Pastega v. Insurance Corporation of British Columbia

Decision Summary

Court	B.C. Supreme Court
Citation	Oral reasons for judgment, New Westminster Registry No. S-214841
Result	Petition dismissed
Judge	Mr. Justice Brongers
Date of Judgment	October 31, 2022, as amended on March 21, 2023
WCAT Decision Reviewed	WCAT Decision No. A1800306 (March 13, 2019)

Keywords

Judicial review – Section 5.1 (now section 135) of the Workers Compensation Act – Policy item # C3-13.00 ("Re: Section 5.1 – Mental Disorders") of the Rehabilitation Services and Claims Manual Vol. II – Policy item #C3-14.00 ("Re: "Arising Out of and In the Course of the Employment") of the Rehabilitation Services and Claims Manual Vol. II – "Arising out of and in the course of" requirement

Background to the Workers' Compensation Appeal Tribunal ("WCAT") decision

The worker (Ms. Pastega) was a claims adjuster with ICBC. She was diagnosed with a mental disorder. She made a claim for compensation to the Workers' Compensation Board (the "Board"), alleging that she had been bullied by her co-workers, both in the workplace and through social media, and that that had caused her mental disorder. The Board denied her claim, and the Review Division upheld the Board's decision. The worker appealed to WCAT.

In its decision numbered A1800306 (March 13, 2019), ("the WCAT Decision"), WCAT found that the diagnostic requirement in section 5.1 (now section 135) of the *Workers Compensation Act*, [R.S.B.C. 1996], c. 492 (the "*Act*") was met (para 118), and that the worker had identified certain events (including the social media activities) as stressors (para 121). The panel found that two episodes of social media activity (namely, two separate posts on Facebook, made by the worker's co-workers, on September 17, 2015) constituted bullying and harassment, and therefore significant stressors (paras 158, 159, 161, 192). The panel accepted that these posts were, at least in part, about the worker and events in the office that took place that day (para 152).

The WCAT panel then turned to the question of whether these significant stressors

arose out of and in the course of the worker's employment. In considering whether the stressors "arose in the course of the worker's employment", the panel applied the test from Part D of the version of Board policy C3-13.00 in effect at the time (the "Mental Disorder Policy"). That test asks whether the "significant stressor … happened at a time and place and during an activity consistent with, and reasonably incidental to, the obligations and expectations of the worker's employment." The panel said that it also found Board policy C3-14.00 ("Re: Arising Out of and In the Course of the Employment") to be of assistance in considering this issue (para 193).

The panel found that the social media posts were created by the worker's co-workers between 8:54 pm and 11:36 pm, on September 17, 2015, that is, after regular work hours. There was no indication that the co-workers were using work computers to post the social media comments. Thus, the social media postings were created at a time and place that was inconsistent with the worker's employment (para 194).

The panel found it most likely that use of the social media platform was not part of the job duties of the worker, or her co-workers. The worker's co-worker used her phone to check the social media site on October 8, 2015, although she was in the office at the time. From this the panel inferred that the use of the social media platform at work, on work computers, was either expressly prohibited by the employer or discouraged (para 195). The worker viewed some of the postings during work hours, and in the office, on October 8. However, she looked at the postings to satisfy her own curiosity about what her co-workers had posted about her, not for the benefit of the employer (para 196). The panel found that this activity was therefore not part of the worker's employment, or reasonably incidental to her work obligations and expectations (para 196). The worker did not need to address the postings as part of her employment obligations (para 200).

Thus, pursuant to the test in the Mental Disorder Policy, the social media posts (the significant stressors in the worker's claim) did not arise out of and in the course of the worker's employment. For that reason, the worker's claim for compensation for a mental disorder failed under section 5.1 of the *Act* (para 200). It was not necessary for the panel to go on to consider the second part of the causation requirement, namely, whether the significant stressors were the predominant cause of the worker's mental disorder (para 201).

Reasons of the B.C. Supreme Court

The court found that the WCAT Decision was not patently unreasonable. It characterized the petitioner as raising four grounds for review of the Decision. It dismissed all of these grounds for review.

First, the court said that WCAT's interpretation of section 5.1 of the *Act*, and the Mental Disorder Policy, was to the effect that bullying and harassment by social media was excluded from coverage, if the social media was used outside of work time, and outside the workplace. The court found that this was not a patently unreasonable interpretation of the *Act*, or of the Mental Disorder Policy. It was not clearly irrational, nor did it border

on the absurd, to find that personal conduct on semi-private platforms, when not related to job functions, was excluded from coverage under the *Act*.

Second, the court found that the fact that the worker's co-worker used her phone to check social media while at work constituted some evidence to support the panel's finding that the employer either expressly prohibited or discouraged social media use at work. Therefore, this finding was not patently unreasonable.

Third, the court found that, given that policy C3-14.00 addresses the "arising out of and in the course of employment" test, it was not patently reasonable for the panel to look to this policy when considering whether the significant stressors arose out of and in the course of the worker's employment, notwithstanding the fact that that policy is predominantly intended to apply to personal injuries. Also, both the Mental Disorder Policy and policy C3-14.00 indicate that they are the "principal" policies to be applied, they do not state that they are the only policies to be applied to mental disorder claims, and personal injury claims, respectively. In the excerpts from the legislative debates in *Hansard* at the time of the expansion of section 5.1 (in 2011), the government indicated that mental disorders are to be treated as personal injuries. Thus, the tribunal's consideration of policy C3-14.00 is consistent with this legislative intention.

Finally, the court found that in finding that the worker did not need to address the postings as part of her employment obligations, the WCAT panel was simply finding that there was no work-related need for the worker to address the social media posts. The tribunal did not make a finding about whether the worker had an obligation to report bullying and harassment pursuant to section 116 of the *Act* (now section 22) and the associated health and safety policies. The court essentially found that the petitioner's reliance on section 116 of the *Act* did not give rise to reviewable error in the WCAT Decision.

The court dismissed the petition, with the result that the WCAT Decision is upheld.