COURT OF APPEAL FOR BRITISH COLUMBIA

Date: 20120215
Docket: CA039639

Between:

Ingrid Andrea Franzke

Appellant
(Petitioner)

And

Workers' Compensation Appeal Tribunal

Respondent
(Defendant)

Before: The Honourable Madam Justice Neilson
(In Chambers)

On appeal from: Supreme Court of British Columbia, August 23, 2011
(*Franzke v. Workers' Compensation Appeal*, 2011 BCSC 1145,
Vancouver Registry S081893)

Oral Reasons for Judgment

Counsel for the Appellant: J. Corbett

Counsel for the Respondent: G.A. Urquhart, Q.C.
C. Peana

Place and Date of Hearing: Vancouver, British Columbia
February 14, 2012

Place and Date of Judgment: Vancouver, British Columbia
February 15, 2012

(extension of time to appeal)

[1] **NEILSON J.A.**: The applicant seeks an order extending the time for filing and serving her notice of appeal pursuant to s. 10(1) of the *Court of Appeal Act,* R.S.B.C. 1996, c. 77. She wishes to appeal the decision of a chambers judge who, on judicial review, upheld earlier decisions of the Workers' Compensation Appeal Tribunal (the "WCAT") that found her action against the respondents Northern Industrial Carriers ("NIC") and Bradley Flowers, arising from a motor vehicle accident, was barred by s. 10 of the *Workers Compensation Act*, R.S.B.C. 1996, c. 492 (the *"Act"*), as the applicant was a worker at the time of the accident and her injuries arose out of and in the course of her employment: 2011 BCSC 1145.

[2] The factors governing an application to extend time are set out in *Davies v. Canadian Imperial Bank of Commerce* (1987), 15 B.C.L.R. (2d) 256 (C.A.) at 259-260:

a) Was there a *bona fide* intention to appeal?
b) When was the respondent informed of that intention?
c) Would the respondent be unduly prejudiced by the extension of time?
d) Does the appeal have merit?
e) Would it be in the interests of justice to grant the extension?

[3] The parties agree the applicant satisfies the criteria I have listed as a, b, and c. The central issues are whether the proposed appeal has merit, and if it would be in the interests of justice to grant the extension. The onus with respect to those matters rests on the applicant. The test for establishing merit is not stringent, and requires only that she establish the appeal is not bound to fail: *Boaler v. Brar* (1997), 88 B.C.A.C. 243 at para. 8.

Background

[4] On February 9, 1999 the applicant left her work in the early afternoon due to her anxiety related to an ongoing snowfall. On the way home she was injured when her vehicle collided with a vehicle driven by Mr. Flowers and owned by NIC.

[5] On February 11, 1999 the applicant gave a statement to an adjuster investigating the accident. This read:

> On the afternoon in question it had been snowing. I didn't want to drive in the chaos of rush hour and snow. I decided to leave work early, and informed my boss... I took some files home with me and I planned on working from home that day and at least the next day.

[6] She commenced an action against NIC and Mr. Flowers on November 24, 2000. She later responded to interrogatories issued by the respondents.

[7] The respondents did not raise the application of s. 10 of the *Act* until July 9, 2007 when they applied to the WCAT for a determination as to whether the applicant was a worker and the injuries she sustained in the accident arose out of and in the course of her employment, pursuant to s. 257 of the *Act*.

[8] In August 2007 the WCAT wrote to counsel for both parties requesting copies of relevant material, including discovery transcripts and any other statements related to the accident.

[9] While the hearing before the WCAT was pending, the defendants examined the applicant for discovery on October 26, 2007. On discovery she stated she took her files home in case she was snowed in as then she would have some work to do at some point, depending on what happened with the weather. Despite the WCAT's request, the transcript of her discovery was not sent to the Tribunal prior to its decision.

[10] On January 29, 2008 the WCAT decided the applicant was a worker pursuant to the *Act*, and the injuries she sustained in the accident arose out of and in the course of her employment (the "Initial Decision"). As a result, the applicant's action against the respondents was barred by s. 10 of the *Act.* In reaching its conclusion, the WCAT relied on policy 18.32 of the Rehabilitation Services and Claims Manual, which states:

> Where the worker terminates productive activity at one point and is required to commence productive activity at another point, travel between these points

> is part of the employment and is in the course of employment as long as the worker is travelling reasonably directly ... .

[11] The applicant applied to the WCAT for reconsideration of the Initial Decision. On August 20, 2009 the WCAT reconsidered that decision and upheld it (the "Reconsideration").

[12] The applicant filed a petition for judicial review seeking to quash both the Initial Decision and the Reconsideration. Her petition was dismissed on August 23, 2011. She now wishes to appeal that decision, and says the chambers judge erred in three respects:

1) in upholding the inference drawn by the WCAT in the Initial Decision that the applicant was required to work at home on the day of the accident;

2) in finding it was appropriate for the WCAT to determine the matter without reference to the applicant's examination for discovery; and

3) in finding it was appropriate for the WCAT to reach its determination without considering the last six words of her February 11, 1999 statement.

1. Did the chambers judge err in upholding the inference drawn by the WCAT in the Initial Decision that the applicant was required to work at home on the day of the accident?

[13] The first ground of appeal arises from the following findings at pp. 10-11 of the Initial Decision:

> In this case, the plaintiff decided to go home to work due to her concerns about the weather. Accordingly, her change of location was motivated by personal reasons but there is no evidence that she intended to do anything other than work for the rest of the day. In addition, under her employment agreement, she was paid to work 7.5 hours per day. There is very little direct evidence from the plaintiff and none from the employer on this point but, based on the evidence that she has provided, I have inferred that she was required to work when she got home unless other arrangements had been made.
>
> ...

> Does the fact that the journey was made for personal reasons take the plaintiff outside of the course of her employment for the duration of her journey? I have considered whether the journey between her office and her home should be considered a form of personal deviation because it was motivated by personal reasons. Had the plaintiff gone home without advising her employer, she may well have taken herself out of her employment by going home to work. However, that is not the case. Her employer was aware that she was going home and must have permitted her to leave at that time of day. ... Generally speaking, when a worker undertakes an activity on his or her own initiative but that action is tacitly permitted by the employer, the worker remains in the course of their employment. As a result, I consider that the policy at item #18.32 is applicable and has the effect of bringing her journey home within the course of her employment.

[14] These findings were upheld in the Reconsideration.

[15] The chambers judge dealt with this issue at paras. 83-91 of her decision. She acknowledged the applicant's argument that nothing in the evidence supported the view that she had been "required" to work when she got home on February 9, 1999 and so her drive home was not in the course of her employment. The chambers judge properly framed the issue as whether there was evidence before the WCAT to support its findings and, if so, acknowledged it was not her role to reweigh that evidence. At paras. 90-91 of her decision she set out the evidence before the WCAT in the proceeding that led to the Initial Decision, and her conclusion:

> [90] In that regard, the following was in evidence:
>
> - On February 11, 1999, two days after the accident, Ms. Franzke stated she intended to work at home that day.
> - In 2007, she said, in answer to interrogatories, that she took files home because she might not make it into the office for a few days because of snow.
> - Ms. Franzke undertook her journey home during paid time.
> - This was not a regular commute at the end of the day.
> - The employer did not object to her leaving early.
> - The work she intended to perform was for the employer's benefit.
> - When she worked at home, she worked at her dining room table as she did not have a home office.
> - Ms. Franzke worked at home on previous occasions.
> - Ms. Franzke stated in her reply to interrogatories that her usual hours of work were 37.5 hours per week.

> [91] In my view, the true substance of what Ms. Franzke seeks is to have this Court reconsider the evidence. But that is not the function of the Court on judicial review. As noted, the question is whether there was evidence to support the finding. I conclude there was evidence on which the findings of the Vice Chair could reasonably be based. The Original Decision in this report was not therefore patently unreasonable. The weight given to the 1999 Statement was a matter for the original tribunal. As the Original Decision survived scrutiny in this regard, it follows that the Reconsideration Decision in this respect is correct.

[16] The applicant says that if she is permitted to pursue her appeal she will argue that the chambers judge erred in finding the evidence supported the inference drawn by the WCAT in the Initial Decision that her employer required her to work at home for the balance of the day on February 9, 1999. She says there was other evidence that supported an inference that she was not required to embark on employment activity at home and thus did not fall within policy 18.32. In essence, she complains the WCAT chose one inference over another in the face of contradictory evidence. She characterizes this as a breach of procedural fairness.

[17] I am unable to agree with that characterization of this issue, or with the view there is merit in this ground of appeal. As the chambers judge noted at para. 83 of her reasons, this is in essence an allegation that the WCAT panels misapprehended the evidence and gave undue weight to the applicant's statement of February 11, 1999. Such an allegation raises questions of fact, rather than procedural fairness. I am satisfied the chambers judge's approach was correct. She reviewed the evidence before the WCAT and concluded there was evidence that supported its findings. It was for the fact-finder to test the reliability and credibility of any conflicting evidence, and ultimately choose the proper inference to be drawn. The fact that it chose an inference unfavourable to the applicant is insufficient to provide a meritorious ground of appeal. I discern no basis on which a division of this Court would interfere with the findings of the chambers judge on this point.

2. Did the chambers judge err in finding it was appropriate for the WCAT to determine the matter without reference to the applicant's examination for discovery?

[18] The applicant argues the chambers judge erred in failing to find the WCAT breached the principles of natural justice in proceeding with both the Initial Decision and the Reconsideration without considering her evidence from her examination for discovery. She points out the discovery was conducted after the s. 10 issue arose, and her evidence there was directly related to this issue, which had not arisen when she made her statement in 1999. As well, she points out that policy 20.31 states that transcripts from examinations for discovery should be provided to the WCAT, and that the WCAT wrote to the parties in July 2007 and specifically asked for transcripts from discoveries. She maintains that when these were not produced at the proceedings, there was an onus on the WCAT to obtain them, or on the respondents, who had conducted the discovery, to produce them.

[19] The Reconsideration dealt with this complaint insofar as it related to the Initial Decision at paras. 87 and 88 of its determination:

> I do not find these arguments persuasive, in terms of establishing that the WCAT decision was patently unreasonable, or that WCAT failed to act fairly. All counsel had knowledge of the examination for discovery, and failed to advise the WCAT panel that it had been conducted. Even if counsel for the plaintiff and for ICBC considered that they were constrained from submitting the examination for discovery transcript, they could have alerted the WCAT panel to its existence and sought direction from the WCAT panel. Alternatively, counsel could have furnished affidavit evidence by the plaintiff, to ensure that the evidence before the panel was complete. In this case, the plaintiff refrained from providing additional evidence, or providing any detailed responses or affidavit evidence in response to the written interrogatories...
>
> The parties were given the opportunity to provide all relevant evidence and submissions. WCAT's general practice of receiving such evidence for consideration was clearly communicated to the parties. This was not a situation in which WCAT indicated an unwillingness to receive the discovery transcript, in which this evidence was submitted but was overlooked by the WCAT panel, or in which it was not foreseeable that the examination for discovery evidence would be relevant. No request was made to WCAT for additional time to provide the transcript. I find there was no denial of a fair hearing, or denial of natural justice, resulting from the fact that no counsel provided WCAT with the examination for discovery transcript.

[20] In considering this argument on judicial review, the chambers judge observed the critical time frame was the period from the time the s. 10 application was made until the Initial Decision was delivered. She found that throughout this period the applicant was aware of the issues, and the evidence and submissions presented by the other parties. As well, she was given the opportunity to provide evidence and make submissions in reply to those. The chambers judge concluded there was no denial of natural justice, stating:

> [117] In my view, it cannot be said that Ms. Franzke at the relevant time did not know the case she had to meet. She was aware of the evidence before the tribunal by virtue of being copied with the correspondence and submissions. She was made aware of the policies and procedures of WCAT and of the tests to be applied. Nor can it be said that Ms. Franzke did not have the opportunity to present her case. She had the opportunity to present evidence to supplement or clarify the February 1999 statement and interrogatories but elected not to do so. In addition, it was her election, through her counsel, to rely upon counsel's statement of facts instead of providing further evidence. She had the opportunity to file reply submissions, but elected not to.
>
> [118] Counsel now characterizes the discovery transcript as critical evidence, but this characterization is tempered by the fact that counsel elected to make no submissions with respect to this evidence at the time. Counsel noted in oral submissions that had WCAT given sufficient weight to counsel's statements of facts, the discovery transcript would not be critical. This really amounts to the application of hindsight to tactical decisions made during the course of litigation. It is not however an indicator of a hearing that was unfair or resulted in a denial of natural justice.

[21] I am satisfied there is no basis on which this Court could or would interfere with those findings. The applicant was aware she had been examined for discovery and her counsel had a copy of the transcript. It is undisputed that there was full disclosure of the evidence and submissions made by the respondents at the Initial Decision and the Reconsideration. The applicant did not dispute that she could have responded to these. I am satisfied this proposed ground of appeal does not meet the necessary standard to justify an extension of time.

[22] I note the applicant also argues the chambers judge erred in applying the wrong standard of review to this argument. Given my view of the merits, I do not find it necessary to address the standard of review as, in my opinion, this argument would have failed on any standard applied by the chambers judge.

3. Did the chambers judge err in finding it was appropriate for the WCAT to reach its determination when the WCAT was not clear on an aspect of her statement?

[23] The applicant complains that both of the WCAT panels failed to consider the last part of her statement of February 11, 1999, which indicated not only that she planned on working from home on February 9, but also "at least the next day". She argues the WCAT thus decided an essential issue without the benefit of all the evidence, contrary to the principles of natural justice. She maintains that the fact she planned to also work on the files the next day adds a significantly different colour to the evidence and supports her argument that she took the files home only as a precaution against being unable to get to the office for several days due to the snow.

[24] With respect, even if that phrase eluded the WCAT panels, I am not persuaded the applicant could establish on an appeal that these words would have had a decisive impact and led to a different result on the s. 257 determination, or on the judicial review.

Conclusion

[25] I am driven to the conclusion that none of the proposed grounds of appeal has sufficient merit to meet the test required for an extension of time. If the applicant were permitted to bring this appeal, I am satisfied it would be bound to fail. It follows that it would not be in the interests of justice to grant the extension and permit the appeal to proceed. The application is accordingly dismissed.

The Honourable Madam Justice Neilson