COURT OF APPEAL OF YUKON

Citation: *Wood v. Yukon (Occupational Health and Safety Branch)*, 2018 YKCA 16

Date: 20181122
Docket: 18-YU825

Between:

Juanita Wood

Appellant
(Petitioner)

And

Director, Occupational Health and Safety Branch
Yukon Workers' Compensation Health and Safety Board

Respondent
(Respondent)

Before: The Honourable Mr. Justice Savage
The Honourable Madam Justice Fisher
The Honourable Madam Justice Smallwood

On appeal from: An order of the Supreme Court of Yukon dated May 3, 2018 (*Wood v. Yukon (Occupational Health and Safety Branch)*, 2018 YKSC 24; additional reasons 2018 YKSC 29)

Oral Reasons for Judgment

The Appellant appearing in person:	J. Wood
Counsel for the Respondent:	S. Paul
Place and Date of Hearing:	Whitehorse, Yukon November 21, 2018
Place and Date of Judgment:	Whitehorse, Yukon November 22, 2018

Summary:

The appellant appeals the dismissal of a petition seeking remedies on the basis that the respondent Director was required to commence a prosecution against her former employer for a prohibited reprisal under s. 18 of the Occupational Health and Safety Act. Held: Appeal dismissed. The chambers judge properly exercised her discretion in striking the petition as an abuse of process and correctly assessed the petition as disclosing no reasonable claim. The petition was an improper attempt to re-litigate a claim arising from the appellant's termination of her employment as a probationary employee. The Director has the authority to investigate complaints of reprisal for the purpose of determining whether a prosecution is warranted.

[1] **FISHER J.A.:** The appellant, Juanita Wood, appeals a decision dismissing her petition against the respondents as an abuse of process of the court, vexatious, and disclosing no reasonable claim.

[2] The petition arose from a complaint made by Ms. Wood following the termination of her employment in February 2015 by the Government of Yukon, Department of Highways and Public Works (DHPW). Ms. Wood alleged that her employment had been terminated because she had questioned the handling of two safety concerns. Her complaint to the respondent Director, Occupational Health and Safety Branch (the Director), made pursuant to s. 18(1) of the *Occupational Health and Safety Act*, R.S.Y. 2002, c. 159 (the *Act*), was dismissed, and her appeal to the respondent Workers' Compensation Health and Safety Board (the Board) was dismissed. In the result, the Director refused to initiate a prosecution against the DHPW.

[3] Section 18(1) of the *Act* prohibits an employer from dismissing a worker for "prohibited reprisals" where the worker in good faith had sought enforcement of the *Act*. Where an employer is found to have contravened s. 18(1), a court may make a number of orders, including reinstatement of the worker.

[4] In the petition, Ms. Wood sought an order setting aside the Director's decision, an order prohibiting the Director from dealing with claims under s. 18 of the *Act,* and various declarations relating to the jurisdiction of the Director and the Board and the alleged bad faith of the Director. (It is not entirely clear in the petition, due to numerous amendments, if Ms. Wood was proceeding with the bad faith allegations.)

[5] This petition was the seventh proceeding commenced by Ms. Wood arising from the termination of her employment.

Background

[6] Ms. Wood was hired by the DHPW in February 2014 for a probationary period as a heavy equipment operator. On February 5, 2015, after her probation had been extended, Ms. Wood was "rejected on probation" on the basis—according to her employer—that she was unsuitable for continued employment. Thereafter, Ms. Wood commenced numerous proceedings, all of which have been dismissed or withdrawn:

1. On February 18, 2015, Ms. Wood appealed her termination to the Deputy Minister of the DHPW, a process provided for under the collective agreement. The Deputy Minister dismissed the appeal, concluding that the employer's concerns about her conduct and behaviour were substantiated.

2. On March 5, 2015, Ms. Wood filed a complaint with the respondent Director, alleging that the Government had retaliated against her for raising safety concerns, contrary to s. 18(1) of the *Act*. The Director's delegate, a safety officer, conducted an investigation and, on November 13, 2015, determined that a prosecution of the employer was not warranted. Ms. Wood appealed that decision to an appeal panel (the respondent Board), which on February 1, 2016, declared that it would not interfere with the decision not to prosecute. She sought a reconsideration of that decision but withdrew that request in May 2016. In June 2017, Ms. Wood sought to restart her appeal but again withdrew that request in December 2017. (The decision of the Director's delegate is the primary decision sought to be reviewed in the petition that is the subject of this appeal.)

3. On April 5, 2016, Ms. Wood filed a complaint with the Yukon Human Rights Commission, alleging discrimination on the basis of her sex

while she was employed by the DHPW. This complaint was terminated in October 2016 and a further appeal to the Yukon Human Rights Commission was dismissed in March 2017.

4. On May 27, 2016, Ms. Wood commenced an action against the DHPW in Yukon Supreme Court but that claim was struck as, *inter alia,* disclosing no reasonable claim. The reasons of Gower J. are indexed as 2016 YKSC 68. An appeal to this Court was quashed as being devoid of merit, in reasons indexed as 2017 YKCA 4.

5. On April 27, 2017, Ms. Wood commenced a petition seeking judicial review of the decision to terminate her employment. This petition was later dismissed by consent.

6. On November 21, 2017, Ms. Wood affirmed a private information alleging a breach of s. 18(1) of the *Act*, but withdrew this in January 2018.

[7] On January 22, 2018, Ms. Wood filed the petition that is the subject of this appeal. On May 3, 2018, Bielby J. allowed an application by the respondents and struck the petition.

Legal principles

[8] Rule 20(26) of the Yukon *Rules of Court* provides:

> (26) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> ... or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[9] The test for striking a claim as disclosing no reasonable claim, set out in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, is whether it is "plain and obvious", assuming the facts pleaded are true, that the claim discloses no reasonable cause of action, has no reasonable prospect of success, or if the action is "certain to fail". If there is a chance that a claimant might succeed, then she should not be "driven from the judgment seat" (at 980).

[10] A pleading is vexatious under this Rule where it is groundless or manifestly futile, not in an intelligible form, or instituted without any reasonable grounds or for an ulterior purpose: *McDiarmid v. Yukon (Government of),* 2014 YKSC 31 (at para. 15).

[11] The doctrine of abuse of process engages a court's inherent power to prevent the misuse of its procedures in a way that would bring the administration of justice into disrepute. It is a flexible doctrine that applies in a variety of legal contexts, and it often includes attempts at relitigation: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at paras. 36–37; *Behn v. Moulton Contracting Ltd*., 2013 SCC 26 at paras. 40–41.

The chambers judge's decision

[12] The chambers judge struck Ms. Wood's petition as an abuse of process, as she found that it constituted a collateral attack on the previous order of Gower J. In his reasons for granting that order, Gower J. concluded that the action disclosed no reasonable claim, was vexatious, and an abuse of process: it disclosed no reasonable claim because it was based entirely on s. 18 of the *Act*, which does not create a civil cause of action; it was vexatious because it purported to be an appeal from Ms. Wood's dismissal on probation when she had already exhausted the appeal process under the *Public Service Labour Relations Act*, R.S.Y. 2002, c. 185, the *Public Service Act*, R.S.Y. 2002, c. 183, and the collective agreement; and it was an abuse of process because the same facts underlay her appeal to the Deputy Minister, the proceedings before the respondent Board, her proceedings before the Yukon Human Rights Commission and the action in that court.

[13] Therefore, the chambers judge concluded:

> [12] While Ms. Wood has again chosen a different procedural vehicle to advance her claim in the current action, and has chosen a different branch of the Government of Yukon as a Respondent, the basis for her claim is identical to the one Judge Gower has previously decided discloses no cause of action, is vexatious and is an abuse of process. Ms. Wood is bound by the substantive results of Judge Gower's decision. She is not entitled to reargue her claim simply by choosing another procedural vehicle, this time a petition, whereas the action before Judge Gower was advanced by way of statement of claim.

[14] She also held that even in the absence of Gower J.'s decision, she would have struck the petition as disclosing no reasonable claim, as being vexatious, and as being an abuse of process of the court.

[15] The chambers judge concluded that Ms. Wood's claim had no chance of success in obtaining reinstatement of her employment because s. 18 does not permit a dismissed worker to sue civilly for reinstatement "upon alleging that one or more of the reasons for her termination arose from her good faith attempts to enforce the *Act*". She held that the only recourse created in s. 18 is by way of a prosecution by the respondent Director, and a worker's right to reinstatement arises only where an employer is convicted of a contravention of s. 18(1). She rejected Ms. Wood's submission that the Director has no authority under the *Act* to decline to prosecute a complaint.

[16] The judge concluded that Ms. Wood's petition was vexatious because it was attempting to advance a claim that had already been determined, and it was doing so by using a vehicle created to punish employers for breach of a statutory duty to create a right of reinstatement for herself. In assessing this, she considered some of the factors relevant in applications to declare a litigant vexatious to be of assistance (*Re Lang Michener et al. and Fabian et al.* (1987), 37 D.L.R. (4th) 685 (Ont. H.C.J.), cited in *Dawson v. Dawson*, 2014 BCCA 44 at para. 16):

> (a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction constitutes a vexatious proceeding;

> (b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious;
>
> (c) vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;
>
> (d) it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings...

[17] Finally, the chambers judge held that the petition was an abuse of process because it was commenced well after the expiry of the limitation period in s. 46(1) of the *Act*. That section provides that a prosecution under the *Act* "shall not be commenced after the expiration of one year after the commission of the alleged offence."

On appeal

[18] Ms. Wood submits that the chambers judge erred in striking the petition as a collateral attack, as disclosing no reasonable claim, and as being vexatious and an abuse of process. She asserts that the chambers judge based her decision on an erroneous interpretation of the legislation and an incorrect assumption of the remedy she was seeking. She says that the petition did not seek a remedy for her but only an injunction and declarations. She submits that the judge erred in not finding that the respondent has a statutory duty to commence a prosecution upon receipt of a complaint and in finding that the evidence did not support her allegation of reprisal for attempting to enforce the *Act*.

[19] The respondents submit that the chambers judge properly exercised her discretion to strike the petition and her conclusions were based on a correct interpretation of s. 18 of the *Act*.

Standard of review

[20] A decision to strike a petition generally involves the exercise of discretion that is entitled to deference from this Court. However, appellate intervention is

appropriate in discretionary decisions where the judge has misdirected herself as to the applicable law or made a palpable or overriding error in the assessment of the facts. A failure to apply the applicable legal criteria for the exercise of a judicial discretion, or a misapplication of them, raises questions of law: *Cliffs Over Maple Bay (Re)*, 2011 BCCA 180 at para. 24; *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 at para. 43.

[21] In this case, the chambers judge's interpretation of s. 18 of the *Act* is a question of law that requires review on a standard of correctness.

Analysis

[22] It is my opinion that the chambers judge properly exercised her discretion in striking the petition on the basis that it was an abuse of process. However, as I will explain, I would characterize the abuse of process somewhat differently. It is also my opinion that the chambers judge correctly assessed the petition as disclosing no reasonable claim. It is not necessary to address whether the petition was properly struck as vexatious or as an abuse of process due to the expiry of the statutory limitation period.

1. Abuse of process

[23] The chambers judge considered that the basis of Ms. Wood's claim in the petition was identical to the claim that was struck by Gower J., despite her choice of a different "procedural vehicle" and a different branch of the government as a respondent. She concluded that it was a collateral attack on Gower J.'s decision and thus an abuse of process. In doing so, she referred to *Toronto (City) v. C.U.P.E*.

[24] In my view, whether or not the petition constituted a collateral attack on the order of Gower J., it was an improper attempt to relitigate a claim that had been considered not only in the previous action, but also in other similar proceedings (as outlined above).

[25] The judge considered that Ms. Wood had sought essentially the same relief in the previous action as she was seeking in the petition. She based this on Gower J.'s description at para. 48 of his reasons for judgment:

> [48] I conclude that Ms. Wood's amended statement of claim, filed October 6, 2016, discloses no reasonable claim or cause of action. This is because it is based entirely on s. 18 of the *OHSA*, which does not create a civil cause of action. Rather, it creates the possibility of a summary conviction prosecution against an employer for an offence. In the case at bar, that offence would be for dismissing a worker because the worker has, in good faith, sought enforcement of the *OHSA*. Ms. Wood is simply mistaken when she states in her written outline that s. 18 "creates a civil cause of action for a prohibited reprisal".

[26] On appeal, this Court agreed with Gower J.'s interpretation of s. 18. Fenlon J.A. (for the Court) confirmed that s. 18 of the *Act* does not create a civil cause of action that can be pursued by an employee directly, and that while conduct that contravenes s. 18 could also be the basis for a separate civil complaint, the *Public Service Act* and the collective agreement together required any challenge to Ms. Wood's termination to be made using the process provided in the collective agreement. As that process had been exhausted, Ms. Wood could not simply start an action in the trial court alleging wrongful dismissal.

[27] Ms. Wood says that the chambers judge erred because she is seeking different remedies in this petition, none of which are personal remedies related to the termination of her employment. The essence of her submission, as I understand it, is that the Director was under a statutory duty to commence a prosecution under s. 18(1) of the *Act* on receipt of her complaint, and he failed to exercise this jurisdiction. Otherwise, she says, a worker is not able to have a hearing into a complaint of reprisal.

[28] The chambers judge may have overstated the similarities between the relief sought in the previous action and that sought in the petition. What relief was actually being sought was not entirely clear in the petition (which was amended many times) or in Ms. Wood's factum on appeal, but it appears that her initial objective was to obtain an order that would require the Director to initiate a prosecution against her

former employer. In the last amended petition, however, she sought other orders, including:

> a) an order setting aside the safety officer's November 13, 2015 decision for want of jurisdiction;
>
> b) a declaration that the decision by the safety officer that the employer did not contravene section 18 of the OHSA is null and void for want of jurisdiction;
>
> c) a declaration that the Appeal Panel's decision in the petitioner's complaint is null and void for want of jurisdiction;
>
> d) an order prohibiting the Director … from accepting and deciding any future claims filed pursuant to s. 18 of the OHSA…

[29] In this appeal, Ms. Wood seeks, in addition to an order setting aside the decision of the chambers judge, an injunction to prohibit the Director "from issuing future enforcement decision letters to Yukon workers in response to complaints of prohibited reprisal" and a declaration that she was "reprised against for raising safety concerns in her workplace in good faith contrary to s. 18". The effect of the latter declaration, she says, is that she would continue to be an "employee" as defined in the *Public Service Labour Relations Act*, which states that a person does not cease to be an employee "only because of their discharge contrary to this or any other Act". Ms. Wood candidly allowed that her ultimate objective is to get her job back.

[30] When all of this is considered in conjunction with the fact that both proceedings stemmed from the same set of facts—the termination of Ms. Wood's employment in February 2015—it is clear, in my view, that there is a sufficient basis for the court to have concluded that this petition is an abuse of process. Ms. Wood was seeking indirectly what she had already been foreclosed from seeking directly: a remedy—specifically, reinstatement—for what she asserts was a wrongful termination of her employment. Not only was the previous action struck, the process under the collective agreement was exhausted. That she seeks in this appeal a declaration that she was "reprised against" further confirms her persistent goal to obtain the same remedy in yet another forum.

[31] Related to this is the obvious weakness, in my view, of Ms. Wood's position that the Director must initiate a prosecution upon receipt of a complaint.

2. No reasonable claim

[32] In concluding that Ms. Wood's claim had no chance of success, the chambers judge interpreted s. 18 of the *Act* as providing recourse to a worker only by way of a prosecution by the Director, and a right to reinstatement that arises only where an employer is convicted of a contravention of s. 18(1). She rejected Ms. Wood's submission that the Director cannot decline to prosecute a complaint:

> [18] Ms. Wood complains that the Director had an investigation of the substance of her claim conducted and decided not to prosecute her employer based on the results of that investigation. She says that because the *OHSA* does not expressly direct such an investigation, the Director had no right to conduct it and no right to decline to prosecute. She argues that the legislation should be interpreted to mean that once a complaint is filed, the Director is obliged to launch a prosecution of the employer who is the subject matter of the complaint, without more.
>
> [19] However, the legislation does not contain an express provision precluding investigation and I conclude it should be interpreted to permit the approach used by the Director in this case. Absent investigation, the Director is unlikely to obtain sufficient evidence upon which to sustain a conviction. A parallel to Ms. Wood's argument is that the police should be obliged to lay a charge whenever they receive a complaint, without any attempt to gather evidence to substantiate that charge. That would lead to many unsuccessful prosecutions, with attendant wasted resources.
>
> [20] While the *OHSA* creates an express obligation to conduct an investigation in certain circumstances, I do not conclude the absence of such a provision in regard to s. 18 complaints means no investigation should occur for this reason. By way of example, while s. 16 of the *OHSA* expressly creates an obligation to investigate when an employee refuses to work because of safety concerns, and s. 17 creates an express right of appeal of the resulting report, the absence of such provisions in s. 18 cannot be interpreted to mean the Legislature intended to preclude investigation to determine whether a conviction was likely should a s. 18 prosecution be undertaken or to limit the Respondent's discretion not to prosecute in such a situation.

[33] I agree with the chambers judge's interpretation of the Director's obligations in respect of s. 18 complaints. There is nothing in the *Act* that restricts the Director's authority to determine whether a prosecution under s. 18 is warranted, and it makes

no sense that such an obligation would be imposed, especially when s. 18 is considered in the context of the *Act* as a whole.

[34] Section 18 simply establishes each specified reprisal against a worker in paras. (a) to (e) to be a contravention of the *Act*. Such a contravention constitutes an offence under s. 44. Under s. 46(2), only the Director can commence the prosecution of an offence. This is consistent with the Director's overall duty, under s. 19(2), to supervise the administration and enforcement of the *Act*. Persons designated as safety officers can do the same under the direction of the board and the director, under s. 20.

[35] Thus, the safety officer in this case had the authority, as the Director's delegate, to consider Ms. Wood's s. 18 complaint and conduct an investigation for the purpose of determining whether a prosecution was warranted. His decision, which was given with full reasons, was subject to an appeal to the board under s. 26(1). Ms. Wood proceeded with an appeal to the point where the appeal panel concluded that there were no grounds to interfere with the decision not to prosecute. This is the process whereby a worker in Ms. Wood's position has a hearing. Ms. Wood's insistence that she is entitled to a hearing before a court is, in my view, without merit, as that process is one that is quasi-criminal in nature, being a prosecution for a contravention of the *Act*.

[36] I also agree with the judge's consideration of Ms. Wood's broader concerns about the Director's practices:

> [21] While Ms. Wood is deeply suspicious that the Director always chooses not to prosecute s. 18 complaints, and of his apparent practice of requesting the party laying a complaint to submit to an interview by a safety officer wherein that officer attempts to resolve the complaint other than by prosecution, there is no evidence to suggest that s. 18 prosecutions never take place, or that employers are being permitted to terminate workers who advance safety concerns without recourse. Her belief that other workers in the Yukon would be assisted by removal of the Director's discretion, does not translate into a right on her part to advance a claim on their behalf.

[37] Ms. Wood made similar submissions before this Court. She went so far as to assert that the Director acts in bad faith by failing to provide information and by

misleading workers about his authority to decide whether or not to initiate a prosecution.

[38] There is no merit to these submissions. Ms. Wood purported to bring the petition "on behalf of all Yukon workers" but acknowledged that she did not have the authority to do that. Importantly, there is nothing in the record that supports the allegations of bad faith and, as I have explained, the Director has the statutory authority to decide if there is a sufficient basis to initiate a prosecution under s. 18(1).

Costs

[39] The chambers judge ordered Ms. Wood to pay the respondent's costs, which were assessed in a subsequent decision (indexed as 2018 YKSC 29) to be $9,000. In her factum, Ms. Wood sought an order setting aside this costs award.

[40] Decisions awarding costs are also discretionary, and are given a high degree of deference by this Court. A costs award should only be set aside on appeal if the judge below has made an error in principle or if the award is plainly wrong: see *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 at para. 27.

[41] Given my conclusions, there is no basis to interfere with the award of costs. The chambers judge made no error of principle and the award is not clearly wrong.

Disposition

[42] For all of these reasons, I would not interfere with the chambers judge's order striking the petition and awarding costs, and I would dismiss the appeal.

Costs of the appeal

[43] As to the costs for this appeal, the respondent Director seeks special costs on a lump sum basis in the amount of $4,500. I see no basis on which to make an order for special costs, but I would award costs of this appeal to the respondent.

[44] **SAVAGE J.A.:** I agree.

[45] **SMALLWOOD J.A.:** I agree.

"The Honourable Madam Justice Fisher"