

C.S. v. British Columbia (Workers' Compensation Appeal Tribunal)

Decision Summary

Court	B.C. Court of Appeal
Citation	2019 BCCA 406
Result	Appeal dismissed
Judges	Madam Justice Dickson, Madam Justice Bennett, Madam Justice MacKenzie
Date of Judgment	November 19, 2019
WCAT Decision Reviewed	WCAT-2014-02791

Keywords:

Judicial review – Charter challenge – Patent unreasonableness – Section 5.1 of the Workers Compensation Act– Policy item #C3-13.00 of the Rehabilitation Services Claims Manual Vol. II – bullying and harassment – labour relations exclusion

Summary:

The appellant, C.S. was employed as a cardiology technician in a private clinic; her duties included performing stress tests and electrocardiograms on patients. The appellant had an ongoing conflict with a co-worker at the clinic which the employer had attempted to resolve. The appellant also had a pre-existing mental disorder, and in November 2012 sought and obtained an accommodation from her employer that she would not perform more than eight stress tests per day. Following events on March 13, 2013, which are described in more detail below, the appellant left her employment.

The appellant made a claim for compensation for a mental disorder with the Workers' Compensation Board of British Columbia (the "Board"). She said that her mental disorder was caused or aggravated by; bullying and harassment by a co-worker, poor treatment from her employer, and the employer repeatedly breached an agreement that she would not perform more than five stress tests in a row. The Board denied the appellant's claim. The appellant then requested a review from the Review Division of the Board. The Review Division dismissed the request for review. The appellant appealed to WCAT.

Before WCAT, the appellant argued that she had been bullied and harassed by her co-worker, the employer's failure to accommodate her five in a row request (or to stick to an agreement on this point) was traumatic and threatening in the circumstances, and that the employer's refusal on March 13, 2013 to accommodate a "no five in a row" request was the final straw.

WCAT found that, while the co-worker's conduct was unpleasant, it did not rise to the level of bullying and harassment and that the employer's conduct, and in particular the events occurring on March 13, 2013 fell under the "labour relations exclusion" in section 5.1(1)(c) of the *Workers Compensation Act* (Act). WCAT denied the appeal.

The appellant brought a judicial review of the WCAT decision. The judicial review was dismissed by Mr. Justice Saunders in 2018 BCSC 778. Relevant to the issues raised in the appeal, Saunders J. declined to hear the appellant's *Charter* argument regarding section 5.1 of the Act and policy item C3-13.00 of the *Rehabilitation Services and Claims Manual*, vol. II, and her argument that the accommodation agreement had been breached when she repeatedly performed more than eight stress tests per day, as these issues were both raised for the first time on judicial review. Saunders J. also found that WCAT's findings of fact were supported by the evidence, and therefore must be given deference by the Court.

The appellant appealed the Supreme Court decision to the Court of Appeal.

The Court, in reasons issued on November 19, 2019, first addressed a number of preliminary issues. The appellant had submitted fresh evidence in support of her appeal. This evidence had not been provided to the chambers judge in the court below, and was not before WCAT. Applying the test for admission of fresh evidence from *Palmer v. The Queen*, [1980] 1 S.C.R. 759, the Court found that the evidence was not admissible in the appeal.

Second, the appellant and her former employers applied for an anonymity orders. The appellant had also applied for an order sealing the entire court file. The Court granted the anonymity orders, but only partially granted the sealing order.

Finally, the appellant challenged WCAT's standing in the appeal. The Court found that where there is no other respondent willing and able to defend the merits of an administrative decision, it is appropriate, as a general rule, to permit a tribunal to argue the merits of its own decision.

With respect to the merits of the appeal, the Court found that the chambers judge's decision not to address the appellant's section 15 *Charter* argument and her argument regarding eight stress tests per day was a discretionary decision entitled to deference (i.e. reviewable on the standard of palpable and overriding error). On this deferential standard, the Court found that the chambers judge did not err when he declined to address the new issues on judicial review.

The Court found that although the appellant had referred to discriminatory treatment before the Review Division and Board, she did not explicitly challenge the constitutionality of section 5.1 of the Act and policy item C3-13.00. Furthermore, the appellant did not argue to WCAT that the Review Division had erred because it failed to address a constitutional issue. In these circumstances, the chambers judge's finding that the appellant raised the constitutional issue for the first time on judicial review was unassailable on appeal. Finally, the chambers judge applied the correct principles when he declined to consider the constitutional issue for the first time on judicial review. The Court dismissed this ground of appeal.

The appellant argued that the employer had repeatedly and intentionally breached the accommodation agreement of eight per day. The Court found no palpable and overriding error in the chambers judge's finding that the appellant did not advance her claim before WCAT on this basis, and dismissed this ground of appeal.

The appellant argued that the Board, WCAT, and the chambers judge failed to apply the *Human Rights Code*. The Court found that this argument was unclear, but declined to consider it in any event as it was a new issue on appeal. This is because the Court generally does not hear new issues on appeal without a proper record developed in the designated forum of first instance.

The appellant argued that WCAT was patently unreasonable because the employer's intentional and egregious breaches of her accommodation agreement amounted to targeted harassment, such that they were not subject to the exclusion in section 5.1(1)(c) of the Act. The Court reviewed WCAT's decision in light of the submissions that were made to it, and found that its decision was not clearly irrational.

Finally, the appellant argued that WCAT was unfair because she was not interviewed by the Board. The Court found that the appellant had failed to demonstrate a breach of procedural fairness. The evidence on the record showed that the appellant had in fact been interviewed by the Board, and in any event she was provided an opportunity to testify before WCAT.

In the result, the Court dismissed the appeal.