

CANADA / JUDGMENT

Njoroge v. British Columbia (Workers' Compensation Board)

2020 BCSC 2241

COURT

Supreme Court of British Columbia

DECIDED

13 March 2020

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2020 BCSC 2241 Njoroge v. British Columbia (Workers' Compensation Board)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Njoroge v. British Columbia (Workers' Compensation Board),

2020 BCSC 2241

Date: 20200313

Docket: S194875

Registry: Vancouver

In the Matter of the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241

Between:

Collins Njoroge

Petitioner

And

Workers' Compensation Board of British Columbia (the "Board")

Respondent

Before: The Honourable Mr. Justice A. Ross

Oral Reasons for Judgment

In Chambers

The Petitioner, appearing in person:

C. Njoroge

Counsel for the Respondent:

D. Eleff

Place and Date of Trial/Hearing:

Vancouver, B.C.

March 12-13, 2020

Place and Date of Judgment:

Vancouver, B.C.

March 13, 2020

- [1] THE COURT: I will commence my reasons now. For the sake of expediency, I am delivering these reasons orally. Should anyone request a copy, I reserve the right to edit these reasons for grammar, syntax, and content. The result will not change.
- [2] The petitioner seeks an order converting his petition against the Workers' Compensation Board into an action. He also seeks certain Charter remedies in the proposed action, including Charter damages. In addition, he seeks an interim order for costs.
- [3] As explained in more detail below, the petitioner claims that he needs to pursue this dispute in the form of an action, because he alleges that the Board engages in the following conduct:
- a) improper interpretation of the bullying and harassment provisions;
 - b) abuse of discretionary power;
 - c) individual and institutional bias;
 - d) collusion; and
 - e) other forms of misconduct.
- [4] For the reasons set out below, I dismiss the petitioner's application for conversion.
- [5] The petitioner is a current employee of the City of Vancouver. He has been employed as an auxiliary park ranger since July 30, 2015. He is a unionized employee and is represented by the Canadian Union of Public Employees, Local 15.
- [6] The City of Vancouver has a respectful workplace policy. It has been in place since 2011 and provides the substantive and procedural framework with respect to an employer's legal obligation to ensure the health and safety of its workers. The petitioner says that he was bullied and harassed at work. He claims that those incidents of bullying were at the hands of his supervisor. The petitioner initiated, on September 1, 2016, the first of several levels of complaint through his union to his employer. At that time, he sought an investigation into

his supervisor's conduct pursuant to the City of Vancouver's bullying and harassment policy.

- [7] The petitioner says that the City of Vancouver refused to investigate his formal complaint. As a result, he had his union file a grievance. On October 21, 2016, a representative of the City met with a union representative at the Stage 1 grievance. The City of Vancouver argued, at that point, that the matter had been fully investigated. The petitioner alleges that following the hearing of the grievance, his supervisor has continued to bully and harass him.
- [8] In November 2017, the petitioner initiated a second formal complaint in accordance with the City of Vancouver's policy in its response to that complaint.
- [9] Having received no satisfactory result through his employer's complaint process, the petitioner contacted the Workers' Compensation Board (the "Board") on February 15, 2018. He subsequently filed a complaint with respect to the City of Vancouver's refusal to investigate his first and second formal complaints. On March 6, 2018, the Board's prevention officer contacted the petitioner with respect to his complaint.
- [10] On May 23, 2018, having not received a satisfactory response from the occupational safety officer, the petitioner filed a verbal complaint with the Board regarding the prevention officer's non-responsiveness. The petitioner alleges that the prevention officer then called him and confronted him in a phone call conversation, stating that, among other things, there would be no further Board action forthcoming and the petitioner could "do as he wished".
- [11] In an email dated May 25, 2018, the prevention officer declined to issue an order against the employer under s. 115 of the Workers' Compensation Act on the basis that "the employer's policy, investigative procedures, and follow-up into the matter [was] compliant with WorksafeBC requirements." In addition, the prevention officer asserted that the evidence provided by the petitioner was sufficient to make a determination.
- [12] The petitioner argues that the Board decision did not reveal any intelligible rationale and, in light of the prevention officer's unprofessional conduct during the course of the Board complaint, the petitioner, on July 3, 2018, sought further assistance. He contacted the Workers' Advisory Office. That office appointed a workers' advisor to Mr. Njoroge. There were further reconsiderations and appeals of the prevention officer's decision. A review decision dated November 27, 2018, confirmed the prevention officer's original decision.
- [13] Two further requests for reconsideration met with the same result, dismissing the petitioner's complaint.
- [14] Those decisions were appealed to the Workers' Compensation Appeal Tribunal or WCAT and those appeals were rejected. It is the last set of decisions from which the petitioner seeks judicial review.

- [15] I pause to note at this point that the bully who was the subject of the petitioner's complaint was fired by the City of Vancouver on November 2, 2018. I further note that the history set out above, absent the information regarding the firing of the bully, is set out in full in this petition I am considering. The petition includes, among other transgressions:
- a) allegations of bias against the original decision maker;
 - b) allegations of both a reasonable apprehension of bias and "demonstrated institutional bias";
 - c) breaches of procedural fairness;
 - d) concerns regarding collusion between the employer and the Board;
 - e) uncritical acceptance of the employer version of the facts;
 - f) failing to undertake an oral hearing.
- [16] It is that petition that the petitioner now seeks to convert into an action.
- [17] The petitioner applies under Rule 22-1(7)(d) of the Civil Rules of Court. The test for conversion of a petition to an action requires this court to determine whether there is a bona fide triable issue that cannot be determined by reference to the file contents. Both parties agree that the test is that set out in *Kerfoot v. Richter*, 2018 BCCA 238, which states:
- [27] In my view, the Saputo test precludes a judge from weighing evidence. Applying *Robertson v. Dhillon*, 2015 BCCA 469, this Court confirmed that the test is akin to the test to be applied for summary judgment: whether, on the relevant facts and applicable law, there is a bona fide triable issue. In the context of this case, where there are factual disputes, the chambers judge was to determine whether Mary, as the party requesting the trial, was bound to lose; more particularly whether there was a triable issue with respect to Bernice's testamentary capacity or the issue of undue influence.
- [28] John's submission that some weighing of evidence is permissible appears to stem from an assumption, incorrect in my view, that a court is limited in an application for summary judgment to examining the pleadings. In summary judgment applications, a court can and usually does consider evidence.
- [29] Where there are disputed facts in the pleadings, the party who seeks either summary judgment or dismissal bears the evidentiary burden of showing that there is no genuine issue to be tried, and that is proven through evidence: *McLean v. Law Society of British Columbia*, 2016 BCCA 368 at paras. 36–39. In considering evidence, however, the court must not weigh it but is limited to assessing whether it establishes a triable issue. As this Court explained in *Skybridge Investments Ltd. v. Metro Motors Ltd.*, 2006 BCCA 500:
- [12] If sufficient material facts have been pleaded to support every element of a cause of action, but one or more of those pleaded material facts are contested, then the judge ruling on a Rule 18(6) application is not to weigh the evidence to determine the issue of fact for the purpose of the application. The judge's function is limited to a determination as to whether a

bona fide triable issue arises on the material before the court in the context of the applicable law. If a judge ruling on a Rule 18(6) application must assess and weigh the evidence to arrive at a summary judgment, the "plain and obvious" or "beyond a doubt" test has not been met.

[Emphasis in original.]

- [18] Thus, in this application, I am assessing the evidence of the petitioner to determine whether it establishes a triable issue. If I determine that the petitioner's action is bound to fail, then his application will be dismissed. Both parties agree that the bar is low, but there is a bar.
- [19] There is a preliminary problem created by the notice of application. Instead of setting out the relief that he intends to seek in the application, the petitioner set out the relief that he intends to seek in the proposed action. Those paragraphs consist primarily of requests for declaratory relief. The petitioner seeks:
- a) declarations that sections of the Workers' Compensation Act are unconstitutional,
 - b) declarations that the Board's interpretation of its own legislation and policies breaches s. 7 of the Charter, and
 - c) damages from the Board for violations of the bullying and harassment provisions of the Board's policies, and Charter damages.
- [20] By agreement between the parties, the application proceeded on the basis that it was, in fact, an application to convert the petition into an action. The facts forming the basis of the application are set out in summary form within the notice of application. That pleading sets out a number of facts. Some facts related to the background to the petitioner's complaint to the board and the subject matter of the petition.
- [21] However, other alleged facts included in the Notice of Application relate to subsequent and unrelated complaints to the Board about other bullying complaints by other union members employed by the City of Vancouver. Still other allegations relate to the actions of unrelated entities, including the petitioner's union, his employer, and the Workers Advisory Office. The petitioner says that those facts are relevant because they indicate a pattern of conduct that provides evidence of, again I quote, "improper interpretation of the bullying and harassment provisions, abuse of discretionary power, individual and institutional bias, collusion, and other forms of misconduct."
- [22] As noted above, my role in this exercise is not the weighing of any evidence, but the assessment of the evidence to determine whether there is a triable issue. Bare assertions without evidentiary foundation are not sufficient.

- [23] The petitioner provided affidavit evidence. He breaks his allegations and information into four categories. I use the word "information", because some of the information tendered in his affidavit material consists of double or triple hearsay. Where necessary, I have accepted those allegations at face value to determine the issues in this application.
- [24] First, with respect to the original bullying complaint that is the subject of the petition, which I will refer to as Bullying Complaint Number 1, the petitioner says that the original prevention officer at the Board lacked impartiality and accepted the City's version of events without question. As noted, that is the foundational decision that is the subject of this petition. The petitioner argues that the prevention officer was biased and not objective.
- [25] I pause to note that the petitioner received the assistance of a workers' advisor from the Workers' Advisors Office. That advisor was in place from October 20 to November 20, 2018. In the midst of that retainer, on November 2, 2018, the original bully, or Bully Number 1, was fired by the City of Vancouver. The petitioner's basic complaint is that the City did not conduct an investigation as required under its employment policies, and then the Board failed to hold the City to account for that failure. Whether the City did or did not take that step, Bully Number 1 was fired in November 2018. It stands to reason that he was fired following some form of investigation.
- [26] The petitioner's argument notes that he continued with the complaint to the Board and he contends the appeals and reconsideration decisions were incorrect. He ultimately appealed the matter to WCAT. WCAT declined jurisdiction. As a result, the petitioner is now seeking judicial review of that string of decisions. I find nothing in the evidence relating to the first complaint that would lead me to determine that there was an issue that should be tried in a trial, or that there was a triable issue in that regard.
- [27] The second item relates to the actions of the workers' advisor during the period of his retainer. The petitioner points to the work done by that advisor and the fact that the advisor told him that in the course of one of the reconsideration applications, that the advisor had faxed Mr. Njoroge's supplemental affidavit to the Board. The Board claims that it never received this affidavit. It proceeded with its decision in the absence of that affidavit. That decision was upheld on further review.
- [28] I note that it will be for the judge at the judicial review to determine whether that procedural decision met with the appropriate test of reasonableness. However, it is not a matter that requires a trial.
- [29] The third area of information provided by the petitioner relates to a subsequent incident of bullying which I will call Bullying Complaint Number 2. In that instance, another employee of the City complained of bullying. She sought the aid of the petitioner to act as her lay advisor and he did so.

- [30] The petitioner says that the positions taken by the Board in relation to Bullying Complaint Number 2 provide evidence of institutional bias and individual bias. He says that the Board employee attempted to talk the complainant out of making a complaint. The "evidence" of this conversation is included in Mr. Njoroge's affidavit. It is, by definition, third-hand hearsay. Regardless, the Board's counsel pointed me to an email that the Board employee sent to the complainant in Bullying Complaint Number 2. My reading of that email indicates that the position taken by the Board employee was rational and disclosed no bias. To the extent the email attempted to talk the complainant out of proceeding, it merely stated that the Board has existing knowledge of the policies of the City of Vancouver and that they are, and I quote, "compliant".
- [31] The Board's set of decisions relating to Bullying Complaint Number 2 would have been subject to judicial review. However, the complainant in that matter did not pursue that complaint to the Board past the chief review officer. As a result, that complaint did not get to the full level of administrative review. Hence, it was not subject to judicial review. If there was something that indicated malfeasance in respect of Bullying Complaint Number 2, it is unclear to me what that is. Further, the complainant has, in effect, accepted the decision by failing to appeal it further.
- [32] I find nothing in Bullying Complaint Number 2 that would lead me to the conclusion that this matter should be converted to an action.
- [33] The fourth and last instance that the petitioner includes in his attempt to show bias and malfeasance relates to a third bullying complaint which I will refer to as Bullying Complaint Number 3. In that complaint, the petitioner, acting on behalf of 10 employees in his position as shop steward of the union, complained to the City and also complained to the Board, about bullying and harassment. He was advised by the Board that the Board cannot proceed with the complaints due to privacy concerns. In other words, the petitioner has no right to bring WCB complaints on behalf of other people. Further, the Board rejected the complaint on the basis that there was no violation by the employer. The Board rejected the second level appeal on December 12, 2019. That decision was not appealed.
- [34] Again, I find no information or evidence within those facts that lead to any suggestion that the Board had acted improperly. I find that there was nothing within Bullying Complaint Number 3 that would suggest to me that the actions of the Board need to be examined at a level below the judicial review.
- [35] In addition to these findings, I note the Board's arguments, and in particular:
- a) First, tribunals are assumed to be impartial, I accept that.
 - b) Second, decisions of all levels of the tribunal were made on the basis of the documentary evidence, hence if there is a gap in the basis for any decisions, the court will be aware of that gap. As a result, there are no issues of credibility to be assessed. I accept that.

- c) Third, if the petition proceeds and if the court directs the matter back down to the Board, the Board will comply with the directions made by the court. I further accept that submission.
- d) Fourth, the Board notes that, to the extent judicial review of the Board's decisions will be referred back down, if that referral comes with a direction that the Board should direct the City to undertake a further investigation and disciplinary measures, then the most serious possible available remedy would be the firing of Bully Number 1. The Board notes that Bully Number 1 was fired on November 2, 2018, hence the Board notes a referral back would lead to a moot decision.
- [36] Finally, the Board argues that the petitioner does not have a right to convert his own petition to an action in order to pursue perceived wrongs on behalf of other City employees. Based on the information provided by the petitioner, those people are unhappy about the representation that they received from their union. The Board argues that that is not a basis for an action against the Board, and certainly not a reason to convert the petitioner's petition to an action.
- [37] While the Board acknowledges that the threshold for this application is low, it argues that the petitioner's material does not come close to establishing that threshold.
- [38] For all of the reasons set out above, the Board argues that an action by the petitioner is bound to fail.
- [39] For the reasons set out above, I agree with the Board's submission. There is nothing in the affidavit material of the petitioner, taken at face value, that provides the basis of any claim that the Board was acting with an improper interpretation of the bullying and harassment provisions, abuse of discretionary power, individual and institutional bias, collusion, or other forms of misconduct.
- [40] Having assessed the petitioner's allegations and affidavit material, I find that any action on the allegations made therein is bound to fail. There is no triable issue.
- [41] The plaintiff can obtain the relief he seeks in a judicial review of the Board decision, if he is successful in that judicial review.
- [42] As noted, the petitioner's application also seeks costs. That application is dismissed. The petitioner's application to convert the petition into an action is also dismissed. That is my ruling.
- [43] Does anything arise from that?
- [44] COLLINS NJOROGÉ: Not at this point.
- [45] THE COURT: All right, we are adjourned.

"A. Ross J."

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