COURT OF APPEAL OF YUKON

Citation: *Wood v. Yukon (Highways and Public Works)*
2017 YKCA 4

Date: 20170525
Docket: 16-YU800

Between:

Juanita Wood

Appellant
(Plaintiff)

And

Government of Yukon
Highways and Public Works

Respondent
(Defendant)

Before: The Honourable Mr. Justice Harris
The Honourable Mr. Justice Willcock
The Honourable Madam Justice Fenlon

On appeal from: an order of the Supreme Court of Yukon, dated December 7, 2016 (*Wood v. Yukon (Highways and Public Works)*, 2016 YKSC 68, Whitehorse Registry No 16-A0034)

Oral Reasons for Judgment

Appellant appearing In Person (via video conference):

Counsel for the Respondent: C. Freedman (via video conference)

Place and Date of Hearing: Vancouver, British Columbia
May 23, 2017

Place and Date of Judgment: Vancouver, British Columbia
May 25, 2017

Summary:

The Government of Yukon applies to quash Ms. Wood's appeal of an order dismissing her application to amend her pleadings and an order striking her notice of claim, on the basis that the appeal is so devoid of merit or substance it would be an abuse of process to allow it to proceed. Ms. Wood also applies to file an amended factum. Held: the application to quash the appeal is granted and the application to file an amended factum is dismissed. Ms. Wood's appeal is bound to fail. The judge did not err in dismissing her application to amend her pleadings and there is no evidence to support a claim for reasonable apprehension of bias. Neither did the judge err in striking her notice of claim; her claim was bound to fail.

FENLON J.A.:

INTRODUCTION

[1] The respondent Government of Yukon applies to quash Juanita Wood's appeal from orders refusing amendments and striking out her statement of claim. Ms. Wood applies for leave to file an amended factum.

BACKGROUND

[2] The dispute underlying the appeal arises out of Ms. Wood's employment with the Department of Highways and Public Works at the Ogilvie camp in the Yukon. She was hired as a heavy equipment operator in February 2014 and dismissed in February 2015. Ms. Wood was on probation for the first six months of her employment. That probation was extended for a further six months. Just before it ended, she received a letter of termination. The letter set out a number of reasons for her dismissal:

- she had been given a letter of expectation, dated June 12, 2014**,** about the importance of following the chain of command;
- she had been given a second letter of expectation following her admission of speeding while driving a government vehicle on June 16, 2014;
- she had been given a third letter of expectation for leaving the worksite without approval on July 16, 2014;
- her probation had been 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;
- she 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
>
> - she had a "confrontational attitude towards branch personnel and a lack of respect towards [her] supervisors and management".

[3] Ms. Wood is of the view that she was dismissed in part because she raised safety concerns in the fall of 2014 about her manager's failure to report a serious incident involving damage to a caterpillar as required by s. 30(2) of the *Occupational Health and Safety Act*, R.S.Y. 2002, c. 159 (*OHSA*). She had also complained the employer had attempted to destroy minutes from a December 4, 2014 monthly safety meeting in contravention of s. 12(1) of the *OHSA* and failed to deal with complaints raised in the safety meeting.

[4] Ms. Wood started a number of proceedings following her dismissal. First, on February 18, 2015, she appealed her dismissal to the Deputy Minister of Highways and Publics Works as provided for in the collective agreement. That hearing involved representations from both the employer and Ms. Wood. On March 5, 2015, the Deputy Minister upheld Ms. Wood's dismissal. He said in part:

> The concerns brought forward by the employer [centered] 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.

[5] That same day Ms. Wood commenced proceedings before the Yukon Workers Compensation and Health and Safety Board (the "Safety Board"), alleging the Government had retaliated against her for raising safety concerns contrary to s. 18 of the *OHSA.* That section establishes a summary conviction offence prohibiting an employer from retaliating against an employee for raising health and safety concerns. Section 18 of the *OHSA* reads as follows:

> 18(1) No employer or trade union or person acting on behalf of an employer or trade union shall
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> (a) dismiss or threaten to dismiss a worker;

> (b) discipline or suspend or threaten to discipline or suspend a worker;
>
> (c) impose any penalty on a worker;
>
> (d) intimidate or coerce or attempt to intimidate or coerce a worker or a member of the worker's family; or
>
> (e) take any discriminatory action against an employee
>
> because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has in good faith sought enforcement of this Act or the regulations.
>
> (2) If an employer or trade union or person acting on behalf of an employer or trade union is convicted of a contravention of subsection (1), the convicting court may order
>
> (a) the employer or trade union or a person acting on behalf of an employer or trade union to cease the conduct that is in contravention, if that conduct is continuing, and to reinstate the worker to their former employment under the same terms and conditions under which they were formerly employed;
>
> (b) the employer to pay to the worker any wages the worker was deprived of by the contravention; and
>
> (c) the employer or the trade union, as the case may be, to remove any reprimand or other reference to the matter in the employer's or trade union's records on the worker's conduct.

[6] In November 2015, the Safety Board officer investigating the complaint determined that a prosecution of the Government was not warranted. Ms. Wood appealed that finding to a Safety Board appeal panel. On February 1, 2016, the appeal panel upheld the decision not to prosecute. Ms. Wood appealed the appeal panel's decision to the full Safety Board but withdrew that appeal on May 27, 2016.

[7] Ms. Wood began a third proceeding on April 5, 2016, filing a complaint with the Yukon Human Rights Commission alleging that the Government of Yukon had discriminated against her on the basis of her sex in connection with her employment. The investigation into that complaint was terminated in October 2016. Ms. Wood appealed that decision to the Yukon Human Rights Commission and that appeal was dismissed on March 1, 2017.

[8] On the same day that she withdrew her *OHSA* appeal, Ms. Wood commenced proceedings in the Yukon Supreme Court. The orders appealed from were made in that proceeding. Ms. Wood applied to amend her statement of claim

by adding several parties and causes of action; the Government opposed those amendments and cross-applied to strike the existing statement of claim, largely on the basis it was based on breach of s. 18 of the *OHSA,* which does not provide for a civil remedy. The chambers judge denied the amendments and struck out Ms. Wood's statement of claim.

THE APPEAL

[9] Ms. Wood filed a notice of appeal of both the order dismissing her application to amend and the order striking her notice of claim. However, in her factum filed April 4, 2017, she conceded that the subject matter and remedies in the proposed amendments were not sufficiently connected to warrant adding the proposed defendants and causes of action to the existing claim. Despite abandoning this ground of appeal, she sought to overturn some of the trial judge's findings of fact as well as his finding that the claims she wished to raise were vexatious and an abuse of process. Ms. Wood views those findings as "unnecessary" and likely to make any further pursuit of her claims more difficult. When informed at the hearing of these applications that this Court can hear appeals only from orders, not reasons for judgment (*Law v. Cheng*, 2016 BCCA 120 at paras. 19 and 20), Ms. Wood withdrew her concession. She also appeals on the basis that the chambers judge was biased.

APPLICATION TO QUASH

[10] Rather than proceed to the hearing of the appeal, the Government of Yukon applies to quash Ms. Wood's appeals. This court has the inherent jurisdiction to quash an appeal where it is so devoid of merit or substance that it would be an abuse of the procedure of the court to allow it to proceed through the normal appeal process: *Ausiku v. Yukon Human Rights Commission*, 2012 YKCA 5 at para.18. The power of the court to quash an appeal on the basis that it is manifestly devoid of merit will seldom be exercised as it is difficult in most cases to reach that conclusion without first hearing the entire appeal: *Schmidt v. Toronto-Dominion Bank* (1995), 24 O.R. (3d) 1 (C.A.). I will consider this test in relation to each ground of appeal.

1. The appeal from the order dismissing Ms. Wood's application to amend her statement of claim by adding parties and causes of action

[11] I turn first to Ms. Wood's appeal from the order denying her application to amend her statement of claim and add parties. As I have noted, Ms. Wood's primary concern is the findings of fact the chambers judge made in arriving at his decision, which she initially conceded was the correct result.

[12] The additional parties Ms. Wood sought to add were all government employees who could not be held personally responsible for Ms. Wood's dismissal, in any event. Nor would they be able to give effect to the relief of reinstatement and compensation that Ms. Wood sought.

[13] The additional causes of action Ms. Wood wished to include in her claim were thoroughly considered by the judge. He concluded they were nothing more than a veiled attempt to re-litigate her failed appeal under the collective agreement and, in some cases, did not disclose a cause of action. In my view, this ground of appeal is bound to fail.

2. Appeal on the basis that there is a reasonable apprehension of bias

[14] As for the ground of appeal relating to a reasonable apprehension of bias on the part of the chambers judge, nothing in the record could reasonably be taken to support that contention. Although it is not necessary for a party complaining of bias to show that the bias led the judge to reach the wrong result, there must be some basis for the allegation beyond mere conjecture.

[15] Ms. Wood relies on the following facts to support her allegation of bias. First, she says the trial judge had decided against her in an unrelated case in 2013; however, the judge asked the parties at the outset whether that was a matter of concern and Ms. Wood did not object to the judge hearing the matter.

[16] Second, much of her complaint is based on the thorough, detailed, and ultimately unfavourable reasons given for denying each new cause of action

Ms. Wood wanted to add to her pleading—reasons Ms. Wood describes as "far exceeding the test to determine if a triable issue existed between the parties".

[17] Third, Ms. Wood relies on the judge's refusal to give her an adjournment mid-application so that she could find a lawyer to advise her on whether s. 18 of the *OHSA* could provide a basis for a civil claim—a refusal based on the long-standing nature of that issue and her own evidence that she had tried for a very long time but could not find a lawyer willing to help, a situation there was no reason to believe would be different at that juncture.

[18] Fourth, Ms. Wood says the judge's suggestion of an alternative reason for the lack of documents supporting the Director's assertion that he had conducted an investigation is evidence of bias because it amounts to defending a proposed new defendant. Finally, she points to findings of law—such as the contractual (not fiduciary) character of the employer/employee relationship posing a bar to her proposed claim in breach of fiduciary duty—as evidence the judge "prejudged the claim". In my view, none of these allegations could reasonably support a claim for apprehension of bias.

3. Appeal from order striking her statement of claim

[19] Ms. Wood acknowledges that the claim she wishes this Court to reinstate is based on s. 18 of the *OHSA.* She pleads that her employer contravened s. 18 and she seeks remedies under that section relating to reinstatement and other damages. It is apparent that the *OHSA* speaks of a contravention, conviction and prosecution and establishes an offence to be prosecuted by the Crown against employers who breach the *Act*. It does not create a civil cause of action that can be pursued by an employee directly, although the penalty that can be imposed following conviction may include remedial orders, such as reinstatement, which affect the employee.

[20] That is not to say that conduct which contravenes s. 18 of the *OHSA* could not also be the basis for a separate civil complaint; but the *Public Service Act,* R.S.Y. 2002, c. 183, and the collective agreement together require any challenge to Ms. Wood's dismissal to be made using the process provided for in the collective

agreement. Ms. Wood acknowledged in the court below that she has exhausted her rights of appeal under the collective agreement**.** As the chambers judge found, Ms. Wood could not simply ignore that result and start an action in the trial court alleging wrongful dismissal.

[21] Ms. Wood argues nonetheless that her claim should not have been struck because her dismissal was also related to rights arising outside of the collective agreement and s. 18 of the *OHSA*. She relies on the Conflict of Interest Mitigation Strategy (referred to as "the Strategy") the Government of Yukon put in place to address the potential conflict of interest arising out of the fact that the Ogilvie Camp foreman, Peter Nagano, is the brother of the Northern Area Superintendent of Highways and Public Works, Richard Nagano. The Strategy required the director of the Transportation Maintenance Branch, Clint Ireland, to "monitor the situation". Ms. Wood is of the view that Mr. Ireland failed in his responsibility to oversee the potential for conflicts, which permitted the two Nagano brothers to engage in a "witch hunt" and set her up for dismissal, in part by not addressing legitimate complaints she raised about safety and other issues and then portraying her as confrontational when she persisted in pursuing these matters.

[22] In my view, this argument cannot succeed because, even if the failure of the Government of Yukon to comply with the "Strategy" was part of the background leading to a wrongful dismissal, it is the dismissal itself which is challenged and that challenge must be taken in accordance with the collective agreement. Put another way, contravention of the Strategy is evidence of the wrongdoing Ms. Wood alleges led to her dismissal, but that does not take the complaint process outside of the collective agreement so as to permit her to start a lawsuit for wrongful dismissal.

[23] In my view, Ms. Wood's action in the Yukon Supreme Court was misconceived, and her appeal from the order striking that claim is bound to fail. Indeed, Ms. Wood now implicitly recognizes that she followed the wrong procedure—on April 27, 2017 she filed a petition seeking judicial review of the Government's decision to dismiss her while on probation. Ms. Wood is self-represented. She says she has been floundering trying to find the correct process to

follow to review the decision of the Government and only discovered recently that judicial review is the correct way to proceed.

[24] In conclusion, in the circumstances, I am of the view that this is one of the rare cases in which the appeal should be quashed on the basis that it is devoid of merit and bound to fail.

APPLICATION FOR LEAVE TO FILE AN AMENDED FACTUM

[25] Having determined that the appeal should be quashed, it is unnecessary to address Ms. Wood's application for leave to file an amended factum. I note that nothing in the proposed changes would answer the Government's application to quash.

[26] In my view Ms. Wood's application would have been dismissed in any event. She sought to revise the factum to, among other things, reframe the issues, remove improper assertions and amend the requested remedies. She did not provide a copy of the amended factum she proposed to file. It is not sufficient to describe in a general way the nature of the changes the new factum would reflect. Before giving leave to file a document, the Court should know what it is agreeing to accept.

DISPOSITION

[27] In summary, I conclude that the appeal should be quashed and Ms. Wood's application to file an amended factum should be dismissed.

[28] **HARRIS J.A.**: I agree.

[29] **WILLCOCK J.A.**: I agree.

[30] **HARRIS J.A.**: The appeal is quashed. The application to file an amended factum is dismissed.

"The Honourable Madam Justice Fenlon"