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CASE SUMMARY: IT WAS PATENTLY UNREASONABLE FOR THE TRIBUNAL TO DISMISS MR. MA'S APPEAL FROM THE DIRECTOR'S DETERMINATION WITHOUT A HEARING

Administrative law – Decisions of administrative tribunals – Employment Standards Tribunal – Employment law – Parental leave; Hearings – Appeals; Judicial review – Bias – Evidence – Procedural requirements and fairness – Standard of review – Patent unreasonableness

Ma v. British Columbia (Employment Standards Tribunal)

When a tribunal is granted a high degree of deference it may not be patently unreasonable for the tribunal to dismiss an appeal of its decision without a hearing.

[2016] B.C.J. No. 2394

2016 BCSC 2097

British Columbia Supreme Court

November 15, 2016

M.M. Devlin J.

The petitioner applied for judicial review of an appeal and subsequent reconsideration of the Employment Standards Tribunal (the "Tribunal"). The petitioner was employed full time as an accountant with a trucking company from February 2012 to September 2013. In December 2012, the petitioner went on parental leave for 37 weeks, scheduled to return in September 2013. To replace the petitioner, the employer hired another accountant. In August 2013, the petitioner was informed that his full time position was no longer available and was offered part-time employment through the same employer. The petitioner decided not to return to the employer and was unemployed from September 2013 to March 2014. The replacement accountant also turned down the part-time employment. Around October 2013, the employer hired a part-time accountant who, in December 2013, moved to full-time employment, when he took on additional non-accounting responsibilities.

The petitioner filed a complaint against the employer claiming that the employer always intended to replace him with another accountant. Moreover, the petitioner claimed that his reduction in hours was motivated by his decision to take parental leave, contrary to s. 54 of the *Employment Standards Act*. A hearing was held before a delegate of the Director of the Employment Standards (the "Director") and both sides gave evidence. On August 20, 2014, the Director released its decision (the "Decision"). The Decision concluded that the employer's reduction in hours was not a result of the petitioner's leave but was genuinely based on a decrease in the amount of work available at the employer.

The petitioner filed an appeal to the Employment Standards Appeals Tribunal (the "Appeals Tribunal") which dismissed the petitioner's appeal without a hearing concluding that it had no reasonable prospect of success. Specifically, the Appeals Tribunal found that the petitioner's appeal was a disagreement with the Decision. The petitioner applied a reconsideration of the Appeal Tribunal's decision (the "Reconsideration"). In the Reconsideration, the petitioner made five submissions:

1. To clarify that his allegation of bias was directed against the processes used by the Employment Standards Branch;

2. The Tribunal failed to address his argument that the employer should have provided documentation to support its claim that the business was slowing;

3. It was an error in the Decision and the Appeal to find that his hours were cut not in response to his parental leave given that businesses are always trying to cut costs;

4. He was informed that he was unable to use evidence gained through the mediation process one day prior to the complaint hearing; and

5. The tribunal failed to appreciate that he was unable to present additional evidence or information after the complaint hearing because he never received the employer's financial statements as agreed during the hearing.

On January 19, 2015, the Tribunal refused the petitioner's reconsideration application, affirming the Appeal.

On review, the court concluded that the standard of review was patent unreasonableness requiring a high degree of deference to tribunal decisions. The court was not satisfied that it was patently unreasonable for the Tribunal to conclude that the Director, despite not having the employer's financial statements, had sufficient evidence to conclude that the employer's decision was not motivated by paternity leave. Similarly, the court was not prepared to conclude that the Appeal and Reconsideration were patently unreasonable for concluding that a hearing was not necessary. The court was also not able to agree that the Tribunal's procedures are unfair because they do not require production in all cases.

The petitioner's main argument was that it was unreasonable and unfair of the Tribunal not to admit his new evidence on appeal and that the Tribunal failed to explain this decision adequately. The court noted that the evidence that the petitioner sought to adduce was substantially the same argument that was adduced in the complaint process and on appeal.

The court dismissed the petition.

This case was digested by Jackson C. Doyle of Harper Grey LLP. If you would like to discuss this case further, please feel free to contact him directly at jdoyle@harpergrey.com or review his biography at http://www.harpergrey.com.