Johnson v. British Columbia (Workers' Compensation Board)

Decision Summary

Court	B.C. Court of Appeal
Citation	2011 BCCA 255
Result	Appeal Allowed, BCSC Order Set Aside, Petition Dismissed
Division	Madam Justice Ryan, Mr. Justice Low, Madam Justice Neilson
Date of Judgment	June 2, 2011
WCAT Decision(s) Reviewed	2005-03622-RB
BCSC Judgments	Johnson v. Workers' Compensation Board, 2007 BCSC 1410; Johnson v. British Columbia (Workers' Compensation Board), 2009 BCSC 877; Johnson v. Workers' Compensation Board, 2009 BCSC 1931

Keywords:

Appeal – Judicial Review – Exhaustion of Internal Remedies – Adequacy of Internal Remedy – Appeal Procedure – Availability of Appeal of Preliminary Order of the BCSC

Facts:

On September 21, 2001, the Workers' Compensation Review Board allowed Mr. Johnson's claim for wage loss benefits regarding a 1999 period of disability. Before the amount of Mr. Johnson's benefits was assessed by the Workers' Compensation Board, operating as WorkSafeBC (Board), the Panel of Administrators (at that time the governing body of the Board) passed a Policy Resolution creating the "New Interest Policy" which became effective November 1, 2001. Under the prior interest policy, a person in Mr. Johnson's position would have been awarded interest on retroactive benefits. Under the New Interest Policy, interest is payable on retroactive benefits awarded by the Board only where the delay is due to "blatant Board error." The Board awarded Mr. Johnson $18,864.83 for time lost from work between March 1999 and November 1999. However, the decision whether to award Mr. Johnson interest on this amount was not made by the Board until after November 1, 2001. Applying the New Interest Policy, the Board did not award any interest on this retroactive benefit.

Mr. Johnson appealed this decision to the Review Board. Under the transition provisions of the *Workers Compensation Amendment Act No. 2*, this appeal became a Workers' Compensation Appeal Tribunal (WCAT) appeal and a precedent panel was appointed to consider whether the Board decision not to award interest amounted to a retroactive operation of the New Interest Policy.

On July 8, 2005, WCAT decided that in Mr. Johnson's case, the New Interest Policy operated retrospectively, not retroactively, and therefore was not so patently unreasonable that it could not be supported by the *Workers Compensation Act* (Act) and its regulations. WCAT also found that under the

New Interest Policy, the Board had committed no blatant Board error and therefore Mr. Johnson was not entitled to interest.

On September 6, 2005, Mr. Johnson sought judicial review of the WCAT decision on the basis that WCAT's finding that the New Interest Policy was not retroactive was patently unreasonable. On August 17, 2006, Mr. Johnson amended his Petition alleging the New Interest Policy was contrary to section 5 of the Act and that the "blatant Board error" test effectively made the New Interest Policy a "No" Interest Policy. This argument had not been pursued in the WCAT appeal although there was a brief statement in one of the submissions to that effect.

In January of 2007, the Petition was certified as a class action under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50. The common issues in the proceeding were declared to be: 1) whether the New Interest Policy is patently unreasonable in light of section 5 of the Act and, 2) whether the New Interest Policy is retroactive and *ultra vires* the statutory authority of the Board. On February 5, 2007, the Board appealed the certification order. WCAT took no position in this appeal. On October 17, 2008, this appeal was adjourned by the BC Court of Appeal (BCCA) pending the outcome flowing from the appeal on the merits (see below).

On September 26, 2007, the BC Supreme Court (BCSC) granted Mr. Johnson's Petition on the basis that WCAT was patently unreasonable when it failed to find the New Interest Policy inconsistent with section 5 of the Act. The BCSC found it unnecessary to deal with the retroactivity argument. The BCSC ordered that the matter be returned to the WCAT Precedent Panel to reconsider Mr. Johnson's appeal "in light of the determination that the New Interest Policy is so patently unreasonable that it is not capable of being supported by the *WCA* and its regulations." The Board appealed that decision. WCAT took no position in this appeal.

On December 20, 2007, the Precedent Panel reconsidered its decision, and in light of the BCSC finding, remitted the matter of interest to the Board for a fresh adjudication of Mr. Johnson's entitlement to interest.

On May 27, 2008, the BCCA allowed the appeal of the September 26, 2007 BCSC decision and returned the matter to the BCSC to consider whether the BCSC can or should consider the legality of the Board New Interest Policy directly on grounds not raised before WCAT.

On July 2, 2009, the BCSC dismissed the Board's application objecting to the BCSC proceeding to hear a direct challenge to the New Interest Policy and ordered that Mr. Johnson be permitted to proceed with his argument that the New Interest Policy should be quashed on the basis that it is inconsistent with the right to interest provided by section 5 of the Act. The Board filed an application for leave to appeal the July 2, 2009 Decision.

On September 9, 2009, before the application for leave to appeal was heard in chambers in the BCCA, the BCSC again allowed the argument that the New Interest Policy violates section 5 of the Act. The petitioner abandoned his ground relating to the retroactive application of the New Interest Policy.

On September 30, 2009, a justice in the BCCA chambers granted leave to appeal the July 2, 2009 of the BCSC. On October 1, 2009, the Board filed an appeal from the September 9, 2009 Decision as well.

In December of 2009, Mr. Johnson sought to consolidate all of the appeals. The Board opposed consolidation and obtained an order from the BCCA Chambers judge that the appeal of the July 2, 2009 BCSC Decision be heard separately on the issue of the requirement to exhaust internal remedies and whether the BCSC could hear a direct challenge to the New Interest Policy. The appeal was heard by the BCCA in March of 2010. WCAT took no position in the appeal.

Result:

In a unanimous decision, the appeal was allowed, the BCSC September 9, 2009 decision of the BCSC was set aside, and the Petition for judicial review was dismissed.

Reasons:

The BCCA determined that the BCSC erred in exercising its discretion in reviewing the Board's New Interest Policy directly. The BCCA considered five grounds of appeal.

First, the BCCA considered whether the internal section 251 policy review process afforded an adequate remedy. The BCCA found that WCAT cannot make an enforceable order based on a finding that a Board policy is patently unreasonable. The worker or employer must ultimately persuade the policy maker itself: the board of directors. Once the board of directors has made its decision to implement policy, there is no independent body which can override it except the BCSC on judicial review. Thus the internal process is ineffective in providing a remedy to someone in Mr. Johnson's position. Consequently, unless there was an overarching purpose to be served by the process, the internal review process could be seen as inadequate.

However, the BCCA found there was such a purpose threefold. First, by going through the internal review process, there is consistency to be attained for all workers and employers affected by a challenge to policy. Second, it affords the board of directors at first instance an opportunity to use its expertise as representatives of the affected community to adjust or change the policy. Third, it provides an opportunity for creating a record containing the expert views of WCAT, the chair of WCAT and the board of directors as to the validity of the policy. As a result, the BCCA found the internal process to be adequate when placed in a fuller context and the immediate frailties ought not to have been weighed in favour of hearing the judicial review.

Second, the BCCA considered the value of tribunal reasons and a complete record for purposes of meaningful judicial review. The BCCA found that judicial review is grounded on respect for choices made by the Legislature and the determinations of administrative decision makers. BCCA noted that following the internal review process would produce at the very least reasons from WCAT, but could also produce reasons from the Chair of WCAT and/or the board of directors. The views of the administrative tribunal are essential to and are necessary to inform the judicial review process. The reviewing judge is not at liberty to reach her own conclusions about policy in view of the fact that it is not the policy per se that is being reviewed on judicial review, but rather the interpretation of the Act made by the administrative body charged with interpreting its legislation and the consistency of the policy with the legislation on a patently unreasonable standard. This was the most important factor which weighed against the hearing of the judicial review.

Third, the BCCA found that the respondent's failure to raise the issue before WCAT, and the respondent now being precluded by time limits from raising it before WCAT was not a factor in exercising discretion to hear the judicial review of the policy.

Fourth, the BCCA did not find that the BCSC based its decision on the initial failure of WCAT to raise the validity of the New Interest Policy on its own motion. In any event, the BCCA found it unnecessary to consider this ground in light of the other reasons given.

Finally, the BCCA concluded the BCSC applied the correct test in determining whether to exercise its discretion to hear the judicial review, but considered the wrong factors.

Procedurally, the BCCA noted that there was some question whether it was appropriate to hear this appeal from what effectively was an interim ruling in the judicial review, particularly in light of the fact the BCSC decided the merits before this appeal was heard. It would have been preferable to have the

appeals consolidated, and indeed, the division moved on its own to consolidate them in order to set aside the September 9, 2009 merits decision of the BCSC once they determined to allow the appeal.