
CANADA / JUDGMENT

Webb v. Canada (Attorney General)

2020 BCCA 34

COURT

British Columbia Court of Appeal

DECIDED

14 January 2020

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2020 BCCA 34 Webb v. Canada (Attorney General)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Webb v. Canada (Attorney General),

2020 BCCA 34

Date: 20200114

Docket: CA46126

Between:

John Webb

Appellant

(Petitioner)

And

Attorney General of Canada and

Workers' Compensation Appeal Tribunal

Respondents

(Respondents)

Before:

The Honourable Mr. Justice Groberman

The Honourable Madam Justice Garson

The Honourable Mr. Justice Fitch

On an application to vary: An order of the Court of Appeal for British Columbia, dated July 30, 2019 (Webb v. Canada (Attorney General), 2019 BCCA 288, Vancouver Docket CA46126).

Oral Reasons for Judgment

The Appellant, appearing in person:

J. Webb

No one appearing on behalf of the Respondents

Place and Date of Hearing:

Vancouver, British Columbia

January 14, 2020

Place and Date of Judgment:

Vancouver, British Columbia

January 14, 2020

Summary:

The appellant applies to vary the order of a single Court of Appeal justice in chambers denying leave to appeal. He had applied for leave to appeal the order of a British Columbia Supreme Court justice that dismissed an application to extend time to file a judicial review proceeding. Held: Application dismissed. The chambers justice made no error in finding that there is no reasonable prospect that a division of this Court would find that the justice erred in the court below.

GARSON J.A.:

Introduction

- [1] Mr. Webb is a fisheries officer employed for many years as such by the Government of Canada. Since at least as early as 2005, he has suffered from bilateral osteoarthritis affecting his knees. His work as a fisheries officer involved long periods helming a zodiac-type vessel, sometimes in quite rough conditions. At the heart of this dispute is his assertion that his progressive osteoarthritis is either a workplace injury or was caused, aggravated, activated, or accelerated by his work.
- [2] The application before the Court is to vary an order of a British Columbia Court of Appeal justice. That order dismissed an application for leave to appeal an order made by a British Columbia Supreme Court justice dismissing Mr. Webb's application to extend the time to file a judicial review proceeding asserting that the Workers' Compensation Appeal Tribunal ("WCAT") erred in finding that his arthritic knee condition was not caused by his employment. The difficulty arose from his late filing of his judicial review petition.

- [3] The sole question before us is whether the Court of Appeal justice erred in principle in deciding that there was no reasonable prospect that a full division of this Court (if it were to hear the appeal) would allow the appeal and extend the time to file his judicial review petition to appeal the WCAT decision rejecting his claim.

Section 9(6) Application

- [4] Mr. Webb's application is brought pursuant to s. 9(6) of the Court of Appeal Act, R.S.B.C. 1996, c. 77, to vary an order made by a single justice in chambers dismissing his application for leave to appeal a decision of the Supreme Court of British Columbia. A variation application in this Court is not a rehearing of the original application: the approach a division of the Court will bring to the matter is highly deferential and it is not enough to allege that the justice erred in the exercise of discretion. The Court will interfere with the order of the single justice only if there has been an error in principle, the justice was wrong in the legal sense, the justice misconceived the facts, or relevant information was not brought to the justice's attention: *DeFehr v. DeFehr*, 2002 BCCA 139; *Haldorson v. Coquitlam (City)*, 2000 BCCA 672.

History of Proceedings

- [5] In 2013, Mr. Webb applied for compensation for his bilateral osteoarthritis affecting his knees, alleging that his condition was an occupational disease. WorkSafeBC did not accept his claim. That decision was upheld on review by the Review Division and on appeal to the WCAT in a decision dated March 18, 2015, (the "2015 WCAT Decision"). Mr. Webb sought judicial review of the 2015 WCAT Decision. His application was filed in time but has not yet been heard.
- [6] Subsequently, in 2016, Mr. Webb changed course somewhat and made a second application to WorkSafeBC for the same condition, but this time he sought a determination as to whether the damage to his knees resulted from a workplace injury. The Board concluded that the osteoarthritis was not compensable as his meniscus damage was not shown to have resulted from a workplace injury. Mr. Webb appealed to the WCAT. The WCAT dismissed the appeal on July 11, 2017 (the "2017 WCAT Decision").
- [7] Mr. Webb petitioned for judicial review on January 15, 2018, but his petition was filed well outside of the 60-day statutory time limit specified in the Administrative Tribunals Act, S.B.C. 2004, c. 45.
- [8] On April 4, 2019, his application to extend the time to petition for judicial review of the 2017 WCAT Decision came on before Justice Affleck in the British Columbia Supreme Court. The judgment dismissing the application is indexed at 2019 BCSC 760. Justice Affleck set out the application before him:

- [1] ...

- a. an order pursuant to s. 57(2) of the Administrative Tribunals Act, S.B.C. 2004, c. 45 extending the time for making an application for judicial review of a decision of the Workers' Compensation Appeal Tribunal (WCAT) dated July 11, 2017;
 - b. an order that his amended petition filed on January 15, 2018 "be considered the pleading" for the judicial review application; and
 - c. an order that the hearing of the application for judicial review of the WCAT decisions dated March 18, 2015 and July 11, 2017 be heard at the same time.
- [9] Justice Affleck instructed himself that the discretion available under s. 57(2) may be exercised in favour of the applicant only if the court is satisfied that there are serious grounds for relief.
- [10] He noted that serious grounds for relief had been interpreted in *J.J. v. School District No. 43 (Coquitlam)*, 2009 BCSC 984, aff'd 2011 BCCA 343, as meaning that there must be a "reasonable prospect or likelihood that the petition will succeed" (at para. 11).
- [11] After reviewing the standard of review and the WCAT's factual findings based on the medical evidence, he concluded that it was unlikely the petition for judicial review could succeed. At para. 30 he held, "[i]n particular there is no prospect that on a judicial review application the court would find that the decision of the WCAT panel was 'patently unreasonable'."
- [12] He set out a portion of the WCAT's decision to illustrate his conclusion about the unlikely prospect of the judicial review succeeding:
- [23] ...
- [93] The worker's evidence was that he spent significant time in the Zodiac and he disputed the Board medical advisor's assessment that not all of his time would have been in inclement weather or at operating the boat at speed. I do not consider it necessary to parse out these details as part of my analysis. None of the evidence presented by the worker provides a medical link between aggravation of knee osteoarthritis and operating a Zodiac or other vessel that produces WBV [whole body vibration]. It is the worker's evidence that this activity caused the condition, and in the alternative, that it aggravated or accelerated the osteoarthritis. I refer to policy #26.55 which discusses the difference between aggravation of the underlying condition, and activities which bring up the symptoms of the underlying condition.
- [94] The worker discussed being exposed to cold, working long hours. He has not provided a medical opinion or explanation as to how these conditions would contribute to a meniscus tear, or aggravate or accelerate osteoarthritis. While these conditions may heighten the worker's symptoms, this does not correlate to a conclusion that these work conditions caused injury or aggravated osteoarthritis.

[95] I therefore place weight on the medical advisor's 2015 opinion, as it is based on the known evidence and scientific literature. The opinion is also consistent with the evidence that the worker's condition gradually deteriorated over a period of at least 10 years, from prior to 2005 to 2014 when he underwent a partial knee replacement. (emphasis added.)

[Emphasis in original.]

[13] In the result, Justice Affleck dismissed the application to extend the time.

Leave to Appeal to this Court

[14] Mr. Webb now seeks leave to appeal Justice Affleck's decision to this Court. He requires leave pursuant to Rule 2.1(e) of the Court of Appeal Rules.

[15] Applications for leave to appeal to this Court are at the first instance brought before a single justice (s. 7 of the Court of Appeal Act) but may be varied by a division of the Court (s. 9(6)).

[16] Justice Hunter instructed himself on the well-known test for leave at para. 14:

[14] The general factors to be considered in determining whether leave should be granted to appeal a limited appeal order are set out in *O'Connell v. Mazilescu*, 2011 BCCA 363 at para. 8 (Rowles J.A. in Chambers):

- (1) whether the point on appeal is of significance to the practice;
- (2) whether the point raised is of significance to the action itself;
- (3) whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and
- (4) whether the appeal will unduly hinder the progress of the action.

[17] He then said:

[15] To succeed in the appeal, Mr. Webb would have to establish that Affleck J. erred in principle in concluding that there were no serious grounds for relief from the 2017 WCAT Decision. To grant leave, I must be satisfied that there is a reasonable possibility that a division of this Court would allow the appeal. This requires a consideration of the prospects for challenging the 2017 WCAT Decision.

[18] After reviewing the applicable standard of review and the submissions of Mr. Webb, Justice Hunter concluded:

[24] The decision of Affleck J. not to extend the time for bringing judicial review proceedings in respect of the 2017 WCAT Decision was discretionary under s. 57 of the Administrative Tribunals Act. In my opinion, there is no reasonable prospect that a division of this Court would overturn his decision. Accordingly, I am not prepared to grant leave to appeal his decision.

- [25] I appreciate the logic of Mr. Webb's position that it would be convenient to have the issues he wishes to raise regarding the 2017 WCAT Decision heard in the same judicial review proceeding as the 2015 WCAT Decision. However, he failed to file his application for judicial review of the 2017 WCAT Decision in a timely manner. In order to extend the time, the chambers judge had to be satisfied that there were serious grounds for relief. Justice Affleck was not so satisfied, and I conclude that there is no reasonable prospect that a division of this Court would find that he was in error in reaching that conclusion.
- [19] The merits test is usually conceded to be a relatively low bar: *Bartram v. Glaxosmithkline Inc.*, 2011 BCCA 539, and is usually expressed as whether there is a prospect (or realistic prospect) of success.
- [20] At para. 15, Justice Hunter articulated the test as a reasonable possibility that a division would allow the appeal. Later in his reasons, at paras. 24 and 25, he described the test as "no reasonable prospect" of success. Looking at the reasons as a whole, I am satisfied that he applied the correct test at paras. 24 and 25. He did not err in principle.
- [21] The overarching test on a leave application is always whether it is in the interests of justice that leave be granted. Justice Hunter did not explicitly mention this aspect of the criteria for leave to be granted. The original question on appeal is whether Justice Affleck erred in refusing to grant an extension of time to petition for judicial review of the 2017 WCAT Decision. In order to appeal that decision, Mr. Webb requires leave to appeal. Leave will not be granted if there is no prospect of success on the appeal to this Court. One of the considerations for leave is whether it is in the interests of justice that leave be granted. Justice Hunter specifically mentioned Mr. Webb's submission that it would be fair to him for both the WCAT appeals to be heard together. This is a factor relevant to the interests of justice. Justice Hunter did consider this submission but he found that it did not factor more importantly than the lack of merit to the appeal. He is entitled to deference on this point.
- [22] The WCAT takes no position on this application to vary the order of the single justice. Nor, indeed, did it take a position before the single justice.
- [23] Mr. Webb has a strongly held view that the WCAT erred in not finding the meniscal tear and osteoarthritis was caused by occupational events or was work related. That was an issue for the WCAT and it had evidence from which it could draw the conclusion it did. It is not part of a court's function on judicial review to reweigh evidence. The WCAT acknowledged, at para. 104 of the 2017 WCAT Decision, the impact of the error made by its medical advisor but explained why, nevertheless, in weighing all the other evidence and submissions before it, it concluded the injury was not compensable. In my consideration of the application to vary Justice Hunter's order, I am unable to identify any error in the WCAT's decision or, indeed, in Justice Affleck's determination that a successful judicial review was not a reasonable possibility. The WCAT may, indeed, have reached a different conclusion but there is no real prospect that a reviewing court would find its decision to be patently unreasonable.

[24] In the result, it is my view there is no reasonable prospect that a division of this Court would extend the time to file the petition because the grounds for challenging the original 2017 WCAT Decision have not been shown to have merit.

[25] I would dismiss the application to vary the order of Justice Hunter.

[26] GROBERMAN J.A.: I agree.

[27] FITCH J.A.: I agree.

[28] GROBERMAN J.A.: The application to vary the order is dismissed.

"The Honourable Madam Justice Garson"

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