IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bioriginal Food & Science Corp. v. Employment Standards Tribunal*, 2025 BCSC 2396

Date: 20251203
Docket: S247551
Registry: Vancouver

2025 BCSC 2396 (CanLII)

Between:

Bioriginal Food & Science Corp.

Petitioner

And

Employment Standards Tribunal, Director of Employment Standards and Angela Zavediuk

Respondents

Before: The Honourable Justice Whately

On judicial review from: A decision of the Employment Standards Tribunal, dated September 4, 2024

Corrected judgment: The style of cause and text of the judgment was corrected on the front page on December 5, 2025.

Reasons for Judgment

In Chambers

Counsel for the Petitioner:	K.E. Allen J. Ovsenek, Articled Student
Counsel for the Respondent, Employment Standards Tribunal:	A.M. Vulimiri
The Respondent, appearing in person:	A. Zavediuk
Counsel for the Respondent, Director of Employment Standards:	L.M. Courtenay
Place and Date of Hearing:	Vancouver, B.C. May 29-30, 2025

Place and Date of Judgment:	Vancouver, B.C. December 3, 2025

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[1] Bioriginal Food & Science Corp. (hereafter referred to as “Bioriginal” or petitioner) brings this petition for judicial review. Bioriginal seeks to quash a reconsideration decision dated September 4, 2024 (the “Reconsideration Decision”) of the Employment Standards Tribunal.

[2] The three respondents to this petition are Angela Zavediuk, Bioriginal’s former employee, the Director of the Employment Standards Branch (the “Branch” or the “Director”), and the Employment Standards Tribunal (the “Tribunal”).

I. BACKGROUND

A. Process Leading Up to the Determination

[3] Angela Zavediuk was an employee of Bioriginal from January 5, 2015 to November 16, 2020. She held a sales position at Bioriginal, through which she received a base salary and commissions.

[4] On April 22, 2018, she filed a complaint with the Branch alleging that Bioriginal made unauthorized deductions from her wages contrary to various sections of the *Employment Standards Act*, R.S.B.C. 1996, c. 113 [*ESA*] and owed her compensation in the amount of $107,179.

[5] Five more complaints followed. Ms. Zavediuk filed three complaints on November 4, 6, and 16 of 2020. The complaints alleged mistreatment under s. 83, wrongful dismissal under s. 66, and violations of ss. 17 and 18. She filed two further complaints concerning with issues with her 2019 and 2020 earnings on June 24, 2019, and April 9, 2020, respectively.

[6] The Director assigned the matter to a delegate (“Delegate S”), who began investigating the complaints.

[7] During Delegate S’s investigation, he issued three reports with preliminary findings on various issues on September 24, 2019, March 5, 2020, and October 21, 2020.

[8] The October 21, 2020 report was titled "Final Findings Regarding the Complaint of Angela Zavediuk under the *Employment Standards Act*" (the "S Report").

[9] In the S Report, under the heading "Final Findings", Delegate S stated that Ms. Zavediuk provided calculations of wages owed "in response to my request for a net number being wages owing to her after the Employer unilaterally altered the conditions of its employment of her in May 2017." He further stated that "by unilaterally changing how it calculated her wages under its incentive program, [the Employer] terminated her employment, following section 66 of the Act."

[10] Delegate S stated that Bioriginal "ha[d] committed many violations of sections 17, 18, 27, 28, 58 and 63 of the Act and section 46 of the Regulation." He commented that Bioriginal could avoid the penalty and a determination under the Act if it paid $201,061.97, less statutory deductions, to the Director by November 3, 2020. He further stated that if the funds were not paid, the Director would proceed to issue a determination under s. 79.

[11] What followed was an unfortunate and unexplained delay. Bioriginal did not make any payment. No determination followed from the Director. The Director's petition response states that Delegate S left the Branch around this time. Delegate V was assigned to the matter in March 2022, over 16 months after the issuance of the S Report.

[12] Delegate V issued a new interim investigation report on August 26, 2022 (the "V Report"), which summarized the proceedings up to that point. The V Report was titled "Interim Investigation Report" and emphasised that it was an "interim report". It noted that "[Delegate S] issued preliminary findings on September 24, 2019, March 5, 2020, and October 21, 2020" [emphasis added.]

[13] The V Report indicated that "the parties have agreed that the issues in dispute are as follows":

…

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4. Were the conditions of Ms. Zavediuk's employment substantially altered such that the Director should find her employment was terminated pursuant to section 66 of the Act as it reads below?

> *If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated.*

5. If the answer to the above question is yes:

a) What condition(s) were substantially altered and when?

b) Were the condition(s) substantially altered within the time limit for filing a complaint set out in section 74 of the Act as it read (below)? Does this filing deadline apply to a Complainant who is still employed?

…

c) If Ms. Zavediuk did not file within the time limit set out in section 74 of the Act, should the Director exercise her discretion to extend the time limit?

6. If section 66 applies:

a) Is Ms. Zavediuk owed compensation for length of service as of the date of the substantial alteration?

b) Is the statutory recovery period set out in section 80 of the Act extended to include the 12 months before the substantial alteration?

[14] In a section entitled "Overview of the sections 66 and 80 disputes", Delegate V stated that Delegate S "opined" that Ms. Zavediuk was owed compensation as a result of being deemed terminated under s. 66 on May 10, 2017.

[15] After the V Report was issued, Delegate V left the Branch and the matter was assigned to yet another new delegate.

[16] The third and final delegate of the Director on the file (the "Adjudicating Delegate") assumed control of the matter in September 2022. On October 19, 2022, the Adjudicating Delegate sent an email introducing himself to the parties and explained the steps he planned to take to resolve this matter. He sought submissions from the parties based on the issues identified by Delegate V in the V report.

[17] The Adjudicating Delegate stated that the V Report "describes in broad strokes the procedural history of the file, and sets out a list of the issues that are in dispute between the parties". He further wrote:

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> Based on my review of the record, the list of the "issues" described in the [V] Report accurately set out the issues that are before me. In the event you disagree with the characterisation of the issues in the [V] Report, please explain in writing by no later than October 31, 2022 at 4:30 p.m. I will provide another opportunity to make submissions on what issues are properly before me once the cross-disclosure process described above is complete, although this will be strictly circumscribed to anything arising from that process
>
> [Emphasis in original.]

[18] The Adjudicating Delegate issued his own interim investigation report on November 17, 2022. It cross-disclosed the evidence that the parties had provided to the Director regarding Ms. Zavediuk's employment with Bioriginal in 2020. It contained Ms. Zavediuk's allegations regarding her termination, and then stated in a section titled "Further Steps" which stated:

> 1. I request the Employer respond to the Complainant's evidence provided herein, particularly in the context of (a) whether the Director should find that a condition of the Complainant's employment was altered, such that it would engage section 66 of the Act, and (b) whether the Complainant was mistreated, as described in section 83 of the Act, based on the complaint process with the Branch. …

[19] The parties attempted to resolve the matter through a mediation process provided by the Branch. The parties did not come to an agreement. The Adjudicating Delegate then continued receiving evidence and written submissions.

[20] Finally, on August 31, 2023, more than five years after Ms. Zavediuk filed the first complaint to the Branch, the Adjudicating Delegate issued a determination under s. 79 of the *ESA* (the "Determination").

B. The Determination

[21] The Determination concluded that Bioriginal had breached the *ESA*, and ordered it to pay Ms. Zavediuk a total sum of $97,615.26, inclusive of interest and administrative monetary penalties.

[22] Crucially, the Adjudicating Delegate did not find that Ms. Zavediuk was terminated under s. 66 of the *ESA* when her compensation package was changed in

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May 2017. The Adjudicating Delegate found instead that Bioriginal had constructively terminated Ms. Zavediuk in November 2020.

[23] The Adjudicating Delegate addressed the S Report as follows:

> [Delegate S] issued preliminary findings on various issues on September 24, 2019, and March 5, 2020 which will be further described below. He also issued a document titled "Final Findings Regarding the Complaint of Angela Zavediuk under the Employment Standards Act" on October 21, 2020. I note that despite its title, this document did not purport to bring the investigation to a close, but rather was another set of preliminary findings by [Delegate S].

[24] The Determination explained its reconsideration of the S Report's finding that a condition of Ms. Zavediuk's employment was unilaterally changed by Bioriginal on May 10, 2017, triggering s. 66 of the *ESA*:

> [Delegate S] goes on to make the preliminary finding that imposing this retroactive change to the Complainant's commission structure unilaterally was unfair, unreasonable and unacceptable, and stated that the Complainant's employment appeared to have been terminated.
>
> I agree with [Delegate S] that there was a unilateral change to a condition of the Complainant's employment (i.e., her incentive compensation), but do not agree that this change was substantial, such that would make it proper for me to exercise my discretion to find the Complainant had been terminated.

C. The Appeal Decision

[25] Ms. Zavediuk appealed the Determination on September 25, 2023. On the appeal application form, she indicated that the Director "failed to observe the principles of natural justice in making the Determination", drawing from the statutory language in s. 112(1)(b) of the *ESA*. Ms. Zavediuk also argued that the Adjudicating Delegate had erred in law, a ground of appeal under s. 112(1)(a)), and that she had new evidence not available at the time of the Determination, under s. 112(1)(c)).

[26] Ms. Zavediuk stated that the Adjudicating Delegate had wrongly calculated her entitlements, wrongly interpreted ss. 66 and 79(2)(c) of the *ESA*, and stated that she had new evidence regarding a company that she had established after the end of the employment with Bioriginal. Ms. Zavediuk said that the S Report made a *final* finding and ordered Bioriginal to pay $201,061.97, and that the Determination was at

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odds with the findings made in the S Report. She argued that the Adjudicating Delegate had failed to observe the principles of natural justice by not issuing a written report of findings and opportunities for responses, which she argued was required under s. 78.1 of the *ESA*¸ and thus "taint[ed] virtually every decision in the Determination and the ability to fairly appeal to the Tribunal."

[27] Ms. Zavediuk's position was that the Determination should be cancelled, and that the matter should be referred back to the Director for a new investigation by a new delegate.

[28] On Dec 27, 2023, the Tribunal issued a decision dismissing all three grounds of appeal (the "Appeal Decision").

[29] The Tribunal dismissed the appeal under breach of natural justice, under s. 114(1)(c) and (f) of the *ESA* on the basis that the appeal was: "frivolous, vexatious or trivial or gives rise to an abuse of process" and "there is no reasonable prospect that the appeal will succeed", respectively.

[30] The Tribunal rejected the argument that the Director breached natural justice by not issuing a section 78.1 report prior to the Determination.

[31] Section 78.1 of the *ESA* states:

> Written report
>
> 78.1 (1) After completing the investigation of a complaint, the director must
>
> (a) summarize the director's findings of the investigation in a written report, and
>
> (b) serve a copy of the written report on the following:
>
> (i) the person who made the complaint;
>
> (ii) the person against whom the complaint was made;
>
> (iii) any person the director considers should have the opportunity to respond to the report.
>
> (2) A person referred to in subsection (1) (b) may, within a period set by the director, provide to the director a written response to the report.

[32] The Tribunal found that the Director complied with s. 78.1 of the *ESA* by preparing and providing several written reports to the parties for their review and reply prior to the issuance of the Determination.

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[33] Ms. Zavediuk's argument regarding the inconsistency between the Determination and the S Report findings was also rejected. The Appeal Decision emphasised that Delegate S had only made preliminary findings, and that the Adjudicating Delegate was not bound by them.

[34] The Appeal Decision confirmed the Determination under s. 115(1)(a).

D. The Reconsideration Decision

[35] Ms. Zavediuk applied for reconsideration of the Appeal Decision on January 26, 2024.

[36] On September 4, 2024, the Tribunal rendered the Reconsideration Decision, which varied the Appeal Decision to cancel the Determination, and sent the matter back to the Director for investigation and determination afresh.

[37] The Tribunal found as follows:

> 58 … if new findings are made in a determination which contradict other findings shared with the parties during the investigation of a complaint, so that the opportunity for an informed and effective presentation of a party's case to the Tribunal is for that reason frustrated, a natural justice concern may arise.
>
> 59 In our opinion, this is what occurred in the case now before us. The S report, and the clarifying email a day later, established, as "Final findings," that the Employer had dismissed the Applicant pursuant to section 66 of the *ESA* in May 2017. They also established that the Applicant was owed $201,061.97 due to the Employer's contraventions of the statute.
>
> 60 While the communications of Delegate [V] and the Adjudicating Delegate suggested that new findings might be made based on further evidence and submissions delivered by the parties, including issues that were subject of the "Final Findings" in the S Report, neither Delegate [V] nor the Adjudicating Delegate shared new findings that altered the substance of the S Report until the Determination was issued. Furthermore, as we have noted earlier, the Adjudicating Delegate decided, contrary to the conclusions in the S Report, that no section 66 dismissal had occurred, and that the Applicant was owed less than half the sum set out in the S Report.

> 61 In these circumstances, we have concluded that the process followed in the investigation of the Complaints had the effect of frustrating the Applicant's ability to present her case. … The point, however, is not the number of submissions the Applicant delivered, or their length, but what the nature and substance of the issues were that those submissions were intended to address.
>
> …
>
> 63 In our view, the failure to alert the Applicant that the Determination would incorporate new findings means that the process followed in the investigation was unfair.

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[38] The Reconsideration Decision identified the issue as, not whether Ms. Zavediuk was deprived entirely of the opportunity to make her case — she made lengthy and comprehensive submissions on multiple occasions — but whether she had the opportunity to address the nature and substance of the issues.

[39] The Tribunal decided that despite the fact that the matter had "extended beyond a duration anyone could have reasonably expected" it was appropriate to send the matter back, because of certain factual issues that were not amenable to review. These included: (i) findings based on the parties' expectations regarding the terms of employment contract; (ii) whether it was a term of the contract that her compensation would change from time to time; and (iii) the arithmetical adjustments consequent thereon.

[40] This petition was filed on November 1, 2024.

II. PARTIES' POSITIONS

[41] Bioriginal's primary position is that the Reconsideration Decision must be set aside. Bioriginal asks this Court to review both the substance of the Reconsideration Decision and the remedy imposed. Bioriginal argues that the Tribunal was wrong in determining that the procedure leading to the Determination was unfair to Ms. Zavediuk.

[42] Further, Bioriginal says that the Tribunal was either procedurally unfair to Bioriginal in ordering the remedy it did, or that the Tribunal was patently unreasonable in ordering said remedy.

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[43] In the alternative, Bioriginal asks that the remedy alone be set aside, and that the court order the matter to be remitted to the Director for reconsideration and determination pursuant to s. 5(1) of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 [*JRPA*] based on the existing record, supplemented by additional submissions from both parties on the s. 66 issue.

[44] The Director consents to the alternative order sought by Bioriginal, given the substantial submissions and evidence already on the record that can be supplemented by additional submissions. Otherwise, the Director takes no positions on the other orders sought.

[45] Ms. Zavediuk and the Tribunal oppose all orders sought by Bioriginal.

[46] Bioriginal and Ms. Zavediuk seek costs of this petition. The Tribunal and the Director do not seek costs and ask that no costs be awarded against them.

III. ISSUES

A. DECISION UNDER REVIEW

[47] The parties agree that the subject of this judicial review is the Reconsideration Decision by the Tribunal, although the Determination and the Appeal Decision form a part of the record and can be considered for context: *Gorenshtein v. British Columbia (Employment Standards Tribunal)*, 2016 BCCA 457 at para. 16.

B. STANDARD OF REVIEW

[48] The Tribunal is subject to the privative clause of s. 58 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*] under the operation of s. 103 of the *ESA*. The privative clause states the following:

> Standard of review with privative clause
>
> 58 (1) If the Act under which the application arises contains or incorporates a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.

> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
>
> > (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
> >
> > (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
> >
> > (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.
>
> (3) For the purposes of subsection (2) (a), a discretionary decision is 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.

[49] The standard of whether the tribunal acted fairly, practically speaking, is correctness, in that no deference is owed to the tribunal: *Sebastian v. Vancouver Coastal Health Authority*, 2019 BCCA 241 at paras. 29–30. Though in *Sebastian*, the Court of Appeal was referring to s. 59 of the *ATA*, the statutory language found at ss. 59(5) to 58(2)(b) are identical.

[50] The standard of patent unreasonableness is the most deferential standard. The standard has been described in many ways: whether “the evidence, viewed reasonably, is incapable of supporting the tribunal’s findings of fact”: *British Columbia (Workers’ Compensation Appeal Tribunal) v. Fraser Health Authority*, 2016 SCC 25 at para. 30; and whether a legal determination “almost border[s] on the absurd” and “openly, clearly, evidently unreasonable”: *West Fraser Mills Ltd. v. British Columbia (Workers’ Compensation Appeal Tribunal)*, 2018 SCC 22 at para. 28.

[51] The patent unreasonableness standard applies to discretionary decisions. The *ATA* sets out certain criteria that can amount to patent unreasonableness at s. 58(3). However, as the Court of Appeal in *J.J. v. School District 43 (Coquitlam)*,

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2013 BCCA 67 at paras. 29–30 summarizes its past decision in *Morgan-Hung v. British Columbia (Human Rights Tribunal)*, 2011 BCCA 122 and stated that the court is not limited to examining a discretionary decision only under these criteria.

1. *Which Standard Applies?*

[52] The parties do not agree on which standard of review applies.

2. *The Reconsideration Decision*

[53] Bioriginal says that the standard of correctness applies to the Reconsideration Decision. They point to s. 58(2)(b) of the *ATA*, which states, "questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly" [emphasis added]. It says that the court owes no deference to the conclusion in the Reconsideration Decision that the procedure was unfair to Ms. Zavediuk.

[54] The Director says that the Reconsideration Decision is subject to the patent unreasonableness standard.

[55] First, the Director says that the Tribunal is protected by a "true privative clause" in s. 110 of the *ESA*:

> Exclusive jurisdiction of tribunal
>
> 110 (1) The tribunal has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in an appeal or reconsideration under Parts 12 and 13 and to make any order permitted to be made.
>
> (2) A decision or order of the tribunal on a matter in respect of which the tribunal has exclusive jurisdiction is final and conclusive and is not open to question or review in any court.

[56] The Director says that s. 110, in conjunction with s. 112(1)(b) of the *ESA* places the question of whether the Director failed to observe the principles of natural justice in the Tribunal's exclusive jurisdiction and further, that s. 115 provides the Tribunal with the exclusive jurisdiction to decide whether it will confirm, vary, or cancel a determination. The Director also says that this question amounts to a

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finding of fact against a legal standard, which also is in the Tribunal's exclusive jurisdiction: see *Cariboo Gur Sikh Temple Society (1979) v. British Columbia (Employment Standards Tribunal)*, 2019 BCCA 131 at paras 26-34, *Gorenshtein* at para. 26.

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[57] The Tribunal says that the patent unreasonableness standard applies to the Reconsideration Decision, for the same reasons as put forward by the Director. The Tribunal also argues that the standard under s. 58(2)(b) of the *ATA* does not apply because this judicial review concerns whether the Reconsideration Decision was adequate in determining that the procedure was unfair to Ms. Zavediuk, such that the reviewing court is able to understand why the Tribunal made the decision.

[58] Ms. Zavediuk largely adopts the Tribunal's position on the applicable standard of review to the Reconsideration Decision.

3. *The Remedy*

[59] The parties, including Bioriginal, appear to agree that the patent unreasonableness standard applies to the remedy issued by the Tribunal, as an exercise of its discretion.

[60] However, Bioriginal also claims that the remedy in the Reconsideration Decision was procedurally unfair to them. Bioriginal further states that the reviewing court owes no deference to the Tribunal with respect to the remedy, if it finds that the rest of the decision is unfair.

4. Standard of Review – Analysis and Decision

[61] In the Reconsideration Decision, the Tribunal determined that Ms. Zavediuk had not been afforded procedural fairness in the proceedings below it. The question is whether the applicable standard is fairness (or correctness) because the decision involves questions of natural justice and procedural fairness, or whether it reverts to patent unreasonableness, either as a matter of exclusive jurisdiction pursuant to the privative clause in the *ESA*, or because the Tribunal was exercising its discretion in making its decision.

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[62] Bioriginal relies on the statutory language in s. 58(2)(b) of the *ATA*, which says that "questions about the application of common law rules of natural justice and procedural fairness" must be decided on a correctness standard.

[63] The Tribunal argues that the Tribunal has exclusive jurisdiction to decide whether the Director failed to observe principles of natural justice in his Determination and that therefore, the applicable standard of review on a decision regarding a breach of procedural fairness by the Director is patent unreasonableness.

[64] The Tribunal and the Director rely on sections 115 and 116 of the *ESA*, and two appellate authorities (*Cariboo* and *Goreshtein*) that support the proposition that the applicable standard of is review for any matters within the Tribunal's exclusive jurisdiction is patent unreasonableness. So, my decision would be whether it was clearly irrational for the Tribunal to determine that the procedure leading up to the first instance determination was not fair in the circumstances.

[65] It is not a straightforward issue. It is perhaps more intuitive to simply assume that the standard of fairness applies in the judicial review context whenever the court is assessing whether a petitioner has been afforded procedural fairness.

[66] However, the court in Cariboo held that the standard to be applied to decisions of the Tribunal that fall within their exclusive jurisdiction is patent unreasonableness. At paras 22-25, the court stated:

> [22] The *ESA* includes a strong private clause. Section 110 of the *ESA* provides:
>
>> 110 (1) The tribunal has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in an appeal or reconsideration under Parts 12 and 13 and to make any order permitted to be made.
>>
>> (2) A decision or order of the tribunal on a matter in respect of which the tribunal has exclusive jurisdiction is final and conclusive and is not open to question or review in any court.
>
> [23] Section 103 of the *ESA* provides that s. 58 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*] applies to the Tribunal. Pursuant to s. 58(2)(a) of the *ATA*, the standard of review of Tribunal decisions on findings

> of fact or law and exercises of discretion in respect of matters within its exclusive jurisdiction under a privative clause is patent unreasonableness: *Canwood International v. Bork*, 2012 BCSC 578; *Communications, Energy & Paperworkers' Union of Canada (Local 298) v. Eurocan Pulp & Paper Co. (Local 298) v. Eurocan Pulp & Paper Co.*, 2012 BCCA 354. Pursuant to s. 58(2)(b), questions of natural justice and procedural fairness must be decided having regard to whether the Tribunal acted fairly.
>
> [24] The patent unreasonableness standard is highly deferential. As the Supreme Court of Canada explained in *Ryan v. Law Society (New Brunswick)*, 2003 SCC 20 at para. 52, a decision is not patently unreasonable unless it is "clearly irrational", "evidently not in accordance with reason" or "so flawed that no amount of curial deference can justify letting it stand".

[67] In *Cariboo*, the Society appealed a reconsideration decision by the Tribunal that declined to find that it been deprived of natural justice in the proceedings below. Dickson J.A. confirmed that on judicial review, the reviewing court applied the patent unreasonableness standard to the Tribunal's reconsideration decision, including the Tribunal's decision regarding whether the delegate had breached the requirements of natural justice. The Court of Appeal upheld the decision to dismiss the application for judicial review, and the standard of review used by the reviewing court.

[68] Further, pursuant to s. 116 of the *ESA*, the Tribunal may reconsider any order or decision and confirm, vary, cancel or refer it back. As per the B.C. Court of Appeal in *Cariboo* at para. 19, this reconsideration power is discretionary in nature. The standard applicable to discretionary decisions is patent unreasonableness.

[69] That there may be confusion between the two standards is understandable, in light of the interaction between the *ATA* and the *ESA*. Further, courts may, and often do refer to "fairness" when they consider whether a decision is patently unreasonable. However, there is a distinction to be made between whether the Tribunal itself acted fairly or applied the laws of procedural fairness in coming to its Reconsideration Decision, and the substance of the Reconsideration Decision. This distinction is explained in *Champ's Fresh Farms Inc. v British Columbia (Employment Standards Tribunal)*, 2023 BCSC 1075 at paras 23-31.

[70] In all the circumstances, I find that the substance of the Reconsideration Decision at issue involved matters that are in the exclusive jurisdiction of the

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Tribunal. I also find that the Reconsideration Decision was discretionary in nature. As a result, the patent unreasonableness standard applies to both the decision and the remedy.

C. WAS THE RECONSIDERATION DECISION PATENTLY UNREASONABLE

[71] I acknowledge that I must apply a reasons-first review when considering whether the Reconsideration Decision is patently unreasonable. While the function of the reviewing court applying the standard of review of patent unreasonableness is not to substitute its decision for that of a tribunal, the decision must nonetheless be subject to careful scrutiny.

[72] The Tribunal considered the process leading up to the decision under review, and determined that despite the copious submissions and lengthy investigation, Ms. Zavediuk was denied natural justice. In essence, the tribunal acknowledged that the manner in which the investigation proceeded, with "Final Findings" early in the process, followed by later determinations by successive Adjudicating delegates that did not clarify that new findings would be made, all served to frustrate Ms. Zavediuk's ability to properly respond to key issues.

[73] The Tribunal made a careful distinction between the denial of an opportunity to provide submissions generally, and the ability to respond to the nature and substance of issues that are material to the result. The Tribunal found it was reasonable for Ms. Zavediuk to rely on "Final Findings" of Adjudicator S, in the absence of specific rationales from later Adjudicators for departing from those findings. The Tribunal found that Ms. Zavediuk was not prevented from making submissions, providing evidence or responding to arguments of other parties, but she was not given the opportunity to address the rationale behind the departure from the "Final Findings" of Adjudicator S. As a result, particularly as she was and is a lay litigant, she was denied natural justice,

[74] I do not find this decision to be patently unreasonable. The investigation and decision-making process in this case suffered from excesses – an excess of

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decision makers, an excess of submissions, and certainly an excess of time elapsed between the onset of the investigation and the conclusion. The Tribunal found that despite the volumes of material submitted by all parties including Ms. Zavediuk, the path through the issues and determinations was not made sufficiently clear for Ms. Zavediuk as a lay litigant.

[75] Under the patent unreasonableness standard of review, it is not my role to agree or disagree with the decision, or to substitute my decision for that of the Tribunal. The Tribunal considered and reviewed how the processes below, while certainly prolix, failed to afford Ms. Zavediuk natural justice even while providing her repeated opportunities to make submissions. In doing so, I find that the Tribunal arrived at a nuanced decision that was open to it to come to, and I do not find it to be absurd or openly, clearly unreasonable on its face.

D. WAS THE REMEDY PATENTLY UNREASONABLE

[76] Bioriginal argues that the remedy imposed by the Tribunal meets the high bar of being patently unreasonable. Bioriginal also argues that the remedy is procedurally unfair in its effect, which also contributes to its unreasonableness.

[77] I understand Bioriginal’s argument to be that, considering the extreme length of the process, and the copious submissions and argument already made by the parties, it was unreasonable for the Reconsideration Decision to fail to explain why cancelling the whole determination, including all findings unrelated to the s. 66 question was an appropriate remedy.

[78] Further, Bioriginal states that the decision on remedy is patently unreasonable because it fails to consider other options or directions, such as whether the issues for fresh consideration can be narrowed, or that the investigation should be limited to the record already before the tribunal.

[79] I disagree. I sympathize with the frustration that all parties must feel. The investigation and determination process has not been efficient, or, arguably, proportional to the issues under review. However, this alone does not render the

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remedy of remittance so irrational such that I can substitute my own remedy in its place.

[80] Ultimately, Bioriginal submits that the remedy is unreasonable because the Tribunal gives no reason for it and fails to consider the inherent unfairness in starting over.

[81] However, the Tribunal explicitly states that the key issues on which Ms. Zavediuk was denied procedural fairness involve findings of fact that are not amenable to review under appeal and are under the exclusive jurisdiction of the Director. The Tribunal determined that it was therefore not appropriate for the Tribunal to reassess those facts pursuant to its limited curative powers.

[82] In coming to this decision, the Tribunal explicitly acknowledged the length and breadth of the process below. This was a discretionary decision. I accept the reasoning of the Tribunal as within the reasonable range, considering their findings on procedural fairness.

[83] While certainly not convenient, and no doubt frustrating for all the parties, the Tribunal’s decision on remedy does not meet the high threshold of patently unreasonable such that I will interfere with it.

IV. CONCLUSION

[84] I dismiss the petition to set aside the Reconsideration Decision and Remedy. Bioriginal will pay costs to Ms. Zavediuk. No costs are ordered with respect to the Director or the Tribunal.

“J. Whately J.”

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