IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Mema v. Nanaimo (City),* 2023 BCSC 1189

Date: 20230712
Docket: S00580
Registry: Abbotsford

Between:

Victor Mema

Plaintiff

And

City of Nanaimo

Defendant

Before: The Honourable Justice Caldwell

Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	A.L. Burchart
Counsel for the Defendant:	R.A. Jarvis
Place and Date of Hearing:	Abbotsford, B.C. April 18, 2023
Place and Date of Judgment:	Abbotsford, B.C. July 12, 2023

[1] The plaintiff, Victor Mema, sues for breach of contract; breach of the duties of good faith and honest performance; intentional infliction of mental suffering; as well as wrongful dismissal and procedural failures relating to that dismissal.

[2] The defendant, the City of Nanaimo (the "City"), applies for summary judgment. Alternatively, the City seeks to have the claim dismissed in its entirety, or at least the claim for wrongful dismissal, by way of summary trial.

BACKGROUND

[3] In 2015, the plaintiff began working for the City as the "Director, Financial Services". A letter was sent to him dated July 9, 2015, offering him this initial position, which was to begin on September 8, 2015. He signed that letter accepting the position on July 13, 2015. That letter included the following paragraph:

> Your employment with the City of Nanaimo is subject to the provisions of *MANAGEMENT TERMS AND CONDITIONS OF EMPLOYMENT BYLAW 2005 No. 7000*, as well as *OFFICERS APPOINTMENT AND DELEGATION BYLAW 2006 NO. 7031* (copies enclosed). The provisions, terms and conditions of these Bylaws form a part of your contract of employment with the City of Nanaimo.
>
> [Emphasis in original.]

[4] On September 6, 2015, he received a credit card, a "P Card", for valid City expenditures and purchases. He signed a cardholder agreement as a condition of receiving the card, which included the following:

> 1. I understand that I will be making financial commitments on behalf of the City of Nanaimo and will strive to obtain the best value for the City.
> 2. I have read and will follow the policies and procedures in the Purchasing Card Policy. Failure to do so could be considered as misappropriation of City funds. Failure to comply with this Agreement may result in either revocation of my user privileges or other corrective action, up to and including termination of employment.
> 3. I understand that under no circumstances will I use the BMO MasterCard to make personal purchases, either for myself or for others. Using the card for personal charges could be considered misappropriation of City funds and could result in corrective action up to and including termination of employment.
>
> …

[5] In spite of this written policy, the City acknowledges that there were “minor modifications” to the above policy for certain personal expenses such as paying for a spouse’s expenses at a conference. There is no evidence that such modifications, minor or otherwise, were reduced to writing or were generally circulated.

[6] On September 10, 2015, the plaintiff received, reviewed and signed a five-page document entitled “JOB DESCRIPTION”. That document contained the phrase/statement: “Adheres to City policies and objectives”, at the bottom of page 4.

[7] The plaintiff became the Chief Financial Officer (“CFO”) for the City in mid-2016.

[8] In or about March 2016, shortly before he became CFO, the plaintiff began charging personal expenses to his P Card. By late 2017, the total of such expenses may have been as high as $14,148.97, and included such things as an almost $1,300 charge incurred in Cancun, Mexico, while he was on vacation there. While expressly denying that this charge was for his hotel, he has failed or refused to indicate the purpose for which this expenditure was incurred, both to the City auditors and in his materials before me.

[9] The plaintiff says that the P Card Agreement, which he signed, does not absolutely preclude use of the P Card for personal expenses. He says that P Cards were used for personal purchases in practice and that there was no policy or practice requiring personal purchase charges to be immediately repaid to the City. He says further that:

- the accounting staff didn’t “follow up” with him regarding his personal charges except as to repayment;
- no one told him in February 2017 to stop using his P Card for personal expenses; and
- no one told him that his use of his P Card for personal expenses was wrong or contrary to the practice that he “understood was in play”.

[10] It is to be remembered that such comments are made in the context that the plaintiff was, at the time, the CFO for the City of Nanaimo and therefore one of the highest-ranking persons in the City regarding decisions, directions, accountability and propriety in the use of City funds which were raised largely, if not exclusively, from the taxpayers of Nanaimo. The accounting staff also presumably reported to the plaintiff and were under his authority while he was in this role.

[11] In December 2016, the plaintiff issued a reimbursement cheque for some of the expenses incurred to that date. The cheque was returned due to insufficient funds in January 2017.

[12] By mid-February 2017, the plaintiff had unilaterally established an arrangement to re-pay these outstanding personal expense charges at the rate of $500 per pay period.

[13] Subsequent to this arrangement being put in place, the plaintiff continued to incur further personal charges on the P Card, including the above noted Cancun charge. He disputes the allegation of the City that he was told to stop using the P Card for personal expenditures.

[14] There may have been a certain level of dissention about this situation brewing among the staff in the finance department, but that matter was not appropriately presented in the materials before me and no affidavit material was provided by any finance department staff. However, evidence was presented indicating that two staff members were issued discipline letters for contacting the City's auditors with concerns about the plaintiff's personal use of his P Card prior to consulting the Chief Administrative Officer (the "CAO") about their concerns.

[15] On October 11, 2017, the CAO wrote to the plaintiff, temporarily suspending his use of the P Card.

[16] On February 21, 2018, the City's auditors KPMG issued a forensic investigation report into the matter of personal use of P Cards. The report confirms, among other things, that:

- there is a written policy that P Cards are not to be used for personal expenses;

- that policy has been modified in practice, but not in writing, to allow for personal expenses to be incurred on the P Cards on the understanding–again unwritten and in direct conflict with the written policy–that they will be identified as personal and be repaid in a timely manner;

- generally, the personal charges on P Cards are incurred for business expenses which include a personal component (*e.g.* paying for a spouse at a conference or are incurred by error);

- the plaintiff was one of two "outliers" who used the P Card for personal expenses significantly more frequently and/or for significantly higher amounts than other City employees;

- the plaintiff's charges were outstanding for extended periods of time and one of his fairly major reimbursement cheques was returned due to insufficient funds; and

- thereafter, the plaintiff unilaterally established a periodic repayment regime which saw him paying $500 per pay period against his outstanding balance owed.

[17] Two days later, on February 23, 2018, a Senior Accountant with the City filed a Report of Serious Misconduct with the Human Resources department of the City regarding the plaintiff's actions. That complaint was placed before the Mayor and Council at an in-camera session on March 1, 2018. On a motion at that session, a decision was made to suspend the plaintiff with pay pending receipt of a further auditors' report and to turn the complaint and allegations of serious misconduct over to the RCMP.

[18] The plaintiff was notified of this decision by letter dated March 1, 2018.

[19] By April 2018, all but $690.17 of the plaintiff's personal expense charges had been repaid.

[20] On April 23, 2018, the plaintiff was notified that Council would be meeting to consider terminating his employment and notifying him as to the procedures to be followed. The plaintiff requested full disclosure for that meeting. The meeting took

place on May 11, 2018. The plaintiff attended with counsel and provided submissions, although he now complains about the inadequacy of disclosure and about certain procedures regarding that meeting.

[21] On May 14, 2018, the plaintiff was notified of Council's decision to terminate his employment with cause.

[22] The plaintiff has been the subject of some local reporting. In May 2018, the KPMG report found its way into the hands of the media. Prior to that, in 2016 and 2017, a large number of Freedom of Information requests were made to the City (including by one or more local investigative journalists) regarding senior management expenses. Information was provided pursuant to those requests.

[23] On July 11, 2018, the plaintiff filed an Individual Complaint with the BC Human Rights Tribunal regarding, at least in part, the circumstances surrounding his termination by the City. That complaint was heard on August 4–7 and 10–14, 2020; and February 1–5 and 8–11, 2021. Written submissions were filed in November 2021. No decision has yet been rendered.

[24] The plaintiff then filed his notice of civil claim on May 13, 2021; it was served on the City on May 30, 2021. A response was filed by the City on June 20, 2022, and an Amended Response was filed on July 21, 2022.

POSITION OF THE PARTIES

[25] The City says that the matter should be dismissed on a summary judgment basis by way of Rule 9-6 of the *Supreme Court Civil Rules* because, as a matter of law, the notice of civil claim was filed out of time and is thus statute-barred.

[26] The City says that the plaintiff was aware of the facts alleged in relation to the claims for breach of good faith and duty of honest performance prior to May 14, 2018, and that the alleged facts relating intentional infliction of mental suffering were known to the plaintiff as early as January 2018. As a result, they say these claims are out of time, because the normal limitation period would have expired prior to the

filing of the notice of claim on May 13, 2021, even with the period of COVID-19 related suspension of limitations in this province.

[27] The City says that even if those portions of the claim might have been filed just in time for the usual two-year time limit, the applicable statutory limit for claims against municipalities in British Columbia is six months. As a result, the City says that the notice of claim was filed out of time. The City says that due to this late filing, there are no triable issues remaining, and that the entire claim must be dismissed.

[28] The City says that the claim regarding wrongful dismissal certainly falls under the six-month time limit, even if the plaintiff's other claims do not.

[29] In the alternative, if the plaintiff's various claims were all filed in a timely manner, the City says that the evidence clearly indicates that it had proper grounds to dismiss the plaintiff for cause, and that it did nothing to breach the duty of good faith or honest performance. It says further that the plaintiff cannot meet the tests for recovery of damages for intentional infliction of mental suffering. For these reasons, the City says if the matter is not dismissed as a summary judgment, then it can proceed as a summary trial.

[30] The plaintiff argues that the shortened limitation period of six months relied upon by the City is not clearly applicable to the plaintiff's claims. The plaintiff also says the evidence regarding cause, intentional infliction of mental suffering, and other issues is not sufficiently clear to be determined on a summary basis. He points out that document exchange and examinations for discovery have not yet occurred.

LIMITATION ISSUE

[31] The focus of the analysis of the six-month limitation period for claims against municipalities is on the following two statutory provisions.

[32] Section 152 of the *Community Charter*, S.B.C. 2003, c. 26 provides:

> **Termination of officers**

> 152 (1) Subject to a contract of employment and subject to providing the officer with an opportunity to be heard, the appointment of a municipal officer may be terminated by the council as follows:
>
> (a) in the case of termination for cause, by immediate termination without any period of notice;
>
> (b) in any other case, by termination on reasonable notice.
>
> (2) A termination under subsection (1) (b) may only be made by the affirmative vote of at least 2/3 of all council members.

[33] Section 735 of the *Local Government Act*, R.S.B.C. 2015, c. 1 provides:

> **Limitation period for certain actions**
>
> 735 All actions against a municipality or regional district for the unlawful doing of anything that
>
> (a) is purported to have been done by the municipality or regional district under the powers conferred by an Act, and
>
> (b) might have been lawfully done by the municipality or regional district if acting in the manner established by law
>
> must be commenced within 6 months after the cause of action first arose, or within a further period designated by the council or board in a particular case, but not afterwards.

[34] The Management Terms and Conditions of Employment Bylaw 2005 No. 7000, at paras 7.1–7.5 [Management Bylaw], are also relevant:

> 7.1 Termination of employment of any Officer having served past the probation period shall be made by Council pursuant to the *Community Charter*.
>
> 7.2 Termination of employment of any Management/Excluded Employee, other than an Officer, having served past the probation period shall be made by the responsible Department Director in consultation with the City Manager or his designate.
>
> 7.3 "Reasonable Notice" of termination of any Officer or Management/Excluded Employee shall mean the length of notice or payment-in-lieu thereof as follows:
> (Bylaw 7000.01)
>
> (i) During the probation period, one month notice or salary in lieu of notice;
>
> (ii) Upon completion of probation, reasonable notice in accordance with common law to a maximum of one month notice or salary in lieu of notice for each completed year of service to a maximum of 24 months with a minimum of six months notice or payment in lieu."

> 7.4 The Council may, in its absolute discretion, grant additional pay in lieu of notice to any Officer or Management/Excluded Employee.
>
> 7.5 "In making exceptions, Council is to consider the judicial jurisprudence that includes length of service and other factors such as character of employment (e.g. junior vs. senior manager), age of the employee and availability of comparable employment."
> (Bylaw 7000.01)

[35] The above noted legislation and other terms and conditions provide local governments with the ability to terminate the appointment of municipal officers. How that termination occurs may be lawful or unlawful, depending on the circumstances and the processes and procedures followed in the particular case.

[36] As noted, the plaintiff has raised procedural issues regarding his termination, especially in relation to the May 2018 meeting and Council's decision to terminate his employment. The plaintiff also alleges that there were additional implied contractual terms including duties of good faith and honest performance of the terms of his employment, and that these terms were breached by the City, and makes a claim grounded in the tort of intentional infliction of mental suffering.

[37] If the processes and/or procedures undertaken in pursuit of termination are acknowledged to meet the legal requirements provided, that termination may well be lawful. A question would remain as to whether termination was "wrongful", including consideration of a "with cause" versus "without cause" determination on the facts, along with the possible consideration as to the adequacy of notice or payment in lieu of notice. In such cases, it would seem at least arguable that the shortened limitation period contained in s. 735 of the *Local Government Act* would not apply as nothing would be alleged to have been done unlawfully by the municipal authority.

[38] As for the procedural issues alleged, the question as to whether in such circumstances the aggrieved person could or should proceed by petition for judicial review of the municipal dismissal decision or by notice of civil claim for damages is not before me. I make no determination regarding that question.

[39] If the processes and/or procedures undertaken are expressly impugned by the aggrieved person, then the question of whether the action taken by the municipal authority–here the decision to terminate the plaintiff's employment–was lawful or unlawful is activated. In particular, the enquiry here becomes:

1. Was the termination unlawfully done?

2. Was it purported to have been done under the powers conferred by an Act?

3. Might it have been done lawfully if it had been done in the manner established by law?

[40] In *Gringmuth v. North Vancouver (District)*, 2002 BCCA 61 and the companion case of *Pausche v. British Columbia Hydro & Power Authority and District of Maple Ridge*, 2000 BCSC 1556 aff'd 2002 BCCA 62, the Court of Appeal addressed a predecessor section with substantially identical wording to that of s. 735 of the *Local Government Act*. The Court provided guidance for the interpretation and application of that section, noting the seeming circularity of the provision, because "anything unlawful done by a municipality would, one might think, have been done 'lawfully' if the municipality had acted 'in the manner established by law'": *Gringmuth* at para. 1.

[41] *Gringmuth* involved allegations of negligent inspection regarding the construction of a home. *Pausche* dealt with alleged negligence in the operation of a dam and failures to warn local residents of an impending flood.

[42] At para. 18 of *Gringmuth*, the Court of Appeal quotes from then-Justice Bauman in *Pausche* at paras. 64–71, where Bauman J. notes that to be provided with the protections of the lowered-limitation period under the *Local Government Act*, the municipality must be acting in accordance with its provided legislative authority:

> What this extract clearly shows, is that the municipality must be able to point to existing legislative authority which makes the impugned conduct, that is the negligent act, lawful.

> I would illustrate the proper application of the section by suggesting a case where the municipality purports to enact a bylaw under the *Local Government Act* expropriating land for a municipal purpose.
>
> The municipality purports to comply with the various statutory requirements and then enters the land and destroys the home on it in preparation for the municipal project.
>
> It transpires that the municipality has not properly complied with the statutory prerequisites to a valid expropriation. (There are a number under the *Act*, the details are not important.)
>
> The expropriation bylaw is successfully attacked by the landowner and it is declared void.
>
> Setting aside considerations of colour of right, the municipality has in law trespassed and converted the landowner's property.
>
> The limitation period of six months, however, properly applies to that cause of action, because if the municipality had acted in the "manner prescribed by law" in adopting the expropriation bylaw, what would otherwise have been an unlawful act - trespass and conversion - might have been lawfully done … [citations omitted].
>
> But that is not the case with the negligent inspection cases and it is not the case with the facts at bar.
>
> [Underline emphasis added in *Gringmuth*.]

[43] The Court in *Gringmuth* agreed with the approach to limitations as discussed by Bauman J., but noted that it would be rare for the six-month limitation to apply to certain types of cases, such as actions grounded in negligence:

> [30] Finally, I agree with Bauman J. in *Pausche* that the proper question to ask is whether, if the municipality had complied with the existing statute law when it (allegedly) caused injury to the plaintiff, it could have done that harm lawfully - i.e., in accordance with the statute. At present, I cannot conceive of a case in which this question would be answered in the affirmative in respect of a breach of a private or common law duty of care - i.e., in a case of negligence.

[44] In his notice of civil claim in the present case, the plaintiff alleges, among other things, that the City did not follow the procedures required by the Serious Misconduct Policy, failed to investigate the allegations of misconduct, and failed or refused to make full disclosure of information to the plaintiff prior to his Hearing before Council. No allegation of negligence is contained in the claim.

[45] In my view, the plaintiff's claim for unlawful termination flowing from the alleged procedural failures of the City falls squarely in line with the hypothetical question raised in *Pausche* and approved by the Court of Appeal in *Gringmuth*. The City purported to comply with the requirements of s. 152 of the *Community Charter* as well as the Management Bylaw. It then terminated the plaintiff for cause. The plaintiff complains that the City did not in fact comply with the statutory prerequisites for his termination. If proven, the result would be that the plaintiff was not lawfully terminated. Depending on the process elected by the plaintiff, the remedies could include reinstatement following judicial review or perhaps damages. If the City had acted in the manner prescribed by law–*i.e*. according to the statutory provisions and procedures–the termination might have been lawfully done, and the six-month limit would be engaged.

[46] The shortened limitation period therefore properly applies here to either form of action or proceeding, at least for unlawful termination.

[47] In this regard, I note as well the case of *Reglin v. Creston (Town)*, 2004 BCSC 791, a decision of Justice Melnick. There, a town employee was terminated without cause. He filed an action by writ of summons and statement of claim within six months, seeking a variety of relief including reinstatement to his previously held position. Some time later, and well after the six-month limitation had passed, the town sought dismissal of the action by way of summary trial. Mr. Reglin then filed a separate petition for judicial review seeking to quash the decision to terminate his employment due to procedural failures. That petition was dismissed as having been filed beyond the limitation period for bringing an action against a municipal authority.

[48] I find that the six-month limitation period provided by s. 735 of the *Local Government Act* applies to the unlawful termination claim–that is the allegations of non-compliance with the City's statutory procedural requirements for termination–as well as the wrongful dismissal claim, which is inextricably connected to the termination issue. I dismiss those portions of the plaintiff's claim in their entirety. Counsel have liberty to apply for further directions or relief on the issue or striking

specific portions, lines or paragraphs of the notice of civil claim should they wish to do so, but I do not believe that to be necessary in the circumstances.

[49] Given my findings regarding the limitation issue on those claims, I need not consider the substantive issues regarding termination.

[50] However, the limitation period does not apply to the allegations regarding breach of the duty of good faith and honest performance, and intentional infliction of mental suffering, as the operative legislation clearly does not provide any lawful means or process by which the City could carry out such acts lawfully. Whether these alleged acts occurred and, if so, whether damages flowed from them, are matters to be determined at trial. In my view, the material before me is insufficient to support a proper finding on those issues in a summary judgment or summary trial forum.

[51] The City has been substantially successful on this application and they are entitled to their costs relating to it on Scale B.

"Caldwell J."