COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Taiga Works Wilderness Equipment Ltd. v. British Columbia (Director of Employment Standards),* 2010 BCCA 364

Date: 20100730
Docket: CA037317

Between:

The Taiga Works Wilderness Equipment Ltd.

Appellant
(Petitioner)

And

The Director of Employment Standards and The Employment Standards Tribunal

Respondent
(Respondent)

Before: The Honourable Mr. Justice Low
The Honourable Mr. Justice Tysoe
The Honourable Madam Justice D. Smith

Supplementary Reasons to: Court of Appeal for British Columbia, February 25, 2010 (*Taiga Works Wilderness Equipment Ltd. v. British Columbia (Director of Employment Standards)*, 2010 BCCA 97)

Counsel for the Appellant:	R. A. Kasting
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Counsel for the Respondent, Employment Standards Tribunal:	E. F. Miller
Place and Date of Hearing:	Vancouver, British Columbia January 12, 2010
Place and Date of Judgment:	Vancouver, British Columbia February 25, 2010
Written Submissions Received:	May 28, June 17 and 23, 2010
Date of Supplementary Judgment:	July 30, 2010

Supplementary Reasons of the Court

Supplementary Reasons for Judgment of the Court:

[1] In reasons for judgment dated February 25, 2010, we allowed this appeal and referred the matter back to the Director of Employment Standards (the "Director") for rehearing. We did not make an order in relation to the costs of the appeal, and the parties requested permission to make submissions with respect to costs. We have now received and considered their submissions.

[2] Eleven former employees of the appellant filed complaints with the Employments Standards Branch. A delegate of the Director investigated the complaints and issued a determination that the employees were due length of service compensation from the appellant in the aggregate amount of $42,133.11.

[3] The appellant appealed the determination to the Employment Standards Tribunal (the "Tribunal"). A member of the Tribunal found that the Director's delegate had breached the principles of natural justice by failing to disclose certain documents to the appellant and by failing to consider the appellant's final written submission before issuing the determination. However, the Tribunal member did not remit the matter back to the Director's delegate because the member considered that the breaches had been cured on appeal.

[4] The appellant applied to have the Tribunal reconsider its decision, and the reconsideration application was dealt with by a different member of the Tribunal. The second Tribunal member was not satisfied that the breach of natural justice in relation to non-disclosure of documents had been cured, and he referred the matter back to the first Tribunal member to hear submissions on the documents that were not disclosed prior to the making of the determination by the Director's delegate.

[5] The appellant petitioned for judicial review of the Tribunal's decisions. The chambers judge who heard the petition held that the Tribunal had the power to cure the breaches of the principles of natural justice committed by the Director's delegate and that the second Tribunal member had acted fairly. He ordered each party to bear its own costs.

[6] On appeal to this Court, the appellant took the position in its factum that an appellate or reviewing tribunal has no power to cure breaches of the rules of natural justice and procedural fairness. Both the Director and the Tribunal, represented by separate counsel, filed factums submitting that the Tribunal did have the power to cure the delegate's breaches. At the hearing of the appeal, the appellant made an alternate submission that if such breaches can be cured by an appellate or reviewing tribunal, it can only be done if that tribunal holds the equivalent of a *de novo* hearing.

[7] We concluded that breaches of the principles of natural justice and procedural fairness can be cured on appeal if the proceedings before the initial tribunal and the appellate tribunal, as a whole, satisfy the requirements of fairness. We referred the matter to the Director for a rehearing because the direction given by the second Tribunal member did not ensure that the proceedings as a whole reached an acceptable minimum level of fairness.

[8] On the issue of costs, the appellant says it succeeded on the appeal and should be awarded a separate set of appeal costs against each of the Director and the Tribunal. In reply, the Director and the Tribunal submit each party should bear its own costs because that is the usual order of costs in the case of administrative tribunals, and there was divided success in the sense that the appellant's primary argument was not accepted.

[9] In cases not involving administrative tribunals, the usual rule regarding costs, set out in s. 23 of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77, is that the party successful on the appeal is entitled to the costs of the appeal. However, in cases involving administrative tribunals, the usual rule is that costs are not awarded for or against the tribunal.

[10] The parties are agreed the leading authority in this Province with respect to the circumstances in which administrative tribunals will be ordered to pay costs is *Lang v. British Columbia (Superintendent of Motor Vehicles)*, 2005 BCCA 244, 254 D.L.R. (4th) 111, in which Mr. Justice Donald said the following:

> [44] As mentioned, it has been held that the adjudicator exercises a quasi-judicial function which attracts the patently unreasonable standard of review: [*Gordon v. British Columbia*, 2002 BCCA 224, 100 B.C.L.R. (3d) 35], [*Pointon*

v. British Columbia (Superintendent of Motor Vehicles), 2002 BCCA 516, 6 B.C.L.R. (4th) 112].

[45] It follows that the Superintendent whose powers are delegated to the adjudicator enjoys the traditional immunity protecting quasi-judicial tribunals.

[46] The parties agree that the immunity extends to costs, subject only to certain exceptions.

[47] In Brown and Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback, 1998-), the learned authors write:

> 5:2560 *Costs Payable by or to the Administrative Agency*
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> Generally, an administrative tribunal will neither be entitled to nor be ordered to pay costs, at least where there has been no misconduct or lack of procedural fairness on its part. As one court has noted:
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> > It has been recognized… that, contrary to the normal practice, costs do not necessarily follow the event where administrative or quasi-judicial tribunals are concerned. They may be awarded only in unusual or exceptional cases, and then only with caution… where the tribunal has acted in good faith and conscientiously throughout, albeit resulting in error, the reviewing tribunal will not ordinarily impose costs… I am of the view that the circumstances which prevail here do not warrant an order for costs against the commission [*St. Peters Estates Ltd. v. Prince Edward Island (Land Use Commn.)* (1991), 2 Admin. L.R. (2d) 300 at 302-04 (PEITD)].
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> However, costs have been awarded against an administrative tribunal where it cast itself in an adversarial position, acted capriciously in ignoring a clear legal duty, made a questionable exercise of state power, effectively split the case so as to generate unnecessary litigation, manifested a notable lack of diligence, or was the initiator of the litigation in question, or where bias among tribunal members had necessitated a new hearing. However, generally only *court* costs, and not costs associated with the entire administrative proceeding, are assessed where there has been misconduct on the part of the tribunal.
>
> Costs were also ordered against a chief judge whose order relocating the applicant to a different district because he disapproved of his decision was set aside as in breach of judicial independence. Otherwise, judges would be discouraged from discharging their duties to uphold constitutional rights.
>
> [Emphasis of Donald J.A.; footnotes omitted.]

[48] For the purposes of this case it is enough to identify two exceptions:

1. misconduct or perversity in the proceedings before the tribunal; or
2. the tribunal argues the merits of a judicial review application rather than its own jurisdiction.

[11] The appellant says this appeal involved a lack of procedural fairness and falls into one of the exceptions noted by the authors of *Judicial Review of Administrative*

Action in Canada. The Tribunal and the Director respond that it is only breaches of procedural fairness constituting misconduct which give rise to an order for costs against an administrative tribunal.

[12] Although there was a breach of the principles of natural justice and procedural fairness in this case, the breach was acknowledged by both the first and second Tribunal members. The principal issue on appeal was whether an appellate tribunal had the capacity to cure such a breach. This is akin to a jurisdictional issue. The normal practice where an administrative tribunal makes submissions with respect to its jurisdiction is that costs are not awarded against the tribunal even if its submissions are not accepted.

[13] On this appeal, we agreed with the positions of the Director and the Tribunal that the Tribunal had the capacity to cure the breaches of the principles of natural justice and procedural fairness made by the Director's delegate. They did not, however, make submissions on the issue of whether the breach was properly cured in this case, which is the issue on which we allowed the appeal.

[14] In these circumstances, it is our view that it would be inappropriate to depart from the normal practice by awarding costs against the Director and the Tribunal. We order that the parties are to bear their own costs.

"The Honourable Mr. Justice Low"

"The Honourable Mr. Justice Tysoe"

"The Honourable Madam Justice D. Smith"