IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *King v. British Columbia (Workers' Compensation Appeal Tribunal),* 2024 BCSC 476

Date: 20240321
Docket: S2111018
Registry: Vancouver

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

Between:

Pauline King

Petitioner

And

Workers' Compensation Appeal Tribunal and Workers' Compensation Board

Respondents

Before: The Honourable Justice Iyer

On judicial review from: A decision of the Workers' Compensation Appeal Tribunal dated October 8, 2021 (WCAT Decision No. A2002257)

Reasons for Judgment

Counsel for Petitioner:	A. Henao
Counsel for Respondent, Workers' Compensation Appeal Tribunal:	I.D. Morrison
Place and Date of Hearing:	Vancouver, B.C. February 9, 2024
Place and Date of Judgment:	Vancouver, B.C. March 21, 2024

OVERVIEW

[1] The petitioner, Pauline King, applies for judicial review of a reconsideration decision made by the Workers' Compensation Appeal Tribunal ("WCAT") denying her claim for compensation for a mental disorder that she said arose out of and in the course of her employment. The key issue in this judicial review concerns WCAT's denial of Ms. King's request for an oral hearing.

BACKGROUND

Circumstances Giving Rise to Claim

[2] Ms. King is an air traffic controller. She was employed by NAV Canada ("NAV") as an international flight rules program specialist within a team of such specialists. In 2016, in response to staff shortages, NAV hired more people into these positions. Ms. King had a very difficult relationship with one of the new hires, MF. The conflict between them increased, and MF filed a harassment complaint against Ms. King.

[3] NAV investigated the complaint and found it was substantiated. Ms. King was disciplined and received workplace coaching. However, matters did not improve. Ms. King continued to complain to NAV about MF, expressing concerns for her safety.

[4] Ms. King was away from the workplace for eight months for unrelated reasons. When she returned in April 2017, she was required to attend a team meeting at which MF was present. She had a panic attack and had to leave the meeting. She went on sick leave and was subsequently diagnosed with a mental disorder.

The Claim Review Process

[5] In July 2017, Ms. King filed a claim for compensation with the Workers' Compensation Board ("WCB") under what is now s. 135 of the *Workers' Compensation Act*, R.S.B.C. 2019, c. 1 [Act][1].

[6] Section 135 provides compensation for diagnosed mental disorders that arise out of and in the course of employment caused by one or more traumatic events or significant workplace stressors. However, pursuant to s. 135(1)(c), such disorders are only compensable if:

> the mental disorder is not caused by a decision of the worker's employer relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the worker's employment.

This is known as the "employment exclusion".

[7] On March 16, 2018, the WCB denied Ms. King's claim. She sought review by the Review Division of WCB but was unsuccessful. She then appealed to WCAT.

[8] In her notice of appeal, filed November 9, 2018, Ms. King requested an oral hearing on the basis that there were conflicting versions of key events and credibility was in issue. Shortly afterwards, WCAT granted her request and advised Ms. King that it would provide her with a hearing date.

[9] The oral hearing was set initially for May 1, 2019. However, it was postponed several times for various reasons. Ultimately, on January 10, 2020, the oral hearing was set for April 15, 2020. During the period leading up to this date, both Ms. King and NAV submitted more written evidence and submissions. Ms. King reiterated the importance to her of having an oral hearing in a number of her communications to WCAT.

[1] The current version of the Act came into force on April 6, 2020, Although the former version was in force at the time of the complaints, I have referred to section numbers in the current Act for convenience. The content of the sections is unchanged.

[10] Unfortunately, the COVID-19 pandemic intervened. WCAT ceased holding in-person oral hearings but did conduct hearings by written "submissions" and by telephone or video. It is important to note that WCAT defines "submissions" to include written evidence as well as argument.

[11] On March 27, 2020, WCAT advised the parties that the WCAT panel assigned to hear the appeal ("Panel") had determined that the appeal would procced by written submission:

> The WCAT panel assigned to the above-noted appeal has determined that the appeal will now proceed by way of written submission. Once submissions are considered complete, the WCAT panel will re-evaluate the matter to determine whether an oral hearing is necessary in order to determine the issue under appeal.

The letter set a deadline for the receipt of written submissions.

[12] The parties complied with this deadline. In her written submission, Ms. King not only provided evidence and argument on the merits of her appeal, she also requested that the Panel provide a telephone hearing for the same reasons she previously expressed.

[13] In its decision, issued on June 30, 2020, the Panel gave reasons for not holding an oral hearing and dismissed Ms. King's appeal. It decided an oral hearing was unnecessary because there were no material facts in dispute and no significant issues of credibility. The Panel held that Ms. King's claim was not compensable because it fell within the employment exclusion.

[14] Ms. King sought reconsideration on the basis that the failure to hold an oral hearing was a breach of procedural fairness. The Panel dismissed Ms. King's application and affirmed the Appeal Decision on October 8, 2021. As the same Panel rendered both decisions, I refer to them collectively as the Panel decisions, specifying "Appeal Decision" and "Reconsideration Decision" as necessary.

ISSUES

[15] Ms. King challenges the denial of an oral hearing in on two grounds. First, she argues that by denying her an oral hearing, the Panel treated her oral testimony as

irrelevant to the employment exclusion, which she contends is a patently unreasonable interpretation of s. 135(1)(c). Second, Ms. King says that denying her an oral hearing breached the rules of procedural fairness.

[16] There is no dispute that the standard of review is patent unreasonableness on the first issue and fairness on the second issue: *Administrative Tribunals Ac*t, S.B.C. 2004, c. 45, s. 58(2).

ANALYSIS

Relevance of Ms. King's Testimony to the Employment Exclusion

[17] The Panel found that Ms. King's claim satisfied all of the requirements of s. 135 except for the employment exclusion. At para. 23 of the Reconsideration Decision, the Panel expressly agreed with Ms. King that "her testimony and credibility were at the heart of the original appeal" and that "mental disorders are shaped by a person's perception, reaction and experience" with respect to the elements of s. 135 other than the employment exclusion. The Panel found Ms. King's oral testimony was not necessary to decide the applicability of the employment exclusion. In the Reconsideration Decision, it wrote:

> [27] …I am not persuaded that an oral hearing would have assisted in deciding the appeal. As discussed above, the outcome of the appeal turned not on the worker's evidence, but rather on my view of the employer's actions in the context of the employment exclusion test. In particular, the worker has not provided submissions with respect to why her position with respect to the fifth test required an oral hearing. I note in this regard that the issue in considering the employment exclusion in the original appeal was not one of the worker's credibility, but rather consideration of the actions of the employer.

[18] The Panel interpreted the employment exclusion as encompassing all legitimate employment-related decisions, including those relating to working conditions, performance management and discipline. It acknowledged that the employment exclusion could be vitiated if NAV's actions were motivated by malice or ill-intent. The Panel assessed the written evidence of both parties and found, as a fact, that NAV was not so motivated: Appeal Decision at para. 55.

[19] On judicial review, Ms. King claims her oral testimony is relevant to that issue:

> [NAV]'s actions and whether they were tainted by malice or ill intent depends on whether the Petitioner's views of [NAV]'s conduct leading up to her panic attack is accepted and deemed credible.

[20] I disagree. Determining an employer's motivation in its actions towards an employee does not turn on the employee's perceptions or opinions of the employer. A finding of malice or ill-intent requires an objective analysis and objective evidence. WCAT decisions have expressly rejected the proposition that a worker's subjective perceptions and beliefs can establish malice or ill-intent. See, for example, WCAT Decision A1903316, 2020 CanLII 59980 at para. 89; WCAT Decision A2301626, 2024 CanLII 10389 at para. 57; WCAT Decision A2201353, 2022 CanLII 125694 at paras. 90, 96. This Court has taken the same approach: *De Jesus v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2023 BCSC 1320 at paras. 67-72; *Lawrence v. Workers' Compensation Appeal Tribunal*, 2023 BCSC 1695 at paras. 121-129.

[21] As Ms. King acknowledges, the Panel considered the written evidence of both parties in makings its findings of fact as to whether NAV was motivated by malice or ill-intent. The Appeal Decision gave reasons based on those findings in concluding that NAV was not motivated by malice or ill-intent. Hearing Ms. King's oral testimony on this issue could only have provided the Panel with her subjective perceptions and beliefs, evidence that could not have made a difference to its analysis of this issue.

[22] I conclude that the Reconsideration Decision was not patently unreasonable in finding that it was unnecessary to hear Ms. King's oral evidence on the employment exclusion.

Procedural Fairness

[23] Ms. King says that denying her an oral hearing was procedurally unfair in three ways. First, Ms. King claims her right to notice was infringed because the Panel did not notify her that there would be no oral hearing before it adjudicated on the merits of the appeal. Second, by having initially decided to hold an oral hearing,

Ms. King says procedural fairness required the Panel to give more fulsome reasons for proceeding by written hearing. Third, Ms. King says the reasons given breached procedural fairness by relying on the outcome of the appeal as the justification for its choice of appeal method.

[24] Before turning to those arguments, I note that Ms. King does not challenge the fairness of the appeal method determination process set out in the WCAT Manual of Rules of Practice and Procedures ("MRPP"). It is in this context that her procedural fairness claims must be assessed.

[25] Section 7.5 of the MRPP provides that WCAT may conduct appeals orally (whether in-person, electronically or by telephone) or in writing. Requests for oral appeals will normally be granted when there are significant credibility or factual issues. The registrar's office usually makes an initial determination about the appeal method, but the hearing panel makes the final determination. As well, a panel that has selected one method may subsequently decide to change the appeal method. In particular, even if "an oral hearing has been scheduled, the panel may conclude that an oral hearing is not necessary to its decision and proceed by written submissions."

[26] This process makes sense because, as it did in this case, WCAT continues to accept evidence and submissions from the parties after an initial appeal method has been chosen by the registrar and even after a hearing panel has made its determination. It is entirely possible that the issues will narrow as more evidence is submitted, and this may obviate the need for an oral hearing.

[27] Turning to notice, I find that WCAT notified Ms. King of how the Panel intended to, and did, proceed with respect to appeal method. In its letter of March 27, 2020, WCAT advised the parties that the hearing would proceed by written submissions and set a deadline for submission of evidence and argument. The letter said that the Panel would consider whether an oral hearing was needed after the Panel had received all evidence and submissions. Nothing in the letter said or implied that the parties would be given a further opportunity to address that issue, nor that they would be notified before that determination was made. The only

expectation the letter created was that the parties would be notified if the Panel decided it needed to hear oral evidence.

[28] I find there was no breach of the right to notice. WCAT did not represent to the parties that it would notify her that there would be no oral hearing before adjudicating the merits of the appeal, and it acted consistently with the MRPP provisions for appeal method.

[29] Ms. King's second and third claims of procedural fairness arise from the reasons the Panel gave for deciding the appeal without an oral hearing. The Appeal Decision explains, under the heading "Appeal Path":

> [10] The worker requested an oral hearing of this appeal. The WCAT Registry staff made a preliminary determination that an oral hearing was required. I find that I can decide the issues in this case without an oral hearing because I have determined that there are no material facts in dispute and there are no significant issues of credibility or other compelling reasons for an oral hearing. Rather, the appeal primarily involves the application of law and policy to evidence already on file. The worker's claim file is well documented and detailed.
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> [11] I note, too, that there was a significant delay in the appeal proceedings, initially due to an extensive discovery of documents process, then due to scheduling conflicts and lastly due to the impact of the COVID pandemic. I decided that this matter should proceed by way of written submissions, rather than delay the matter further. I note in this regard that WCAT has statutory timelines for appeal decisions and those timelines have been exceeded in this proceeding. Having considered these specific proceedings, I find that an oral hearing is not necessary for the full and fair adjudication of this appeal.
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> (see also Reconsideration Decision at para. 22)

[30] On reconsideration, the Panel summarized Ms. King's submissions on this issue, noting her reliance on three cases: *Squires v. British Columbia (Workers' Compensation Appeal Tribunal),* 2011 BCSC 556, *Campbell v. Workers' Compensation Board*, 2012 SKCA 56 and *Weiss v. Worker's Compensation Appeal Tribunal*, 2021 BCSC 231. The Panel wrote:

> [25] I am not persuaded by the worker's submissions with respect to the decisions in *Squires*, *Campbell* and *Weiss*. The original decision was not a case where I did not provide reasons for the change of appeal path. I provided reasons, noting the sufficiency of the evidence and the procedural delays. In this regard, I acknowledge the tension between the doctrine of legitimate expectation with respect to the original appeal path and the

> statutory context of WCAT decision-making (requiring WCAT to render a merit decision within 180 days). Pursuant to item #6.4 of the MRPP, the 180-day time frame to render the decision starts once WCAT receives the Board's records (which is determined by the disclosure certificate). The disclosure certificate in the worker's original appeal was dated January 8, 2019. The original decision was issued on June 30, 2020, a period of 539 days, far in excess of the statutory 180 days.

[31] Ms. King cites no authority for the proposition that deciding not to hold an oral hearing after initially deciding to do so imposes a higher bar for the sufficiency of reasons. While WCAT decisions attract a relatively high degree of procedural fairness (*Djakovic v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2010 BCSC 1279 at paras. 44-48), Ms. King does not challenge in general the process that the MRPP sets out for determining appeal method. Importantly, she has not explained what was missing from the Panel's reasons for proceeding by a written and not an oral hearing. I find that the Panel explained its reasons sufficiently.

[32] In my view, the core of Ms. King's procedural fairness claim is not about notice or how fulsome the reasons for denying an oral hearing were; it is about the reasons the Panel gave. Ms. King argues:

> The WCAT Decision justified the denial for an oral hearing based on the outcome of the Merit Decision rather than pre-decision considerations. Vice Chair Clarke reasoned that "an oral hearing was unnecessary to fully consider the worker's 'perception, reaction, and experience' with respect to the first four tests in the applicable policy as I found in the worker's favour on those points" [para. 27 of Reconsideration Decision]. But as the Court reasoned in *Weiss*, assessing procedural fairness based on how WCAT eventually chose to decide the case is not the proper approach. The Court in *Weiss* goes on to say (at para 74),
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> > The process will be established by the tribunal before the merits result is known. A tribunal should not generally receive a "pass" on establishing an unfair procedure simply because its final analytical path may bypass the effects of depriving the petitioner of a fair procedure.

[33] Ms. King points to the phrase "as I found in the worker's favour on those points" as signifying that the Panel was relying on the outcome of its decision on the merits as the justification for its choice of procedure.

[34] However, read in the context of the whole paragraph, the Panel is not justifying its choice of procedure by the outcome of the appeal, it is saying that it

determined, as its letter of March 27, 2020, had said it would, that the written evidence already submitted was sufficient to decide the merits, so an oral hearing was not necessary:

> [27] Further, and in reconsidering the worker's submissions in this reconsideration on the merits of the original decision, I am not persuaded that an oral hearing would have assisted in deciding the appeal. As discussed above, the outcome of the appeal turned not on the worker's evidence, but rather on my view of the employer's actions in the context of the employment exclusion test. In particular, the worker has not provided submissions with respect to why her position with respect to the fifth test required an oral hearing. I note in this regard that the issue in considering the employment exclusion in the original appeal was not one of the worker's credibility, but rather consideration of the actions of the employer. As noted above, an oral hearing was unnecessary to fully consider the worker's 'perception, reaction and experience' with respect to the first four tests in the applicable policy as I found in the worker's favour on those points. Lastly, I also note that the worker's submissions in the original appeal did address the employment exclusion test and thus it cannot be said that she was deprived of an opportunity to speak to the issue.

[35] Based on the written evidence submitted, the Panel was able to determine that Ms. King's credibility was not in issue and that material facts were not in dispute. As the Panel explained, the reason Ms. King's credibility was not in issue was because it did not doubt her credibility on any credibility-related issues. While the phrase "as I found in the worker's favour on those points" could be construed as based on outcome, the context of the paragraph demonstrates that the Panel was not referring to the outcome of the appeal, but to its preliminary assessment of the sufficiency of the evidence to determine the need for an oral hearing.

[36] The situation in this case is unlike that in *Weiss*. There, the Court found that even though the panel had assumed that the petitioner was an employee, an issue that did engage her credibility, her credibility was also relevant to a second issue, which was whether she was in the course of employment at the time of the accident: *Weiss* at para. 76. Having found that credibility was relevant to an issue the panel had to decide, the Court concluded it was procedurally unfair to deny the petitioner an oral hearing.

[37] *Squires* and *Campbell* do not assist Ms. King because they were cases where the hearing panel gave virtually no reasons for denying an oral hearing despite acknowledging that credibility issues were central.

[38] I conclude that WCAT did not breach the rules of procedural fairness.

[39] In the alternative, if I am wrong in this conclusion, this is one of the rare situations discussed in *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202 at 228, 1994 CanLII 114 (S.C.C.), where a court disregards a breach of procedural fairness because it could not possibly have made a difference to the outcome of the case on review: see also *Boone v. Jones*, 2023 BCCA 215 at para. 49; *Mountainstar Gold Inc. v. British Columbia Securities Commission*, 2022 BCCA 406 at para. 56. Having sustained the Panel's conclusion that Ms. King's credibility was not in issue because the appeal turned on the employment exclusion, remitting the matter to WCAT to hold an oral hearing would be futile.

CONCLUSION

[40] The application for judicial review is dismissed without costs to either party.

"Iyer J."