SUPREME COURT OF YUKON

Citation: *Wood v Yukon (Highways and Public Works)*, 2016 YKSC 68

Date: 20161207
S.C. No. 16-A0034
Registry: Whitehorse

Between:

JUANITA WOOD

Plaintiff

And

GOVERNMENT OF YUKON, HIGHWAYS AND PUBLIC WORKS

Defendant

Before Mr. Justice L.F. Gower

Appearances:

Juanita Wood	Self-represented
Cindy Freedman and Kelly McGill	Counsel for the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] These are cross-applications by the plaintiff, Juanita Wood, and the defendant, Yukon Government ("YG"), relating to Ms. Wood's recent employment with YG. Ms. Wood was hired by YG's Department of Highways and Public Works ("HPW") on February 17, 2014, and was on probation for the first six months of her employment. On August 13, 2014, her probation was extended for a further six month period. On February 5, 2015, she was dismissed while on probation, pursuant to s. 104 of the *Public Service Act*, RSY 2002, c 183. Ms. Wood then appealed to the Deputy Minister of HPW, who upheld the dismissal on March 5, 2015.

[2] After taking proceedings before the Yukon Workers' Compensation Health and Safety Board ("YWCHSB") and the Yukon Human Rights Commission ("YHRC"), Ms. Wood commenced this action on May 27, 2016, alleging that YG contravened s. 18 of the Yukon *Occupational Health and Safety Act*, RSY 2002, c 159, ("*OHSA*") by terminating her employment because she raised safety concerns. Ms. Wood amended her statement of claim on October 6, 2016, but maintained that her cause of action was based upon a contravention of s. 18 of the *OHSA* (the "s. 18 issue").

[3] Ms. Wood now applies to add seven new defendants, all YG employees, pursuant to Rule 15(5)(a)(iii) of the *Rules of Court*. YG has cross-applied to strike Ms. Wood's amended statement of claim, filed October 6, 2016, on the basis that it discloses no reasonable cause of action, is vexatious, and/or is an abuse of process. YG relies on Rules 20(26)(a),(b) and (d) of the *Rules of Court*. In support of her application to add defendants, Ms. Wood has attached to her second affidavit a draft second amended statement of claim which, although as yet unfiled with the court, raises several new potential causes of action. The proposed new defendants are all allegedly connected to the new potential causes of action.

BACKGROUND

[4] On January 15, 2015, the Director of the Transportation Management Branch ("TMB") of HPW, Clint Ireland, wrote a letter to Ms. Wood terminating her employment while on probation, per s. 104 of the *Public Service Act*. The letter was delivered to Ms. Wood on February 5, 2015, and therefore her termination was effective as of that date. The letter referred to Ms. Wood having:

- received a letter of expectation, dated June 12, 2014, about the importance of following the chain of command;
- received a second letter of expectation following her admission of speeding while driving a government vehicle on June 16, 2014;
- received a third letter of expectation for leaving the worksite without approval on July 16, 2014;
- had her probation extended for another six months, as of August 13, 2014, in order to provide her with an opportunity to demonstrate her suitability for continued employment;
- challenged managerial decisions in an unhelpful and confrontational manner on "several occasions", including as examples five emails written by Ms. Wood and a report from a HPW Safety Trainer; and
- a "confrontational attitude towards branch personnel and a lack of respect towards [her] supervisors and management".

[5] On February 18, 2015, Ms. Wood argued the appeal of her dismissal to the HPW Deputy Minister. The hearing involved representations from both the employer and Ms. Wood. Ms. Wood presented a written submission of 22 pages, as well as 39 exhibits. The Deputy Minister released his written decision on March 5, 2015, upholding Ms. Wood's dismissal. His decision included the following comments:

> - The concerns brought forward by the employer centred around Ms. Wood's conduct and behaviour, not about her ability to perform the technical aspects of the job.
> - Ms. Wood's presentation substantiated the employer's assertion that she conducted herself in a confrontational, argumentative and [insubordinate] manner on many occasions. Her presentation and accompanying material contained many allegations of conspiracy, biased

> opinions, conduct by others in conflict with Yukon Government policies, discrimination and criminal activity.

[6] On March 5, 2015, Ms. Wood commenced proceedings before the YWCHSB, alleging that YG had retaliated against her for raising safety concerns contrary to s. 18 of the *OHSA*. On November 13, 2015, the YWCHSB safety officer determined that a prosecution of YG under s. 18 was not warranted. Ms. Wood then appealed that finding to a YWCHSB Appeal Panel. On February 1, 2016, the Appeal Panel upheld the decision not to prosecute YG. On February 5, 2016, Ms. Wood further appealed that decision to the full YWCHS Board. However, on May 27, 2016 she withdrew that appeal.

[7] Also on May 27, 2016, Ms. Wood commenced this court action.

[8] On April 5, 2016, Ms. Wood made a complaint to the Yukon Human Rights Commission alleging that YG had discriminated against her on the basis of her sex in connection with her employment. On October 14, 2016, the Director of Human Rights terminated the investigation of the complaint. Ms. Wood has appealed that decision to the Yukon Human Rights Commission and the appeal is set to be heard on February 23, 2017.

[9] The cross-applications before me were argued at a hearing on November 25, 2016. About three quarters of the way through the hearing, Ms. Wood asked for an adjournment of both applications for the purpose of getting legal advice. In particular, she wanted to get further legal advice on the issue of whether s. 18 of the *OHSA* is capable of giving rise to a private civil cause of action. Ms. Wood explained that she has attempted to contact every lawyer listed with the Law Society of Yukon, but has been unable to retain anyone to represent her. She also stated that she has been unable to

recruit a lawyer from Vancouver, Calgary or Edmonton. Ms. Wood did not elaborate further on why she has been unable to retain counsel, other than commenting briefly that immediately following her dismissal, she was unable to afford doing so.

[10] The application to adjourn was opposed by YG's counsel on the basis that the s. 18 issue has already been thoroughly canvassed in the YWCHSB proceedings and Ms. Wood ought to have known that it would be a live issue in the current cross-applications as well. Further, counsel indicated that Ms. Wood has been complaining about not being able to find a lawyer to represent her for a long time now.

[11] I indicated at the hearing that I would reserve my decision on the adjournment, but that I wanted to hear full submissions on the cross-applications in any event. I said that if I decided to deny the adjournment, I would release my decisions on the cross-applications and deal with the adjournment at the same time.

[12] I have decided to deny the adjournment. I agree with YG's counsel that Ms. Wood has known for a significant period of time that YG was challenging her ability to bring a private civil law action on the basis of s. 18 of the *OHSA*. Both the OHS Safety Officer, who made the initial decision not to prosecute YG under s. 18, and the Appeal Tribunal, focused extensively on the issue of prosecution and prosecutorial discretion under s. 18. Clearly, the references to an employer being "convicted" and "the convicting court" in s. 18(2) should have alerted Ms. Wood to the fact that this provision operates in a public summary conviction context, and not in a private civil law context. Secondly, given Ms. Wood's apparent inability to successfully retain counsel up until now, I do not hold out much hope that she would be able to do so in a timely fashion if granted an adjournment.

[13] During the hearing, an issue also arose about whether an HPW policy document, entitled *Ogilvie Conflict of Interest Mitigation Strategy* (the "*Strategy*")[1] was enforceable in law. Neither party had provided any authorities on point and I gave them time to do so. YG's counsel filed her submissions and authorities on November 29, 2016. Ms. Wood filed her submissions and authorities on December 1, 2016. However, at that time Ms. Wood also purported to file her affidavit #6, the body of which is five paragraphs and attached are three exhibits comprising nine pages of material. Ms. Wood gave no notice of her intention to file this material at the hearing and did not seek leave of this Court to do so. I find that it would be unfair to YG to allow Ms. Wood to file this new material after the hearing has been concluded. Accordingly, I have given it no consideration.

ANALYSIS

1. Application to add new defendants

[14] Rule 15(5)(a)(iii) provides:

> At any stage of the proceeding, the court on application by any person may
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> …
>
> (iii) order that a person be added as a party where there may exist, between the person and any party to the proceeding, a question or issue relating to or connected, in the opinion of the court, it would be just and convenient to determine as between the person and that party.
>
> (A) with any relief claimed in the proceeding, or
>
> (B) with the subject matter of the proceeding,

[1] Exhibit A to Ms. Wood's Affidavit # 5.

> which, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

[15] The British Columbia equivalent of this sub-rule has been considered by the BC Court of Appeal in *Strata Plan No VIS3578 v Canan Investment Group Ltd*, 2010 BCCA 329. There the Court held that an applicant must initially establish that there is a real issue between the proposed new defendant and the plaintiff that relates to the subject matter of the proceeding and that the issue is not frivolous. The threshold is low. Secondly, the court must be satisfied that it is just and convenient to add the party, in the circumstances of the particular case:

> 45 Subrule 15(5)(a)(iii) thus establishes two requirements that an applicant must prove to succeed in joining a new defendant. First, it must show that there is a question or issue between the plaintiff and the proposed defendant that relates to the relief, remedy, or subject matter of the proceeding. The threshold is low. It has been expressed as establishing simply that there is a real issue between them that is not frivolous, or that the plaintiff has a possible cause of action against the proposed party. This requirement may be met solely on the basis of proposed amendments to the statement of claim, or the parties may provide affidavit evidence addressing it. If evidence is provided, the court is not to weigh it and assess whether the plaintiff could prove the allegations. It is limited to examining the evidence only to the extent necessary to determine if the required issue between the parties exists: *Strata Plan LMS 1816 v. Acastina Investments Ltd.,* 2004 BCCA 578, 33 B.C.L.R. (4th) 69; *MacMillan Bloedel Ltd. v. Binstead et al.* (1981), 58 B.C.L.R. 173 (C.A.).
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> 46 If this first requirement is met, the court must next determine whether it would be just and convenient to decide the issue between the parties in this proceeding. This is a discretionary decision, but that discretion is fettered to the extent that it must be exercised judicially, and in accord with the evidence adduced and the guidelines established in the authorities: *Letvad v. Fenwick*, 2000 BCCA 630, 82 B.C.L.R. (3d) 296. At para. 29 of *Letvad*, Esson J.A., writing for the

> Court, adopted the list of factors to be considered from *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), 71 B.C.A.C. 161, 19 B.C.L.R. (3d) 282, a decision that dealt with adding further claims under R. 24. These include the extent of the delay, the reasons and any explanation for the delay, any prejudice arising from the delay, and the degree of connection between the existing action and the new parties and claims contemplated. The overriding question is what is just and convenient in the circumstances of the particular case.

[16] A pleading is frivolous or vexatious if:

- it does not go to establishing the plaintiff's cause of action;
- it does not advance any claim known in law;
- it is obvious that an action cannot succeed;
- it would serve no useful purpose and would be a waste of the court's time and public resources; or
- it is so confusing that it is difficult to understand what is pleaded.

See *Willow v Chong*, 2013 BCSC 1083, ("*Willow*") at para. 20.

[17] An abuse of process is a wider concept than vexatiousness, and captures any circumstance in which the court's process is used for an improper purpose: *Acumar Consulting Engineers Ltd v Assn of Professional Engineers and Geoscientists of British Columbia*, 2014 BCSC 814, ("*Acumar"*) at para. 29. Judges have an inherent and residual discretion to prevent an abuse of the court's process: *Acumar*, at para. 28. It is an abuse of the court's process to use a civil action to collaterally attack decisions of an administrative tribunal that are otherwise subject to a statutory right of appeal: *Acumar*, para. 32. It is also an abuse of process for a plaintiff to commence subsequent actions against the same defendants based upon the same factual matrix: *Acumar*, para. 33.

[18] I dismiss Ms. Wood's application to add new defendants for the following reasons.

[19] First, all of the new proposed defendants are YG employees and none of these individuals, acting in their own capacity, could grant Ms. Wood the remedies she seeks in para. 15 of the draft second amended statement of claim, which include such things as:

- reinstatement of her position;
- payment of all wages she was deprived of;
- reinstatement of all her benefits;
- removal of all reprimands from her record; and
- reimbursement of all her costs and disbursements.

[20] Secondly, the addition of the proposed new defendants would unnecessarily complicate the proceedings and lead to the expenditure of significant additional resources. Accordingly, it would not be just and convenient to allow them to be added.

[21] Thirdly, Ms. Wood herself acknowledges that she has brought multiple proceedings based upon the same factual matrix, i.e. the proceedings before the YWCHSB, the YHRC and now this Court. Further, she chose to abandon her statutory right of appeal in the YWCHSB proceedings at the same time she commenced the within action. Accordingly, this action is a collateral attack on the YWCHSB proceedings and is therefore an abuse of process.

[22] Fourthly, I am not persuaded that any of the additional potential causes of action in the second amended statement of claim rise above the level of frivolousness, and even if any are possible viable causes of action against YG, it is not necessary for any

of the proposed new defendants to be added in order to litigate them. I will address each of the potential new causes of action in turn.

[23] **Wrongful Dismissal:** These allegations are found in paras. 16 to 18 of the draft second amended statement of claim. However, this common-law remedy is not available to Ms. Wood because it has been entirely displaced by the relevant provisions in the *Public Service Labour Relations Act*, RSY 2002, c 185, the *Public Service Act,* cited above, and the Collective Agreement pertaining to Ms Wood's employment with YG. Ms Wood herself admits this in her submission to the Human Rights Commission dated November 10, 2016, at p. 26. As a result, this cause of action is bound to fail.

[24] **Breach of Fiduciary and Statutory Duties and Breach of Trust:** These three alleged causes of action are pled at paras. 19 through 30 of the draft second amended statement of claim. However, Ms. Wood has focused here solely on the breach of fiduciary duty allegedly arising from the Ogilvie Conflict of Interest Mitigation Strategy. No other breach of statutory duty or breach of trust is pled in these paragraphs. The Strategy is a document which was created by the Public Service Commission in March 2014 in order to address the potential conflict of interest resulting from the hiring of Peter Nagano, as the Ogilvie Camp Foreman, by the Northern Area Superintendent of HPW, Richard Nagano. Richard and Peter Nagano are brothers. The Strategy includes various provisions regarding monitoring of the situation by the Director of the TMB, who was then Clint Ireland. At one point, Ms. Wood complained to Mr. Ireland that the Nagano brothers were making a "concerted effort" to "build a case" against her. Ms. Wood further alleges that Mr. Ireland did not properly investigate her complaint as required by the Strategy. I reject this argument for the following reasons.

[25] First, while a mid-level employee such as Mr. Ireland may owe certain fiduciary duties towards his employer, he cannot be said to have had a fiduciary duty towards employees in his Department[2]. Indeed, employer-employee relationships are not *per se* fiduciary. Rather, they are based on contract: *Coca-Cola Bottling Co v UFCW, Local 175/633*, (2005) 142 LAC (4th) 139 (OLRB), at para. 32.

[26] Second, the Strategy is simply an administrative policy. It is not incorporated by reference into any legislation or the Collective Agreement. Therefore, any alleged breaches of the policy do not give rise to any legal remedies in court. This is settled law. In *Friends of the Oldman River Society* v *Canada*, [1992] 1 SCR 3, the Supreme Court of Canada clearly stated that internal ministerial policy guidelines intended for the control of public servants under a minister's authority do not have legal force:

> [36] …There is little doubt that ordinarily a Minister has an implicit power to issue directives to implement the administration of a statute for which he is responsible; see for example Maple Lodge Farms Ltd. v. Government of Canada, [1982] 2 S.C.R. 2. It is also clear that a violation of such directives will only give rise to administrative rather than judicial sanction because they do not have the full force of law. (my emphasis)

[27] This principle was confirmed by the Federal Court of Appeal in *Arsenault* v *Canada (Attorney General)*, 2009 FCA 300:

> 41 In *Carpenter Fishing Corp. v. Canada*, [1998] 2 F.C. 548, this Court, at paragraph 28 of its Reasons, discussed the nature of a fishing quota policy imposed by the Minister. Décary J.A., who wrote the Reasons for the Court, indicated that a quota policy, in contrast to a fishing licence granted under s. 7 of the Act, was a discretionary decision and that judicial review thereof was greatly limited. He further indicated that the Minister could issue policy guidelines as long as he did not fetter his discretion with respect to the

[2] Geoffrey England, *Individual Employment Law*, (2nd ed) (Toronto: Irwin Law, 2008), at 80 - 81.

> granting of licenses "by treating the guidelines as binding upon him". His full remarks are as follows:
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> > 28. The imposition of a quota policy (as opposed to the granting of a specific licence) is a discretionary decision in the nature of policy or legislative action. Policy guidelines outlining the general requirements for the granting of licences are not regulations; nor do they have the force of law… (emphasis already added)

[28] Ms. Wood argues that, in some instances, courts may legitimately take jurisdiction over disputes between an employer and an employee which do not arise under a collective agreement. She further submits that the case at bar is such an instance because the Strategy does not arise under or form part of the Collective Agreement. The only authority submitted by Ms. Wood for this general proposition is the case of *Piko v Hudson's Bay Company*, (1998) 41 OR (3d) 729 (CA). However, *Piko* is clearly distinguishable from the case at bar. There, the defendant employer charged the plaintiff employee with fraud because of an incident that took place in the workplace. After the Crown withdrew the criminal charge, the employee brought an action against her employer for malicious prosecution and mental distress. The employer relied upon *Weber* v *Ontario Hydro*, [1995] 2 SCR 929, in which the Supreme Court held that parties must arbitrate any dispute arising under a collective agreement and cannot litigate such a dispute in the courts. The employer submitted that *Weber* ousted the jurisdiction of the court over a tort claim by the unionized employee against her employer. However, the Ontario Court of Appeal noted that *Weber* also recognizes that collective agreements do not govern every dispute between an employer and employee and that courts may legitimately take jurisdiction over these disputes. The Court further agreed with the employee that the "essential character" of the lawsuit in *Piko* was not

one which arose under the collective agreement. Rather, it was triggered by the employer's decision to charge the employee criminally. Therefore, the action for malicious prosecution was not foreclosed by *Weber*.

[29] In the case at bar, I conclude that the essential character of the dispute is the dismissal of Ms. Wood while on probation, and that is a matter which clearly arose in the context of the governing legislation and the Collective Agreement.

[30] Interestingly, the Court of Appeal in *Piko* distinguished *Weber* from the case before it in a manner which has some application to the case at bar:

> 19 This case also differs from Weber itself. In Weber, the plaintiff employee took an extended leave of absence for which he received sick-leave benefits. The employer, Ontario Hydro, suspecting that the plaintiff was malingering, hired a private investigator to conduct surveillance on him. The investigator went on the plaintiff's property and, pretending to be someone else, was allowed inside the plaintiff's home. Hydro then suspended the plaintiff for abusing his sick-leave benefits. The plaintiff sued Hydro for damages for trespass, nuisance, deceit, invasion of privacy and breach of sections 7 and 8 of the Charter. On a motion to determine a question of law before trial, the Supreme Court of Canada dismissed the action because the plaintiff's claims, though framed in tort and under the Charter, arose under the collective agreement….

[31] The Court of Appeal in *Piko* referred to another case it previously decided which also has some similarities to the case at bar:

> 13. …[I]n Ruscetta v. Graham,[3] the plaintiff had been refused long-term disability benefits and he had appealed the refusal. In reviewing his employment file for his appeal, he discovered a memo written by a fellow employee claiming that the plaintiff was a "problem employee". The plaintiff sued his employer and the employee who had written the memo for damages for defamation, negligent misrepresentation and breach of fiduciary duty. The motion

[3] (1998),114 OAC 320.

> judge dismissed the action, relying on Weber. This court agreed….

[32] My third reason for rejecting Ms. Wood's argument that Mr. Ireland breached a fiduciary duty by not following the Strategy is that the Strategy is simply irrelevant to Ms. Wood's termination. Peter Nagano had no dealings with Ms. Wood at the Ogilvie worksite after the end of August 2014, as he had been relocated to Dawson City. Therefore, I fail to see how the Strategy could have any relevance to issues about Ms. Wood's job performance for the last five months of her employment, until her termination on February 5, 2015. In the same vein, it cannot be said that there is any causal connection between her termination and the implementation, or lack thereof, of the Strategy. To the extent that there is an indirect reference to the potential conflict of interest between the Nagano brothers in Mr. Ireland's termination letter to Ms. Wood dated January 15, 2015, it is nothing more than that. In particular, the indirect reference to the "concerted effort" of the two brothers to build a case against her is only one of five bullet points referring to emails drafted by Ms. Wood (all in December 2014)[4], which were used as examples by Mr. Ireland to substantiate his opinion that Ms. Wood was being terminated because of her unhelpful, confrontational and disrespectful workplace conduct.

[33] Accordingly, these causes of action are also bound to fail.

[34] **Abuse of Authority, Breach of the Public Trust, Improper Use of Government Funds and Assets** - These allegations are pled in paras. 31 through 42 of the draft second amended statement of claim. The bulk of the allegations are for breach of public trust against Clint Ireland, although Ms. Wood also accuses each of

[4] A further bullet point referred to a report from an HPW Safety Trainer.

Lisa Wykes, the Director of Human Resources for HPW and Richard Nagano of breach of public trust. The first problem with these allegations is that these are not recognized torts. Second, the allegations do not involve duties owed to Ms. Wood. Rather, they appear to involve duties owed by YG employees to the public. Third, these paragraphs include sweeping and speculative allegations against Mr. Ireland (i.e., that his actions were "egregious, deliberate, harsh, reprehensible, and malicious"), principally because of his failure to conduct an investigation into Ms. Wood's complaint about the conflict of interest between the Nagano brothers. However, we know from the email from Mr. Ireland to Ms. Wood dated January 20, 2015[5] that he did conduct an investigation. This is apparently recognized by Ms. Wood herself in her written submissions to the HPW Deputy Minister appealing her dismissal. In referencing her December 15, 2014 email, Ms. Wood stated "There was no real investigation from my perspective." This sounds more like Ms. Wood was subjectively unhappy with the quality of the investigation; she did not say that the investigation did not occur at all. Fourthly, I repeat that the Strategy, because it is only an administrative policy, cannot support Ms. Wood's argument that Mr. Ireland had a legal obligation to conduct a proper investigation of her conflict of interest complaint. As a result, this cause of action is also bound to fail.

[35] **Conspiracy to Injure** - These allegations are found at paras. 43 through 49 of the draft second amended statement of claim. Here, Ms. Wood alleges that Clint Ireland, Peter Nagano, Richard Nagano, Anita Wetherall (the HPW Safety Trainer who provided a report about Ms. Wood) and Lisa Wykes variously agreed with each other at different times to dismiss Ms. Wood from her employment and to take other actions

[5] Exhibit C to Ms. Wood's Affidavit # 5.

intended to cause her injury. The fundamental flaw in these allegations is that government employees, acting within the scope of their employment, are all representing the corporate government employer, and therefore their respective individual acts are the acts of one party, i.e. the government. In other words, government employees cannot conspire with each other if they are acting within the scope of their employment, and Ms Wood does not suggest otherwise. In *Kuhn v American Credit Indemnity Co*., [1992] BCJ No 953 (SC), Master Joyce had this to say about the allegations of conspiracy between the various employees of the corporate defendant, American:

> The acts of these individuals which are complained of are ones which, in my view, clearly were done by them in their capacities as officers of American. It is not alleged that they were done outside the scope of their office or employment. On the contrary, the plaintiff admits in paragraph 9 that in their capacities as officers the individual defendants were acting within the scope of their employment. They were, in my view, not the acts of these individuals done pursuant to a common plan but the acts of one person, the corporate defendant, acting through its officers. A person cannot conspire with himself. (my emphasis)

[36] Accordingly, this cause is also bound to fail.

[37] **Knowing Assistance of Breach of Fiduciary and Statutory Duties** - These allegations are found at paras. 50 through 53 of the draft second amended statement of claim. Like the earlier allegations of breach of fiduciary duty discussed above, these allegations turn largely on Ms. Wood's mistaken assertion that the Strategy created a legally binding duty upon Mr. Ireland to conduct an investigation into Ms. Wood's conflict of interest complaint. As I have found that there was no such legal obligation, and therefore no cause of action for breach of fiduciary or statutory duty in the

circumstances, there can be no action for anyone knowingly assisting in the commission of such alleged breaches. Thus, this cause of action is also bound to fail.

[38] **Malfeasance in Public Office** - These allegations are made at paras. 54 through 57 of the draft second amended statement of claim, and all pertain to Lisa Wykes, the HPW HR Director. Ms. Wood alleges that Ms. Wykes has maintained her name on a "blacklist", which has been used to screen out Ms. Wood in her applications for other employment with YG, subsequent to her dismissal. The fundamental flaw with these allegations is that in order to prove malfeasance (also known as misfeasance) in public office, which is a recognized tort, there must be proof that a public officer engaged in unlawful conduct. In *Odhavji Estate v Woodhouse*, 2003 SCC 69, the Supreme Court summarized the law in this area as follows:

> 32 To summarize, I am of the opinion that the tort of misfeasance in a public office is an intentional tort whose distinguishing elements are twofold: (i) deliberate unlawful conduct in the exercise of public functions; and (ii) awareness that the conduct is unlawful and likely to injure the plaintiff. Alongside deliberate unlawful conduct and the requisite knowledge, a plaintiff must also prove the other requirements common to all torts. More specifically, the plaintiff must prove that the tortious conduct was the legal cause of his or her injuries, and that the injuries suffered are compensable in tort law. (my emphasis)

[39] Ms. Wood has not alleged that Ms. Wykes' conduct was unlawful. Indeed, it would appear that Ms. Wykes was simply doing her job as HR Director in screening out Ms. Wood as an unsuitable candidate for subsequent YG job applications precisely because she had been previously terminated for being unsuitable while on probation. The dominant purpose of this screening activity was not to injure or harm Ms. Wood, but

rather to have suitable applicants considered for new positions. Further, this screening activity is not unlawful. Accordingly, this cause of action is also bound to fail.

[40] **Negligent Supervision** - These allegations are found at paras. 58 through 64 of the draft second amended statement of claim. Here, Ms. Wood alleges that Allan Nixon, the Assistant Deputy Minister of HPW, and Jim Connell, Public Service Commissioner, negligently supervised the implementation of the Strategy. Like the problem with the "Knowing Assistance" allegations, the flaw here is that the Strategy does not give rise to legal obligations. Accordingly, there is nothing to substantiate a duty owed to Ms. Wood under the Strategy policy, and there can be no negligence flowing either from its enforcement or lack thereof. Therefore, this cause of action is also bound to fail.

[41] Having addressed all of the additional proposed causes of action, it immediately becomes obvious that Ms. Wood is seeking to significantly change the nature of her case from one exclusively based upon s. 18 of the *OHSA*. It is further apparent that this is an attempt to appeal what she fundamentally believes to be a wrongful dismissal, when she has no legal right to pursue such an appeal. It is also a collateral attack on the decision of the YWCHSB Appeal Tribunal, which Ms. Wood has chosen not to appeal further, notwithstanding that she had a statutory right to do so. In addition, the proposed draft second amended statement of claim can also be seen as a collateral attack upon the decision of the Director of Human Rights to terminate the investigation into Ms. Wood's complaint of discrimination, notwithstanding that she has a pending appeal before the Human Rights Commission. In this sense, her proposal to add new parties and substantially amend her statement of claim also constitutes an abuse of this Court's process.

[42] In this regard, I rely upon *Willow*, cited above, where Fisher J. said this about abuse of process:

> 21 Abuse of process …is a flexible doctrine. It allows the court to prevent a claim from proceeding where to do so would violate principles of judicial economy, consistency, finality and the integrity of the administration of justice. A claim may be struck where it is a collateral attack on an administrative decision that is subject to appeal or judicial review… A claim may also be struck as an abuse of process where it is an attempt to re-litigate an issue that has already been decided. (citations omitted) (my emphasis)

[43] Similarly, the British Columbia Court of Appeal in *Cimaco International Sales Inc v British Columbia*, 2010 BCCA 342 referred with approval to one of the leading cases on abuse of process, as follows:

> 44 Again, in *Stephen v. British Columbia (Minister of Children and Family Development)*, 2008 BCSC 1656, the plaintiff sued a number of governmental bodies and individuals involved in a Human Rights Tribunal process. Mr. Stephen, instead of pursuing judicial review, commenced an action for damages. Although the plaintiff claimed against the Crown defendants "breaches of duty, failures to perform legal obligation, negligent supervision ... and torts" as his causes of action, "the use of these words does not change the essential character of the plaintiff's complaint against the defendants. He believes that he was wronged by the decisions. ... There was another forum for challenging those decisions but the plaintiff did not avail himself of it." (paras. 62-63) The claim was dismissed…. (my emphasis)

[44] Precisely the same could be said about Ms. Wood. Despite the various negative and disparaging ways in which she seeks to characterize the actions of YG as causing her injury, it is the termination of her employment which remains her principal complaint. Further, Ms. Wood had another forum for challenging that termination, the appeal to the YWCHS Board, but she chose not to avail herself of it.

[45] Finally, the comments of the British Columbia Supreme Court in *Acumar*, cited above also seem apropos:

> 41 Here, the petition includes vague, general references to bad faith, discrimination, criminality, fraud, and abuse, among other things. In the context of this case these references cannot be taken as true. They are only language, unconnected to any real pleaded facts or causes of action. (my emphasis)

[46] For these reasons, Ms. Wood's application to add new defendants to her action is dismissed.

2. Application to strike the amended statement of claim

[47] YG's application here is based on Rules 20(26)(a), (b) and (d), which generally provide that a pleading may be struck if: it discloses no reasonable claim/cause of action; it is unnecessary, scandalous, frivolous or vexatious; or it is an abuse of process. In *Willow*, cited above, Fisher J. dealt with equivalent provisions in British Columbia and nicely summarized the test for striking a statement of claim as follows. Although I referred to part of this quotation earlier, I will repeat it here for the sake of convenience:

> 18 The test for striking a claim as disclosing no reasonable claim under Rule 9-5(1)(a), set out in *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959 and reiterated more recently in *R. v Imperial Tobacco Canada Ltd.*, 2011 SCC 42, 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 the plaintiffs might succeed, then they should not be "driven from the judgment seat." No evidence is admissible on an application under Rule 9-5(1)(a).
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> …

> 20 Under Rule 9-5(1)(b), a pleading is unnecessary or vexatious if it does not go to establishing the plaintiff's cause of action, if it does not advance any claim known in law, where it is obvious that an action cannot succeed, or where it would serve no useful purpose and would be a waste of the court's time and public resources: *Citizens for Foreign Aid Reform Inc. v Canadian Jewish Congress*, [1999] BCJ No. 2160 (SC); *Skender v Farley*, 2007 BCCA 629. If a pleading is so confusing that it is difficult to understand what is pleaded, it may also be unnecessary, frivolous or vexatious. An application under this sub-rule may be supported by evidence.
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> 21 Abuse of process under Rule 9-5(1)(d) or the court's inherent discretion is a flexible doctrine. It allows the court to prevent a claim from proceeding where to do so would violate principles of judicial economy, consistency, finality and the integrity of the administration of justice. A claim may be struck where it is a collateral attack on an administrative decision that is subject to appeal or judicial review: *Cimaco International Sales Inc. v British Columbia*, 2010 BCCA 342; *Stephen v HMTQ*, 2008 BCSC 1656; *Varzeliotis v British Columbia*, 2007 BCSC 620; *Gemex Developments Corp. v City of Coquitlam*, 2002 BCSC 412; *Berscheid v Ensign*, [1999] BCJ No. 1172 (SC). A claim may also be struck as an abuse of process where it is an attempt to re-litigate an issue that has already been decided: *Toronto (City) v Canadian Union of Public Employees (CUPE), Local 79*, 2003 SCC 63.

[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".

[49] I further conclude that the amended statement of claim is unnecessary and vexatious. This is because it purports to be an appeal from Ms. Wood's dismissal on probation when, as a member of the Public Service Alliance of Canada, she has already exhausted the appeal process for that decision through the application of the *Public Service Labour Relations Act*, the *Public Service Act*, and the Collective Agreement. There is simply no right of appeal from the decision of the Deputy Minister of HPW of March 5, 2015. It is therefore obvious that Ms. Wood's action cannot succeed.

[50] Finally, I conclude that the amended statement of claim constitutes an abuse of process. As Ms. Wood herself acknowledged at the hearing, the "same facts" underlie her appeal to the Deputy Minister, her proceedings before the YWCHS Board, her proceedings before the Yukon Human Rights Commission, and now her action in this Court. Her focus in each forum was slightly different, but the factual matrix in each case turns on her perception that she has been wrongfully dismissed. Before the Deputy Minister, she focused on being targeted and treated unfairly by her Foreman and Area Superintendent, Peter and Richard Nagano, respectively. Before the YWCHS Board, her focus was on YG retaliating against her for raising safety concerns. Before the Yukon Human Rights Commission, her focus is on YG discriminating against her on the basis of her sex. Before this Court, her focus is on s. 18 of the *OHSA* giving rise to a civil cause of action. Accordingly, this is the fourth forum that Ms. Wood has accessed to relitigate her dismissal on probation.

[51] Furthermore, Ms. Wood chose not to pursue her right of appeal from the Appeal Tribunal to the YWCHS Board. Rather, on the very day that she withdrew her appeal, she commenced the within court action. That constitutes a collateral attack on the

Appeal Tribunal and is an additional basis for concluding that this court action is an abuse of process.

CONCLUSION

[52] Ms. Wood's application to add additional defendants is dismissed. YG's application to strike the amended statement of claim filed October 6, 2016 is granted. Neither party sought costs in their respective notices of application. However, I will remain seized of this matter in the event that YG wishes to make further submissions on costs. If so, they are to be in writing and filed within 20 days of the date of these reasons being released. In that event, Ms. Wood will have a further 10 days to submit her written submissions on costs.

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GOWER J.