COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Ashraf v. Jazz Aviation LP,*
2024 BCCA 45

Date: 20240207
Docket: CA48944

Between:

Affan Ashraf

Appellant
(Plaintiff)

And

Jazz Aviation LP, Helene Fraser, and Paul Pabello

Respondents
(Defendants)

Before: The Honourable Mr. Justice Harris
The Honourable Madam Justice Fisher
The Honourable Justice Winteringham

On an application to vary: An order of the Court of Appeal for British Columbia, dated November 16, 2023 (*Ashraf v. Jazz Aviation LP*, 2023 BCCA 434, Vancouver Docket CA48944).

Oral Reasons for Judgment

The Appellant, appearing in person (via videoconference on February 7, 2024):	A. Ashraf
Counsel for the Respondents:	G.J. Litherland (appeared on February 6, 2024 only) K. Draskovic
Place and Date of Hearing:	Vancouver, British Columbia February 6, 2024
Place and Date of Judgment:	Vancouver, British Columbia February 7, 2024

Summary:

The applicant seeks to vary on order of a single justice dismissing his appeal for failure to post security for costs. Held: Application dismissed. The applicant has not demonstrated any reversible error in the justice's exercise of discretion.

[1] **HARRIS J.A.**: This is an application to vary an order of a single justice that dismissed this appeal as abandoned as a result of the failure of the appellant to post security for costs of the appeal as ordered previously by Justice Frankel. Justice Voith dismissed the appeal as abandoned because he concluded it was in the interests of justice to do so, and dismissed a cross application to reduce the amount of security.

[2] The facts giving rise to the appeal and related proceedings are set out in detail in the judgment of Justice Frankel indexed at 2023 BCCA 284 and are summarized also in the reasons for judgment indexed at 2023 BCCA 434 leading to the order sought to be varied. Given the view I take of this application, it is sufficient to refer to those judgments, and is unnecessary to repeat what they describe here.

[3] It is, however, important to reiterate what is well known. An application to vary is not a rehearing of the order under review. An applicant must demonstrate legal error in the order under review. In short, the applicant must demonstrate that the justice was wrong in law or principle or misconceived the facts. This standard of review is highly deferential, particularly where, as here, the order under review is discretionary. It is not open to an applicant to argue that a justice should have reached a different result or should have exercised discretion differently unless that exercise of discretion is founded on legal error.

[4] The issue before us is whether Justice Voith made an error in principle. In my opinion, he did not. The justice began by noting that the *Court of Appeal Act* and *Rules* conferred on him the power to dismiss an appeal as abandoned where the appellant has failed to comply with an order to post security for costs of an appeal. This is clearly correct. He then set out the test governing whether the appeal should be dismissed as abandoned. He identified the relevant considerations, drawing on

Quinn v. Coutts, 2018 BCCA 433 at para. 14 and *Bhimani v. Beninteso*, 2020 BCCA 174 at paras. 28–29, as:

1. What was the reason the appellant failed to comply with the order? Has the appellant offered a realistic assurance that security will be posted within an acceptable period of time?

2. Will the delay in posting security cause prejudice to the respondent?

3. Do the merits of the appeal justify declining to exercise the jurisdiction to dismiss?

4. Is the dismissal of the appeal in the interests of justice?

[5] Once again, Justice Voith correctly identified the test he had to apply. There is no merit to any suggestion that he was wrong in law or in principle. Applying those considerations, the justice explained that: “it is in the interests of justice to dismiss the appeal as abandoned given that Mr. Ashraf has not complied, or taken any steps to comply, with the order to pay security for costs and his appeal is without merit”: at para. 17.

[6] Justice Voith examined the applicant’s contentions in some detail. He rejected Mr. Ashraf’s justification for not complying with the order; namely, that he had applied for leave to appeal the Supreme Court order under appeal and Justice Frankel’s order to post security to the Supreme Court of Canada. Quite correctly, he noted that Mr. Ashraf had not sought to vary Justice Frankel’s order or to stay it. Accordingly, it remained in effect. This conclusion does not rest on legal error.

[7] Next, Justice Voith considered whether he should vary by reducing the amount of security Justice Frankel had ordered. He recognized that, under the new *Act* and *Rules*, he had jurisdiction to do so, but could discern no proper basis, such as a material change in circumstances since the order was made, that would warrant doing so. I detect no legal error underlying that conclusion.

[8] He then turned to the issue of the lack of merit in the appeal. Like Justice Frankel, he concluded that the appeal was without merit. Given the lack of merit, and the difficulties the respondents have encountered in recovering under any of the cost orders made against Mr. Ashraf, he concluded that the interests of justice justified dismissing the appeal as abandoned so that the respondents would not be troubled by or incur further costs to defend a meritless appeal.

[9] I acknowledge that Mr. Ashraf disagrees fundamentally with the conclusion reached by Justices Frankel and Voith that the appeal is devoid of merit. In his written materials, and to some extent in passing in oral argument, he seeks to rely, amongst other things, on a comment I made in which, notwithstanding expressing reservations about the merits of the appeal, I commented that, reluctantly, I was not prepared to say that his appeal was absolutely bound to fail. It is worthwhile to refer to what Justice Frankel had to say about this matter. He referred to my comment, noting, correctly, that it had been made at a very early stage in this appeal, without any developed submissions by Mr. Ashraf and without hearing from the respondents. He then, correctly, noted, that under the new *Rules*, and, in any event in the circumstances, my statement was not binding on him. He went on to say:

> [26] Mr. Ashraf's position is that his appeal raises important employment and human rights law issues that warrant consideration by this Court. I disagree.
>
> [27] Having reviewed Mr. Ashraf's factum, I have concluded this appeal is without merit and is bound to fail. As mentioned above, the chambers judge, based on *Weber* and other authorities, determined that the Supreme Court of British Columbia does not have jurisdiction over Mr. Ashraf's claims because they fall under the collective agreement governing his employment. Like my colleague, I cannot see any error in the chambers judge's application of *Weber*. Equally important is that the jurisdictional issue on which the judge's order is based is not addressed in Mr. Ashraf's factum. Indeed, *Weber* and its progeny are not even mentioned. Rather, Mr. Ashraf advances various arguments, some of which are difficult to understand, that appear to be in support of the proposition that the *Human Rights Code*, the *Canada Labour Code*, R.S.C. 1985, c. L-2, the *Charter*, and other statutes and instruments, including the *International Covenant on Economic, Social and Cultural Rights*, Can. T.S. 1976 No. 46, protect his right to work free from discrimination.

> [28] That the factum fails to address the essential element of the chambers judge's decision is also reflected in the "Nature of Order Sought" section, wherein Mr. Ashraf states the relief he is seeking as follows:
>
> > [81] The Appellant submits that s. 13 of the *British Columbia Human Rights Code* protects the right to work and prohibits discrimination for every individual pursuing the gaining of a livelihood as to offer protection against discrimination.
> >
> > [82] The Appellant seeks an Order from this Honourable Court permitting for the presentation of oral argument at the hearing of the Appeal to further address the issues discussed in here.
> >
> > [83] The Appellant seeks and order for full disclosure of the documents mentioned in paragraph 48 and that the appeal be allowed and a new trial is ordered.
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> The reference to paragraph 48 appears to be a typographical error, as that paragraphs sets out a provision of the *International Covenant on Economic, Social and Cultural Rights*. In paragraph 71, under the heading "Disclosure", the following documents are sought (I assume from Jazz):
>
> 1. *Performance Letter(s);*
> 2. *Plaintiff, Affan Ashraf; October 14, 2019 schedule;*
> 3. *Emails to HR (Terri Green);*
> 4. *Service of Procedure (2019);*
> 5. *Code of Ethics;*
> 6. *Business Conduct Policy*
> 7. *Any other documents this Court may permit or advise.*

[10] I agree with the view expressed by Justices Frankel and Voith that the appeal is devoid of merit. The basis of the order under appeal in these proceedings is that the Supreme Court of British Columbia did not have jurisdiction to adjudicate Mr. Ashraf's claims, as they fall exclusively within the collective agreement governed his employment. The Supreme Court judge applied the principles set out in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, as summarized by Justice Newbury in *Bruce v. Cohon*, 2017 BCCA 186, leave to appeal to SCC refused, 37696 (15 March 2018):

> [7] In 1995, in *Weber v. Ontario Hydro* [1995] 2 S.C.R. 929 and its sister case, *New Brunswick v. O'Leary* [1995] 2 S.C.R. 967, the Supreme Court of Canada adopted the "exclusive jurisdiction" model of 'final and binding' clauses in labour legislation. Under this model, once it is shown that the parties' dispute 'arises from' a collective agreement, the claimant may proceed only under the dispute resolution mechanism (arbitration) set out in that agreement. The courts have no jurisdiction to entertain the dispute

> unless the remedy claimed is one the arbitrator may not grant, or the remedy granted would be otherwise inadequate. (*Weber*, at para. 57.)

[11] There is no prospect that a division of this Court would reach a different conclusion to that of the Supreme Court judge. *Weber* is binding on us, and is dispositive of this appeal. In my view, Mr. Ashraf has not laid any basis to conclude that the remedies available to him under the dispute resolution procedures provided for by his collective agreement were unavailable or inadequate. I reach this conclusion notwithstanding Mr. Ashraf's argument that there is what he refers to as a "*Weber* gap", by which he seems to mean that the issues he wishes to raise about the circumstances involving his employment may be adjudicated in the Supreme Court even though they arise from a collective agreement. He complains that Justice Thomas dismissed his action in breach of the principles of procedural fairness by relying on *Weber* without first permitting him to receive what he identifies as full disclosure to test what he views as the merits of his dispute with the respondents. He says he should be entitled to lead fresh evidence to demonstrate that his case falls within the "*Weber* gap", and, in doing so, refers to at least the possibility of the evidence establishing criminal conduct, perjury, contempt of court and the breach in various ways of his constitutional rights. He goes so far as to suggest that the order of Justice Voith was made in bad faith, since he is unable to pay $10,000 in costs and the merits of his claims against the respondents have never been addressed. Therefore, he should, in the interests of justice, be allowed to continue with his appeal, if he posts $2,000 as security for costs, instead of the $10,000 that Justice Frankel had ordered. I repeat that, in my opinion, *Weber* is dispositive of this appeal.

[12] It is important to remember that an appellant's impecuniosity does not prevent an order for security for costs of an appeal being ordered where the appeal is weak. As Justice Hunter wrote in *Chung v. Shin*, 2017 BCCA 355 at para. 24:

> The significance of Mr. Chung's financial position is relevant to the third issue raised by the appellants, the merits of the appeal. On a security for costs application, the merits may be important in one of two ways. If the appeal appears to be meritorious and a security order might prevent an appellant without means from pursuing it, security for costs will generally not be

> ordered: *Gardezi v. Canadian Union of Public Employees, Local 3495*, 2016 BCCA 462 at para. 10. On the other hand, if an appeal appears to be weak, the impecuniosity of an appellant will not prevent an order for security for costs from being issued, as "without an order for security for costs, the appeal is a gamble by the appellants with the respondents' money": *Daymax Management Inc. v. WHA 820 Holdings Ltd.*, 2004 BCCA 414 (in Chambers) at para. 24.

[13] It follows from all of this that Justice Voith applied the correct principles. It has not been demonstrated that he misapprehended the facts. I would dismiss the application.

[14] I turn now briefly to consider the respondents' application for special costs of this application. They say that Mr. Ashraf has conducted himself reprehensibly in these and related proceedings, persisting in advancing what he has been told a number of times are unmeritorious arguments given the proper scope of the jurisdiction of the superior courts. He has alleged perjury, contempt of court, bad faith, casts aspersions on counsel and the parties, and alleged criminal conduct.

[15] While I share many of the concerns raised by counsel, and indeed would warn Mr. Ashraf of the potential consequences of making such serious allegations, I think we should focus on his conduct of this review application. Mr. Ashraf is entitled to seek a variation of the order dismissing his appeal as abandoned. I am aware that he may not have followed proper procedure in bringing the matter before a division, and that he has advanced some arguments that are worthy of rebuke. I am prepared, however, to accept that Mr. Ashraf's arguments are driven, in large part, by his failure to understand the implications of *Weber*, and that they are, as a result, misguided. In the result, although this is a close call, I would not, on the record before us, order special costs. I do think, though, that there must be finality. Accordingly, I would fix costs for this review application at $1,500 based on the tariff and making reasonable allowance for disbursements typically involved in such applications.

[16] **FISHER J.A.**: I agree.

[17] **WINTERINGHAM J.A.**: I agree.

[18] **HARRIS J.A.**: The application is dismissed and an order for costs is made on the terms set out in the judgment.

"The Honourable Mr. Justice Harris"