer must not take a prohibited action against a worker for exercising or carrying out their duties in respect to occupational health and safety, or for raising occupational health and safety concerns with another worker, a union or their employer.

[65] Thus, a prohibited action complaint seeks a remedy for the employer's action which is alleged to be retaliatory. In this case, the Prohibited Action Complaint sought a remedy for the termination of Ms. Pereira's employment.

[66] Where an employee feels that their employer has committed a prohibited action, s. 49 provides:

> 49 (1) This section applies to a worker who considers that
>
> (a) an employer or union, or a person acting on behalf of an employer or union, has taken or threatened to take prohibited action against the worker contrary to section 48, or
>
> (b) an employer has failed to pay wages to the worker as required by the OHS provisions or the regulations.

> (2) The worker may have a matter referred to in subsection (1) dealt with through the grievance procedure under a collective agreement, if any, or by complaint in accordance with this Division.
>
> (3) A complaint under subsection (2) must be made in writing to the Board,
>
> (a) in the case of a complaint respecting a matter referred to in subsection (1) (a), within one year of the action considered to be prohibited, and
>
> (b) in the case of a complaint respecting a matter referred to in subsection (1) (b), within 60 days after the wages became payable.
>
> (4) In relation to a matter referred to in subsection (1), whether dealt with under a collective agreement or by complaint to the Board, the burden of proving that there has been no such contravention is on the employer or the union, as applicable.

[67] Upon receiving a complaint, s. 50(1) provides that the Board "must immediately inquire into the matter and, if the complaint is not settled or withdrawn, must (a) determine whether the alleged contravention occurred, and (b) deliver a written statement of the Board's determination to the worker and to the employer or union, as applicable."

[68] If the Board finds that a contravention has occurred, s. 50(2) provides the Board with a variety of remedial powers, which include reinstatement or the payment of wages.

Appeals of Board Decisions on Prohibited Action Complaints

[69] Under s. 289 of the *Act*, Board decisions made in relation to prohibited action complaints can be appealed directly to WCAT, which is a separate and independent administrative body continued under s. 278 of the *Act*. In this case, the Investigations Legal Officer's decision that the Prohibited Action Complaint could not proceed engaged Ms. Pereira's right of appeal under the *Act*.

[70] Section 303(2) of the *Act* provides that WCAT "must make its decision based on the merits and justice of the case, but in doing this the appeal tribunal must apply any policies of the board of directors that are applicable in that case." Policies are created pursuant to s. 319 of the *Act*, which requires the Board of Directors of the

Workers' Compensation Board to set and revise as necessary policies respecting occupational health and safety, compensation, rehabilitation and assessment.

[71] Policy P2-50-1 in the Board's *Prevention Manual* was applied by WCAT to address Ms. Pereira's arguments concerning s. 49(2) and the Board's ability to consider a prohibited action complaint that has been the subject of a union grievance. Policy P2-50-1 provides, in part:

> The worker may withdraw a complaint at any time, settle the dispute privately with the employer or union, or pursue alternative remedies under a collective agreement. The worker cannot pursue both a grievance under a collective agreement and a complaint to the Board regarding the same alleged prohibited action or failure to pay wages. The worker is required to elect between the two processes.
>
> If the worker elects to pursue a grievance under a collective agreement, but the union decides not to pursue the grievance, the worker may revoke their election within 30 days of the union's decision and pursue a complaint to the Board. The complaint must be, however, still be made within one year of the action considered to be prohibited or within 60 days after the wages became payable.

[72] Once WCAT has made a decision, it retains an ability to correct a jurisdictional defect in the decision at the request of a party: s. 307(5). Ms. Pereira's application for reconsideration engaged WCAT's powers to correct a jurisdictional defect.

Section 31(1) of the *Administrative Tribunals Act*

[73] By operation of s. 296 of the *Act*, WCAT can apply the "summary dismissal" powers set out in s. 31 of the *ATA*:

> 31 (1) At any time after an application is filed, the tribunal may dismiss all or part of it if the tribunal determines that any of the following apply:
>
> (a) the application is not within the jurisdiction of the tribunal;
>
> (b) the application was not filed within the applicable time limit;
>
> (c) the application is frivolous, vexatious or trivial or gives rise to an abuse of process;
>
> (d) the application was made in bad faith or filed for an improper purpose or motive;
>
> (e) the applicant failed to diligently pursue the application or failed to comply with an order of the tribunal;

> (f) there is no reasonable prospect the application will succeed;
>
> (g) the substance of the application has been appropriately dealt with in another proceeding.
>
> (2) Before dismissing all or part of an application under subsection (1), the tribunal must give the applicant an opportunity to make written submissions or otherwise be heard.
>
> (3) If the tribunal dismisses all or part of an application under subsection (1), the tribunal must inform the parties and any interveners of its decision in writing and give reasons for that decision.

[74] The term "application" is defined under s. 1 of the *ATA* as including "an appeal, a review or a complaint".

[75] The summary dismissal power contained in s. 31(1)(g) of the *ATA* is similar to the power granted to the Human Rights Tribunal under s. 27(1)(f) of the B.C. *Human Rights Code,* R.S.B.C. 1996, c. 210 [*HRC*]. Section 27(1)(f) of the *HRC* reads:

> 27 (1) A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:
>
> …
>
> (f) the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding;

[76] In *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52 [*Figliola*], the Supreme Court of Canada considered s. 27(1)(f) in the context of an appeal concerning whether it was patently unreasonable for the Human Rights Tribunal to dismiss an application brought by the Board under s. 27(1)(f) seeking to have the Tribunal dismiss complaints on the grounds they had been "appropriately dealt with" by proceedings before the Board. The complaints at issue were brought by several workers who received compensation from the Board for chronic pain resulting from workplace injuries. The workers alleged that the Board's policy concerning fixed awards for chronic pain was discriminatory, which was an argument they had made to the Board and which the Board rejected.

[77] The Court allowed the appeal and remitted the matter to the Tribunal for reconsideration, finding that it had failed to properly apply s. 27(1)(f). In doing so, the

Court interpreted s. 27(1)(f), which it described as a "statutory reflection" of various common law doctrines which serve "as vehicles to transport and deliver to the litigation process principles of finality, the avoidance of multiplicity of proceedings, and protection for the integrity of the administration of justice, all in the name of fairness": at para. 25.

[78] Justice Abella provided guidance for the application of s. 27(1)(f) and cautioned against viewing it as an invitation for one tribunal to reconsider a legitimately decided issue emerging from a separate arena, even where there is a concurrent jurisdiction over the issue:

> [36] Read as a whole, s. 27(1)(f) does not codify the actual doctrines or their technical explications, it embraces their underlying principles in pursuit of finality, fairness, and the integrity of the justice system by preventing unnecessary inconsistency, multiplicity and delay. That means the Tribunal should be guided less by precise doctrinal catechisms and more by the goals of the fairness of finality in decision-making and the avoidance of the relitigation of issues already decided by a decision-maker with the authority to resolve them. Justice is enhanced by protecting the expectation that parties will not be subjected to the relitigation in a different forum of matters they thought had been conclusively resolved. Forum shopping for a different and better result can be dressed up in many attractive adjectives, but fairness is not among them.
>
> [37] Relying on these underlying principles leads to the Tribunal asking itself whether there was concurrent jurisdiction to decide human rights issues; whether the previously decided legal issue was essentially the same as what is being complained of to the Tribunal; and whether there was an opportunity for the complainants or their privies to know the case to be met and have the chance to meet it, regardless of how closely the previous process procedurally mirrored the one the Tribunal prefers or uses itself. All of these questions go to determining whether the substance of a complaint has been "appropriately dealt with". At the end of the day, it is really a question of whether it makes sense to expend public and private resources on the relitigation of what is essentially the same dispute.
>
> [38] What I do *not* see s. 27(1)(f) as representing is a statutory invitation either to "judicially review" another tribunal's decision, or to reconsider a legitimately decided issue in order to explore whether it might yield a different outcome. The section is oriented instead towards creating territorial respect among neighbouring tribunals, including respect for their right to have their own vertical lines of review protected from lateral adjudicative poaching. When an adjudicative body decides an issue within its jurisdiction, it and the parties who participated in the process are entitled to assume that, subject to appellate or judicial review, its decision will not only *be* final, it will be treated as such by other adjudicative bodies. The procedural or substantive

> correctness of the previous proceeding is not meant to be bait for another tribunal with a concurrent mandate.

[79] The principles discussed in *Figliola* are relevant to the arguments raised in this appeal concerning s. 31(1)(g) of the *ATA*.

Was the PAC Decision or Reconsideration Decision Patently Unreasonable?

[80] In my view, Ms. Pereira has failed to demonstrate that the WCAT decisions were patently unreasonable. I will address each of the arguments she raises.

Validity of the Settlement Agreement

[81] Ms. Pereira takes issue with what she sees as a lack of final adjudication concerning the termination of her employment. She expresses a desire to understand the employer's reasons for terminating her employment and to have heard her concerns with that decision.

[82] However, the lack of adjudication concerning the termination of Ms. Pereira's employment is a result of her decision to address the matter through a grievance, which Ms. Pereira was entitled to do under the *Act*. She participated in mediation, made settlement proposals, and did not instruct the Union to withdraw the grievance, despite her objections to the settlement the Union ultimately obtained.

[83] A union has "ownership" over grievance proceedings and may determine how to proceed, which includes the option of settling with the employer: *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39 [*Noël*] at para. 45. In the leading LRB decision on a union's duty of fair representation, *Judd v. Communications Energy and Paperworkers Union of Canada, Local 2000*, [2003] B.C.L.R.B.D. No. 63, 2003 CanLII 62912 (B.C. L.R.B.), the LRB described how this principle applies in the context of a complaint brought under s. 12 of the *Labour Relations Code*:

> [94] Employees who are considering making a Section 12 complaint should also understand that it is usually to their advantage to cooperate with the union in the meantime. This does not mean they should refrain from telling the union about their dissatisfaction -- in fact, it is generally preferable that they speak up at the earliest opportunity and tell the union specifically

> what they think is wrong. However, the Board often sees Section 12 complaints where complainants have given the union an ultimatum concerning their representation: e.g., they will not cooperate with the union unless it adopts the particular strategy they advocate. This is almost always a mistake. It should be evident from the discussion above that the union has a wide latitude in choosing the appropriate strategy -- it is not up to the individual employee to dictate. It would be a rare situation where any other strategy than that advocated by the grievor would necessarily be arbitrary.
>
> [95] The same rationale applies to settlement agreements. The grievor does not have a veto over whether or not the grievance should be settled, or what the terms of the settlement ought to be. It is of course best for the union to consult the grievor before agreeing to a settlement, though it is not necessarily required. Ultimately, however, whether to accept the settlement agreement is for the union to decide.
>
> [Emphasis added.]

[84] Ms. Pereira is dissatisfied with her choice of pursuing a remedy through the Termination Grievance and raises a number of allegations concerning the Union's handling of the matter. She alleges that she proceeded with the Termination Grievance relying on the "union's lies that they were taking it to arbitration." She disagrees that the Union "had jurisdiction to settle" and says that the Union's decision to enter into the Settlement Agreement was "arbitrary" and that the agreement was "fraudulent".

[85] Notwithstanding Ms. Pereira's dissatisfaction, the validity of Union's decision to enter into the Settlement Agreement has been conclusively addressed. Ms. Pereira was entitled to, and did, challenge the Union's representation of her in the Termination Grievance. In her complaint to the LRB under s. 12 of the *Labour Relations Code*, Ms. Pereira made various arguments concerning whether the Union failed to properly represent her interests and requested an order that the Union advance the Termination Grievance to arbitration. The LRB dismissed Ms. Pereira's s. 12 complaint, and she was uniformly unsuccessful in challenging that decision.

[86] To the extent Ms. Pereira's arguments depend on a finding from this Court that the Termination Grievance and resulting settlement were illegitimate, they must fail. This Court's role is not to question the circumstances that resulted in the Settlement Agreement, but rather to determine whether it was patently unreasonable

for WCAT to find that the Settlement Agreement prevented Ms. Pereira from continuing to pursue her Prohibited Action Complaint before the Board.

Section 49(2) of the Act and Concurrent Jurisdiction Over Prohibited Action Complaints

[87] Ms. Pereira relies on the following excerpt from the arbitral award in *Health Employers Association of BC v. British Columbia Nurses' Union*, 2021 CanLII 20880 (B.C.L.A.), for the proposition that there is a concurrent jurisdiction between labour arbitrators and the Board over prohibited action complaints:

> Section 113(1) of the *WCA* clearly and expressly indicates that WSBC has exclusive jurisdiction "to inquire into, hear and determine all those matters and questions of fact and law arising or required to be determined under" Part 3 of the *WCA*, which includes the *OHS Regulation*. The statute also expressly addresses the circumstance where concurrent arbitral jurisdiction was intended. Section 152 of the *WCA* specifically provides that complaints of discriminatory actions may be heard by WSBC or an arbitrator. Accordingly, this is not a case where it is necessary to infer legislative intent. The statute is clear: with one exception, matters that arise from the *WCA* are to be determined by WSBC, not arbitrators.

[88] My understanding of Ms. Pereira's submission is that the Board had a continuing ability to assess the outcome of the Termination Grievance because it concerned her Prohibited Action Complaint, which is a matter that the Board has concurrent jurisdiction over.

[89] The *Act* does establish a concurrent jurisdiction, but, in my view, Ms. Pereira is mistaken as to the effect of that concurrent jurisdiction. The concurrent jurisdiction over prohibited action complaints simply means that, at first instance, a worker is entitled to seek a remedy for an alleged prohibited action through a grievance procedure or from the Board. It does not mean that a worker is entitled to swap forums once they have elected to address their complaint through a grievance and are dissatisfied with the outcome.

[90] Dexterra refers to *Johanns v. Fulford*, 2014 ONCJ 348, in which the Court provided a succinct illustration of the principle of concurrent jurisdiction:

> [29] The Ontario Court of Justice and the Superior Court of Justice have concurrent jurisdiction in matters concerning custody, access and child support. *Barron's Canadian Law Dictionary* defines concurrent jurisdiction as "Equal jurisdiction; that jurisdiction exercised by different courts at the same time, over the same subject matter and within the same territory, and wherein litigants may, *in the first instance*, resort to either court indifferently" (my emphasis).
>
> [30] Concurrent jurisdiction means that, under provincial family law statutes, both courts can deal with issues of custody, access, and support, as courts of first instance. It does not mean that where a court has made a final order in an application, the motion to change can be brought in the other court. It does not mean that an order made in one court can be varied in the other court, where the other court acts as a court of first instance. It does not mean that a party can pursue actions for the same relief in both courts at once. It does not mean that a party can begin an application in one court and bring a motion in another court for the same relief. It does not mean that a party bringing a motion in an application can find the court with the most convenient date, and bring the motion in that court.

[91] In my view, it was not patently unreasonable for WCAT to interpret s. 49(2) of the *Act* as requiring Ms. Pereira to elect to pursue her Prohibited Action Complaint through a grievance or before the Board, but not both.

[92] WCAT's interpretation is consistent with the plainly disjunctive text of s. 49(2) of the *Act*, which provides that a worker may have a prohibited action complaint "dealt with through the grievance procedure under a collective agreement, if any, or by complaint" (emphasis added). It is also consistent with the borders around the Board's jurisdiction under the *Act* and the principle of concurrent jurisdiction more broadly.

[93] In my view, Ms. Pereira's arguments concerning concurrent jurisdiction do not establish that the WCAT decisions were patently unreasonable.

The Meaning of "Proceeding" and "Reasonably Dealt With" in s. 31(1)(g) of the Administrative Tribunals Act

[94] With regard to s. 31(1)(g) of the *ATA*, Ms. Pereira makes two intertwined arguments. First, she says that the Termination Grievance was not a "proceeding"

within the meaning of s. 31(1)(g) because the Termination Grievance did not proceed to arbitration. Second, she maintains that the Prohibited Action Complaint was not "appropriately dealt with" within the meaning of s. 31(1)(g) of the *ATA* because there was no final determination concerning the employer's onus under s. 49(4) of the *Act*, which Ms. Pereira says is required for every prohibited action complaint.

[95] In my view, these arguments do not have merit.

[96] With respect to the meaning of "proceeding", the Vice Chair stated in the PAC Decision that the Settlement Agreement was a "legitimate proceeding that resolved the dispute regarding [Ms. Pereira's] termination." WCAT clearly interpreted "proceeding" under s. 31(1)(g) of the *ATA* as including grievance proceedings which result in a settlement. This interpretation was not patently unreasonable.

[97] Under WCAT's interpretation, a grievance which results in a settlement is a proceeding which is capable of resolving a prohibited action complaint. This is consistent with WCAT's interpretation of s. 49(2) of the *Act* as permitting a worker to address a prohibited action complaint through a grievance. It is also consistent with s. 50 of the *Act*, which contemplates settlement of a prohibited action complaint by requiring the Board to investigate and make a finding on a complaint only if the complaint "is not settled or withdrawn" (emphasis added).

[98] I disagree with Ms. Pereira that a meaningful distinction can be drawn between settlement of a complaint that is before the Board alone, and settlement that results from a grievance where the worker has expressed dissatisfaction with the settlement. As I have already discussed, Ms. Pereira's objections to the Union's decision to settle the Termination Grievance do not mean the Settlement Agreement was invalid or illegitimate. The Union had the authority to settle the grievance, and Ms. Pereira was unsuccessful in challenging the Union's exercise of that authority. In this appeal, Ms. Pereira's primary assertion is that she was entitled to adjudication of her Prohibited Action Complaint, but she has failed to demonstrate that adjudication is mandatory or necessary to achieve a just result in every case.

[99] Ms. Pereira's proposed interpretation would enable a worker to collaterally attack a grievance settlement agreement by asserting that the matter should have proceeded to adjudication, and to seek a remedy from both the Board and LRB on that basis. This is contrary to the scheme created by the *Act*, which contemplates settlement of prohibited action complaints. It is also contrary to the principle that an employer is entitled to compliance with a settlement agreement so long as the union has satisfied its proper role in settling the grievance: *Noël* at para. 45. The question of whether a union has satisfied its proper role is a matter for the LRB. Had the LRB determined that the Settlement Agreement was entered into arbitrarily, discriminatorily, or in bad faith, perhaps Ms. Pereira may have had recourse to WCAT. However, that was not the reality before WCAT, and it was not open to WCAT to make that determination.

[100] Next, Ms. Pereira submits it was patently unreasonable for WCAT to find her complaint was "appropriately dealt with" by the Termination Grievance, because in order for the substance of a prohibited action complaint to be appropriately dealt with the employer must be held to its onus as set out in s. 49(4) of the *Act*.

[101] I do not find Ms. Pereira's argument concerning the effect of the employer's onus under s. 49(4) of the *Act* to be persuasive. In the Reconsideration Decision, WCAT rejected this argument and held that the onus set out in s. 49(4) applies only where the worker "seeks a finding on the prohibited action". I fail to see how this interpretation of the *Act* was patently unreasonable. As I have already discussed, ss. 49 and 50 of the *Act*, read harmoniously, contemplate the settlement of prohibited action complaints regardless of whether a worker decides to address the complaint through a grievance or before the Board. Where a prohibited action complaint has been settled, the proceeding stops short of a finding on the complaint. To interpret the *Act* as Ms. Pereira suggests would make adjudication of every prohibited action complaint mandatory, which is simply unsupportable.

[102] In the PAC Decision, the Vice Chair adopted analysis from a 2016 WCAT decision, which I have quoted at para. 39. This analysis reflects what is, in my view,

a plainly reasonable basis for dismissing the substance of Ms. Pereira's appeal pursuant to s. 31(1)(g) of the *ATA*. WCAT was clearly alive to the unfairness, inefficiency and expense involved in readdressing the settled complaint, and did not view its concurrent jurisdiction as an invitation to reassess the outcome of the Termination Grievance. These same principles were discussed in *Figliola* as properly informing a decision to dismiss a matter as "appropriately dealt with in another proceeding."

[103] In sum, Ms. Pereira's arguments throughout have amounted to an allegation that she was entitled to final adjudication of her Prohibited Action Complaint, despite having elected to address the complaint through a grievance which resulted in a settlement. It was not patently unreasonable for WCAT to reject Ms. Pereira's arguments and conclude it had no authority to allow her to seek a duplicative remedy before the Board.

Disposition

[104] In my view, Ms. Pereira has failed to establish that the PAC Decision or Reconsideration Decision were patently unreasonable. Accordingly, I would dismiss Ms. Pereira's appeal.

[105] The correct name of the respondent is the Workers' Compensation Appeal Tribunal. The Notice of Appeal is missing the apostrophe. The style of proceeding is amended accordingly.

Costs

[106] Ms. Pereira submits that it would be an injustice to make any order concerning costs because Justice Weatherill "failed in his duties…to provide adequate reasons."

[107] I disagree that the reasons provided militate against awarding costs.

[108] The sufficiency of reasons is evaluated by reading the reasons as a whole and in the context of the record: *R. v. Nduwayo*, 2012 BCCA 281 at para. 66.

Justice Weatherill functionally adopted the oral and written submissions of the respondents and found them to be responsive to the issues raised. This was a minimalistic approach, but not insufficient in this context. It was open to Ms. Pereira to review the respondents' submissions to understand the grounds upon which her petition was dismissed.

[109] There will be an award of costs against Ms. Pereira in favour of the respondent Dexterra. WCAT does not seek its costs and no costs are awarded against it.

"The Honourable Madam Justice Stromberg-Stein"

I agree:

"The Honourable Justice Skolrood"

I agree:

"The Honourable Justice Winteringham"