

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Wolfe v. West Kootenay Women's Association*,
2025 BCSC 469

Date: 20250318
Docket: S23491
Registry: Nelson

Between:

Reasha Wolfe

Petitioner

And

**West Kootenay Women's Association and Vita Luthmers
and Donna MacDonald and the British Columbia Human Rights Tribunal**

Respondents

Before: The Honourable Justice B. Smith
Appearing by MS Teams

On judicial review from: A decision of the British Columbia Human Rights Tribunal, dated May 18, 2023 (Reasha Wolfe v. West Kootenay Women's Association and Vita Luthmers and Donna MacDonald, File number: CS-005665).

Reasons for Judgment

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Place and Date of Hearing:

Nelson, B.C.
February 12, 2025

Place and Date of Judgment:

Nelson, B.C.
March 18, 2025

Introduction

[1] This is a judicial review application of the British Columbia Human Rights Tribunal's (the

“Tribunal”) decision dated May 18, 2023 (the “Decision”), in which the Tribunal determined it was not in the public interest to accept Reasha Wolfe’s (the “Petitioner”) late-filed complaint for filing under s. 22(3) of the *Human Rights Code*, R.S.B.C. 1996, c. 210 (“Code”).

Factual Background

[2] On December 2, 2021, the Petitioner filed a complaint with the Tribunal against the West Kootenay Women’s Association, Vita Luthmers, and Donna MacDonald (the “WKWA Respondents”), and one other person who the Tribunal later removed as a respondent to the complaint. The complaint alleges discrimination in employment based on sex, gender identity or expression, and political belief, and discrimination regarding a publication based on sex and gender identity or expression. The complaint includes submissions on the one-year time limit under the *Code*.

[3] On August 18, 2022, the Tribunal wrote to the Petitioner’s counsel stating the Tribunal can only proceed with complaints which describe facts that, if proven, could be discrimination contrary to the *Code*. Among other things, the Tribunal noted that the complaint was over seven months late-filed and it would seek submissions from the parties to determine if the complaint should proceed under s. 22 of the *Code*.

[4] On September 8, 2022, the Tribunal issued a Notice of Late Filed Complaint and invited the parties to provide submissions about whether it should proceed with all or part of the complaint under s. 22(3) of the *Code*.

[5] As requested by the Tribunal, the WKWA Respondents and the Petitioner each subsequently provided submissions.

The Decision

[6] On May 18, 2023, the Tribunal issued its Decision, in which it determined it was not in the public interest to accept the Petitioner’s complaint under s. 22(3) of the *Code*.

[7] First, the Tribunal set out the procedural history of the complaint. It then summarized its Decision on why it denied the WKWA Respondent’s application to file further submissions and why the complaint would not proceed for filing.

[8] The Tribunal then gave reasons why it declined to accept the Petitioner’s complaint under s. 22(3) of the *Code*. The Tribunal cited the two factors under s. 22(3) which must be satisfied for it to exercise its discretion to allow a late-filed complaint to proceed: doing so is in the public interest and no substantial prejudice will result to any person. It found that no person would experience substantial prejudice, but that it was not in the public interest for Ms. Wolfe’s complaint to proceed.

[9] The Tribunal quoted *British Columbia (Ministry of Public Safety and Solicitor General) v. Mzite*, 2014 BCCA 220, leave to appeal to SCC ref'd, 36041 (27 November 2014) for the list of factors the Tribunal generally considers when it assesses the public interest element under s. 22(3).

[10] In this case the Tribunal considered:

- a) the length of the delay;
- b) the reasons for the delay in filing, including counsel error and the Petitioner's health issues;
- c) whether the issues raised in the complaint were unique, novel or unusual; and
- d) the Petitioner's policy argument related to the pandemic and suspension of time limits.

[11] The Tribunal concluded that the 7.6 months delay in filing was a "significant period of delay" that did not weigh in favour of allowing it to proceed.

[12] The Tribunal further concluded that the Petitioner's reasons for delay did not weigh in favour of the complaint proceeding. The Tribunal considered the reasons why the Petitioner said her complaint was late, including erroneous legal advice from her lawyer. The Tribunal was satisfied the Petitioner's counsel may have provided her with bad advice regarding the filing deadline; however, it was not convinced this resulted in it being in the public interest to allow her complaint to proceed.

[13] The Tribunal next found the nature of the issues in the complaint did not weigh in favour of allowing the complaint to proceed, stating that the *Code* only protects persons against discrimination based on a person's own protected characteristics, not the protected characteristics of others.

[14] Next, the Tribunal addressed the Petitioner's policy arguments about the Legislature suspending some limitation periods during the pandemic, finding them unconvincing, because she did not point to any actions which were impossible for her to take to file her complaint during the pandemic.

[15] Finally, the Tribunal went on to explain why it found no person would experience substantial prejudice if it allowed the complaint to proceed.

Legal Principles

[16] It is undisputed that the Tribunal's determination that it was not in the public interest to accept Ms. Wolfe's complaint for filing under s. 22(3) of the *Code* involves an exercise of discretion.

[17] Section 59(3) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [ATA] states that a “discretionary decision” must not be set aside unless it is “patently unreasonable”.

[18] Section 59(4) of the ATA provides that a decision will be patently unreasonable if the discretion: (a) is exercised arbitrarily or in bad faith; (b) is exercised for an improper purpose; (c) is based entirely or predominantly on irrelevant factors; or (d) fails to take statutory requirements into account.

[19] It is also undisputed that if an extricable question of fact or law is found to underlie the exercise of discretion, the Court must engage in a two-step analysis. As stated in *Morgan-Hung v. British Columbia (Human Rights Tribunal)*, 2011 BCCA 122 [“*Morgan-Hung*”]:

[28] The same sort of test applies to the standard of review prescribed for discretionary decisions in the *Administrative Tribunals Act*. If there is a readily extricable finding of fact or law underlying the discretionary decision, that finding will be reviewed on the standard applicable to issues of fact or law, as the case may be. On the other hand, if the issues of fact or law are inextricably intertwined with issues of discretion, the review must take place on the standard applicable to discretionary decisions.

[29] While the decisions of this Court in *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95 (particularly at paras. 20-22) and *Gichuru v. British Columbia (Workers Compensation Appeal Tribunal)*, 2010 BCCA 191 have been cited for the proposition that there is an “anti-parsing” doctrine applicable to discretionary decisions under the *Administrative Tribunals Act*, I consider that to be a misinterpretation of the cases. They stand merely for the proposition that the standard of review for a discretionary decision will not be altered by the existence of embedded issues of fact or law that are inextricably intertwined with the exercise of discretion.

[30] In the case before us, the factual error made by the Tribunal – the finding that the job in Abbotsford was a full-time one – is readily extricable from the discretionary decision – what damages were to be awarded. The factual issue, therefore, is to be reviewed on the standard set out in s. 59(2) of the *Administrative Tribunals Act*. The Tribunal’s finding of fact must be overturned, as there was no evidence to support it.

[31] An analysis under s. 59(2) does not end the matter. The impugned fact-finding is only important to the Tribunal’s decision in that it was a factor in the making of a discretionary order. Having identified the error in fact-finding, therefore, it is necessary to analyze the effect of that error on the exercise of discretion. This analysis must be performed under ss. 59(3) and (4) of the *Act*.

[32] In *Berezoutskaia* at para. 21, Levine J.A. commented that a discretionary decision, based on a finding of fact that is overturned, can be characterized as “arbitrary” under s. 59(4)(a) of the *Administrative Tribunals Act*. In the context of *Berezoutskaia*, it is clear that she had in mind factual errors that might have a material effect on exercises of discretion.

[33] In the case before us, the finding that the Abbotsford position was full-time appears to have been an important consideration for the Tribunal in fixing past wage loss – it is one of only two considerations that are singled out for mention. In the result, it seems to me that the error of fact was material to the award. The use of an erroneous finding of fact as a material factor in making the discretionary decision made the decision “arbitrary” as that word is used in s. 59(4)(a) of the *Administrative Tribunals Act*.

[20] The analysis to be undertaken here is therefore as follows:

- the Court must determine whether there is a readily extricable finding of fact or law underlying the discretionary decision;
- if there is, the Court must review the readily extricable finding on the standard applicable to the issue of fact or law, as the case may be; and
- if there is an error, the Court must analyse the effect of that error on the exercise of discretion and intervene only if it determines that the error renders the exercise of discretion patently unreasonable under ss. 59(3) and (4) of the ATA.

[21] The Court must not be “too quick to brand a question as one of mixed fact and law and therefore subject to a standard of correctness”: *J.J. v. School District No. 43 (Coquitlam)*, 2013 BCCA 67 at para. 28.

Positions of the Parties

[22] The Petitioner says the Tribunal erred in four ways. First, the Tribunal incorrectly stated and applied the law regarding counsel error in filing a complaint past the statutory deadline. Second, by requiring the Petitioner to provide more specific evidence of her attempts to prepare the complaint, the Tribunal erred in imposing an evidentiary burden not supported by jurisprudence, and which would have required the Petitioner to waive privilege in order to meet. Third, in assessing the novelty of the complaint, the Tribunal erred by failing to apply the correct standard and further erred by misapprehending the law regarding discrimination under the *Code*, resulting in an exercise of discretion that was arbitrary and based predominantly on irrelevant factors. Finally, the Petitioner asserts the Tribunal misapprehended their submissions regarding public policy reasons for taking a more lenient approach to complaints filed while limitation periods were suspended during the Covid-19 pandemic, and whether the merits could be properly considered at the screening stage.

[23] The WKWA Respondents say that the Decision was not patently unreasonable. They say that, read in context, the Decision is not openly, evidently, and clearly irrational, or bordering on the absurd. It was not arbitrary, nor was it in bad faith or issued for an improper purpose. It was not based on irrelevant factors and took the relevant statutory requirements into account. Second, the WKWA Respondents deny the Tribunal imposed any unique or undue evidentiary burden on the Petitioner. They say the Petitioner put the legal advice she received from her counsel squarely in issue and, as such, it was open to the Tribunal to consider such evidence, or a lack thereof, notwithstanding any privilege issue. They say it is not for the Court on judicial review to second guess the conclusions drawn from the evidence considered and substitute different findings of fact or inferences drawn from those facts. They say the Tribunal appropriately applied the law regarding counsel error to the facts at issue, and correctly applied holdings in similar cases. Finally, the WKWA Respondents deny the Tribunal made any reviewable error in assessing the novelty of the

complaint.

[24] The Tribunal is participating in this judicial review application in an explanatory role respecting the record, and makes submissions concerning the Court's authority, the discretionary bars to judicial review, the admissible materials, the standard of review, and the available relief should the Court determine the Tribunal erred: *Silver Campsites Ltd. v. James*, 2012 BCSC 1437 at para. 20, rev'd on other grounds 2013 BCCA 292. The Tribunal did not seek a broader role or address the merits of the Decision.

Discussion

[25] In my view, this petition can be determined based on the first error alleged by the Petitioner, namely the counsel error issue.

Counsel Error

[26] The Petitioner says the tribunal incorrectly stated and applied the law regarding counsel error in filing a complaint past the statutory deadline in the *Code* when conducting the public interest assessment under s. 22(3) of the *Code*.

[27] The Tribunal cited para. 33 of *Adolphs v. Boucher Institute of Naturopathic Medicine*, 2014 BCSC 298 [*Adolphs*] where the Court said:

I agree with petitioner's counsel that the requirements of a solicitor to bring reasonable care, knowledge and skill to the performance of professional services and the quality of a solicitor's submissions are not issues for consideration when determining whether it is in the public interest to accept a late-filed complaint. However, the fact remains that the petitioner had the onus of demonstrating it is in the public interest that the Complaint be accepted.

[28] In para. 43 of *Adolphs*, the Court went on to say:

The BC Human Rights Tribunal has previously held that it is in the public interest to accept a complaint where a delay in filing is the result of an error by a complainant's counsel: *Ashrafinia v. Koolhaus Design (BC) Ltd.*, 2007 BCHRT 241 at para. 11. However, in that case as in all similar cases I am aware of, evidence was proffered to the effect that counsel for the complainant had erred and the error had been explained: [Citations omitted].

[29] At page 10 of the Decision, the Tribunal said:

I am satisfied that Ms. Wolfe's legal counsel may have provided her bad advice regarding the application of legislation regarding a pause on limitation periods to her complaint. However, I am not convinced that this results in it being in the public interest to proceed with her complaint. As has been accepted by the BC Supreme Court, the requirements of a lawyer to bring reasonable care, knowledge, and skill to the performance of their professional services and the quality of their doing so, are not matters for the Tribunal to consider when determining whether it is in the public interest to accept a late-filed complaint: *Adolphs v. Boucher Institute of Naturopathic Medicine*, 2014 BCSC 298, at para. 33; *Thandi v. Abbotsford Police Department*, 2017 BCHRT 152 at para. 40. Where a party relies entirely on their legal counsel to competently represent them, and then their legal counsel is deficient in

doing so, any resulting negative impacts on that party should be resolved between that party and their legal counsel, or through the regulatory bodies that oversee relationships between legal counsel and their clients.

[Emphasis added.]

[30] The Petitioner says the emphasized portion is incorrect, and that the tribunal relied on the wrong paragraph from *Adolphs*, as is clear from what the Court said at paras. 33-36 of *The Parent obo the Child v. The School District*, 2020 BCCA 333, which I have reproduced in its entirety because it is directly applicable to the analysis of the counsel error issue here:

[33] In my view, it is unnecessary to consider the Tribunal's jurisprudence in detail to examine the relevant policy perspectives. This is because the question on appeal is whether the threshold test applied by the Tribunal member on the erroneous legal advice issue is *correct*. The Tribunal member justified his approach with reference to the decision in *Adolphs v. Boucher Institute of Naturopathic Medicine*, 2014 BCSC 298. The judge found that the Tribunal member misinterpreted *Adolphs* and that led to the application of the wrong test. In my view, the judge's reading of *Adolphs* as to the proper test to apply when considering erroneous legal advice as a justification for a late-filed complaint is correct.

[34] The judge considered these issues in some detail at paras. 40-54 of the Reasons. As the judge noted, in *Adolphs*, the Tribunal rejected the complainant's argument based on legal advice error because the applicant gave *no explanation* for the delay in submitting the complaint. Instead, in *Adolphs*, the court found that "despite it being obvious that the Complaint had been filed late, [petitioner's counsel] made a convoluted and nonsensical attempt to demonstrate that it had been filed in time": at para. 44. The court went on to note, in para. 45, that there was no evidence before the Tribunal that the late filing was due to *error* on the part of counsel. Rather, the petitioner deliberately chose to take the position that no explanation was required because the complaint was filed in time and no error had been made.

[35] As the Parent properly notes, in the present case, there was evidence before the Tribunal that the late filing was due to erroneous legal advice. In the Parent's affidavit he stated:

Around the time we filed our appeal to the Superintendent of Achievement, we consulted with a very experienced lawyer who specializes in human rights cases against schools for a failure to accommodate children with disabilities. The lawyer advised us that if we chose to file a human rights complaint, we should ensure that we file our complaint within six months from February 3, 2015 out of an abundance of caution. We relied on that advice.

[36] In *Adolphs*, the court referred to various Human Rights Tribunal decisions in which "evidence was proffered to the effect that counsel for the complainant had erred and the error had been explained: at para. 43. However, this does not require that the lawyer be identified or admit that their advice was erroneous, nor that the legal advice is shown to be wrong, as the judge correctly notes at paras 46 – 47:

I do not read *Adolphs* as holding that evidence of erroneous legal advice, when put forward as an explanation for a late filing, is only open for consideration under s. 22(3) if it identifies the lawyer, includes an admission that the lawyer provided erroneous legal advice, and the lawyer explains how that came to be. Nor does *Adolphs* hold that the public interest under s. 22(3) is only engaged where the legal advice is shown, in fact, to be wrong.

Instead in my view, Justice Weatherill was simply making the point, in contrast to the record before him, that in cases where erroneous legal advice has been found to warrant an exercise in discretion in favour of a late filing, the explanation for delay was

supported by evidence relevant to that issue. As there was no evidence tendered in *Adolphs*, the petitioner fell short.

[Emphasis in original.]

[31] I am satisfied that there is an extricable question of law which underlies the Tribunal's exercise of discretion, namely: should the Tribunal consider counsel error in determining whether it is in the public interest to accept a late-filed complaint? The Tribunal concluded the answer is "no". In my view, the Tribunal reached an erroneous conclusion on a question to which a standard of correctness applies: *ATA*, s. 59(1).

[32] Based on the emphasized portion of the excerpt from the Decision found at para. 29 of these reasons for judgment, I agree with the Petitioner that the Tribunal erroneously relied on para. 33 of *Adolphs* to support its conclusion that counsel error in filing a complaint late is not relevant to the public interest assessment under s. 22(3) of the *Code*.

[33] As noted in the Decision, the Tribunal was "satisfied that Ms. Wolfe's legal counsel may have provided her bad advice regarding the application of legislation regarding a pause on limitation periods to her complaint." The Tribunal was clearly satisfied there had been counsel error, but was not convinced that this was a matter to be considered in determining whether it was in the public interest to proceed with the Petitioner's complaint. The Tribunal clearly relied on its erroneous statement and application of the law to reach its conclusion.

[34] There was evidence before the Tribunal that a particular lawyer within the law firm retained by the Petitioner had been identified, albeit not by name, and an explanation for the counsel error was provided.

[35] Having found that the Tribunal reached an erroneous conclusion on an extricable question of law which underlies the Tribunal's exercise of discretion, I must go on to determine whether the error rendered the decision patently unreasonable within the meaning of s. 59(4) of the *ATA*: *Morgan-Hung* at para. 31.

[36] In *Envirocon Environmental Services, ULC v. Suen*, 2019 BCCA 46 at para. 34, leave to appeal to SCC ref'd, 38580 (8 August 2019) the Court held that a discretionary decision will be arbitrary within the meaning of s. 59(4) of the *ATA* if it is "grounded on an erroneous conclusion with respect to a material consideration".

[37] I find that the Tribunal's discretion was exercised arbitrarily, because it was grounded on an erroneous conclusion with respect to a material consideration, namely counsel error. Pursuant to s. 59(4)(a) of the *ATA*, a discretionary decision is patently unreasonable if the discretion is exercised arbitrarily. The Decision is therefore patently unreasonable.

Conclusion

[38] In light of my determination on the counsel error issue, I need not consider the other bases upon which the Petitioner says the Decision should be set aside.

[39] The petition is granted. The Decision is set aside and the matter is remitted to the Tribunal for consideration of whether the Petitioner's complaint should be accepted outside the six-month filing time limit pursuant to s. 22(3) of the *Code*.

[40] It is undisputed that costs are not normally awarded to or against tribunals on judicial review: *18320 Holdings Inc. v. Thibeau*, 2014 BCCA 494.

[41] The Petitioner is entitled to their costs, payable by the WKWA Respondents.

"B. Smith J."

B. SMITH J.