IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kainth v. Newton Whalley Hi Way Taxi Ltd.,* 2023 BCSC 844

Date: 20230310
Docket: S230300
Registry: Vancouver

Between:

Davinder Kainth

Petitioner

And

Newton Whalley Hi Way Taxi Ltd., Parmjit Singh and Others

Respondents

Before: The Honourable Madam Justice Wilkinson

Oral Reasons for Judgment

(In Chambers)

Counsel for the Petitioner:	T. Bhullar
Counsel for the Respondents:	N. Steinman A.R. Nelson
Place and Date of Hearing:	Vancouver, B.C. March 10, 2023
Place and Date of Judgment:	Vancouver, B.C. March 10, 2023

[1] **THE COURT:** These are my reasons for judgment on the application.

[2] The petitioner applies for an interim injunction pending resolution of the petition itself, as set out in Order #2 sought in his notice of application. He has abandoned the relief sought in Order #1.

[3] On the evidence before me, the background facts are the following for the purposes of this application, and much of it are alleged facts as represented and put forward by the parties and their witnesses.

[4] The respondent company, Newton Whalley Hi Way Taxi Ltd. (“Newton Whalley”), operates a taxi service (the “Company”). Many, but not all, of the drivers of the Company are shareholders of the Company. The petitioner owns two shares in Taxi 109. He also owns a one-quarter share in Taxi 130, along with other shareholders. Under the shares the petitioner owns in the taxi, he owns two 12-hour shifts in a period of 24 hours. He has the choice to either drive the taxi himself if he meets the Company’s requirements as a driver, or he can sublease his shifts. As a shareholder, the petitioner also has the following rights: voting at annual general meetings, ownership in the Company, entitlement to dividends of the Company, the opportunity to examine the yearly financial statements of the Company, and the right to transfer ownership of his shares in the Company.

[5] The Company does not have a shareholder's agreement with the petitioner, nor does it appear that it exists with any other shareholder, on the evidence before me anyway.

[6] After the petitioner purchased his first share in the Company, he signed a Taxi Driver ID Agreement dated November 20, 2018. The petitioner was issued a taxi driver ID pursuant to the agreement, which is required to operate a taxi for the Company. A driver with a valid taxi driver ID may operate a taxi owned by him or her by reason of their shares, or operate a taxi owned by another individual. Shareholder status is not required; however, a driver who holds a taxi driver ID is entitled to access the Company's dispatch system. When the Company gets a call from a

customer, the dispatcher enters the information into the software. The system automatically picks up the suitable vehicle. The driver can then accept or complete the job or the driver can refuse the job. In such circumstances, the Company dispatcher apparently has to manually dispatch a job, such as when the driver refuses a job, and when that happens, the dispatcher has to manage and send the closest car.

[7] Another consideration when dispatching a car for a job is the requirement of a customer. For example, if a customer requires a car with wheelchair access, this consideration is used by the dispatch system in dispatching a car. I note that the petitioner's Taxi 109 is enabled for wheelchair access.

[8] The petitioner and others filed an action in the British Columbia Supreme Court on August 10, 2020 against the respondents and others (the “First Action”). In the First Action, the petitioner alleged, among other things, that the conduct of the respondents and various of its directors and officers at the time amounted to oppressive conduct or was unfairly prejudicial to him and the other plaintiffs.

[9] The First Action alleges similar or same conduct as that alleged in paras. 19 and 20 of Part 2 of the petition. The petitioner alone filed another action in the BC Supreme Court on December 9, 2020 against the respondents and others (the “Second Action”). In the Second Action, the petitioner alleged, among other things, that the conduct of the respondents and various of its directors and officers at the time amounted to oppressive conduct or was unfairly prejudicial to him. The Second Action alleges the same conduct as alleged in para. 22 of Part 2 of the petition. The two actions are outstanding.

[10] This petition was filed on January 17, 2023. In addition to the existence of the litigation, at least since the petitioner commenced the First and Second Actions, the relationship between the Company and the petitioner appears to have deteriorated. The petitioner has apparently been repeatedly requesting information from staff about third parties and recording his conversations with staff.

[11] For example, on May 22, 2021, the petitioner alleges failure by the Company to provide the petitioner with information about another taxi that he was seeking. On May 29, 2021, the petitioner alleges forced dispatches on the petitioner from different zones. On February 8, 2022, the petitioner corresponded with the Company asking 26 questions regarding dispatch information and information on operational decisions. Responses prepared by the Company were not to the petitioner's satisfaction.

[12] The general manager on behalf of all staff made a complaint to the board of directors dated April 28, 2022 about the alleged conduct of the petitioner in harassing staff and asking for information about other shareholders. The petitioner emailed a member of the board of directors and another shareholder on June 12, 2022, complaining about the conduct of the general manager and threatening legal action against him. The petitioner was requested to attend at a meeting of the board of directors on July 18, 2022, but he declined to attend if those he had complaints about also attended.

[13] The petitioner has also asked for information about other drivers, which the Company viewed as inappropriate and contrary to privacy laws.

[14] Since the August 3, 2022 termination notice, which I will refer to at this point, the petitioner has also engaged in other conduct. On August 3, 2022, the Company sent a letter to the petitioner terminating his employment with the Company on a without cause basis and provided him with six months' notice of termination of his employment effective February 3, 2023. This was in case he actually was an employee as opposed to an independent contractor, according to the terms of the letter. The Company set out that the termination does not impact the petitioner's shares and his entitlement to hire other drivers to operate the vehicle.

[15] The petitioner has also attended at the offices of the Company on more than one occasion since that date with other people and recorded his attendance.

[16] The assistant manager complained on November 14, 2022 about the petitioner showing up at the office with others, recording her and harassing her. She apparently felt threatened and had to call the police to ensure the petitioner and others left the building as no one else was in the office. She also allegedly required personal health days because of the visit of the petitioner and others on that day.

[17] By letter dated December 6, 2022, the Company sent a reprimand letter to the petitioner about his alleged conduct above. As of February 4, 2023, as set out in the termination letter sent to the petitioner in August 2022, the Company has terminated the petitioner's taxi driver ID licence and his access to the Company's dispatch system. The taxi can still be operated by a qualified individual, however, and the petitioner has allowed that to occur in the past and may currently be also subleasing his taxi.

[18] The petitioner submits the relief he seeks is in the nature of a prohibitive injunction and not a mandatory one, and that is the relief sought before me today. The relief sought is that the respondent, Newton Whalley, be prohibited from denying access to the dispatch system pending resolution of the petition. However, in fact what the petitioner seeks is a return to the status quo, as that denial of access has already taken place. The petitioner seeks a return to the status quo before the termination of his access on either February 4, 2023, or otherwise by reason of the six months' notice provided to him on August 3, 2023, before his employment was terminated.

[19] This is therefore an application for a mandatory injunction: *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5 at para. 15.

[20] Therefore, the petitioner is bound, among other things, to show that he has a strong *prima facie* case in order to succeed on obtaining an interim injunction, which is extraordinary discretionary relief.

[21] The petition in this matter relates to the Company's dismissal of the petitioner as a driver for the Company. Accordingly, the court's preliminary assessment of the merits at step one in the case at bar may also include the following considerations.

[22] Termination of employment alone is not sufficient grounds for an oppression action. A plaintiff may pursue an oppression action only in respect of wrongs suffered *qua* shareholder, and not for wrongs suffered in other capacities. Normally, a person who is both an employee and a shareholder of a company cannot bring an oppression action in respect of claims that arise *qua* employee: *Dubois v. Milne*, 2020 BCCA 216 at para. 113.

[23] This militates against finding that the petitioner has a serious question to be tried, or a strong *prima facie* case.

[24] It is only where a company has been structured in such a manner so as to tie closely employment to shareholdings, such that the right to be employed in a management position flows from the status of being shareholder, that a court will consider wrongful termination as founding the basis of an oppression remedy claim: *Dubois* at para. 116; *Naneff v. Con-Crete Holdings Ltd.*, [1993] O.J. No. 1756 (Gen. Div.), remedy varied on appeal 1994 CanLII 7542 (O.N.S.C.), appeal allowed [1995] O.J. No. 1377 (C.A.).

[25] The petitioner has never had a reasonable expectation of participating in management simply because he owns a fraction of the shares in the Company. The Company has about 125 shareholders, none of whom own more than two shares in the Company. He is entitled to see financial statements and has seen those for the fiscal years ending July 31, 2020 and July 31, 2021, which were provided to the petitioner by e-mail or otherwise: *Business Corporations Act*, S.B.C. 2002, c. 57, ss. 42 and 46.

[26] The petitioner also does not have a reasonable expectation of personally operating the taxi he owns merely because he owns two shares in the Company. There is no right conferred in the Articles of Incorporation on a shareholder to

personally operate a taxi. Rather, a shareholder is only entitled to operate a taxi. Since a shareholder who wishes to personally operate a taxi is required to sign the Taxi Driver ID Agreement, and the petitioner did sign the Taxi Driver ID Agreement, he was aware that he had no reasonable expectation of personally operating his taxi.

[27] The applicant has the onus of proving irreparable damage: *Goloff v. I.W.A., Local 1-405* (1959), 29 W.W.R. 511 (B.C.C.A.).

[28] In its assessment of the existence of irreparable harm, as set out in *Canadian Broadcasting Corp. v. CKPG Television Ltd.* (1992), 64 B.C.L.R. (2d) 96 (C.A.) at 9–12, the court ought to consider the following points:

a) adequacy of damages as a remedy for the applicant if the injunction is not granted and for the respondent if the injunction is granted;

b) the likelihood that if damages are finally awarded, they will be paid;

c) preservation of contested property;

d) which party took the step which first brought about the alteration in their relationship which led to an alleged actionable breach of the rights of one of the parties;

e) which party took the action which is said to be an actionable breach of the rights of the other party;

f) a consideration of the nature of the conduct which is said to be wrongful and which is being carried on at the time that the application for the interim injunction is brought; and

g) other factors affecting whether harm from granting or refusal of the injunction would be irreparable, as well as other factors.

[29] The Court of Appeal further held at 11 that:

> " ... the process of applying the second prong of the test is not a process of considering each possible factor separately, and then doing a tally, nor is it a process that can be regarded as effectively discharged by the mechanical application of a formula or checklists of points. Rather, it is a process of assessing all of the relevant factors at one time and in one unified context and reaching a single and overall conclusion about where the balance of convenience rests."

[30] In this case there is evidence that the petitioner can sublease his taxi. He has done so in the past. He need not personally drive his taxi. The practice in the industry apparently is to sublease a taxi for a period of one month for a daily 12-hour shift to be charged at $1,690.00 per month. Two shifts can be subleased for $3,380.00 per month. The petitioner as a shareholder is entitled to sublease his taxi to another driver or drivers to cover one or more of the two 12-hour shifts under his shares.

[31] The petitioner says that when he drives his own cab for a 12-hour shift, he is able to make a net income of $224.00 per shift. His income from operating Taxi 109 could be as much as $4,000.00 per month. He is not barred from renting out or subleasing his cab at this time. This ability to rent out the vehicle allows the petitioner to reduce any loss he may have suffered. As well, he has a claim which can be compensated in damages.

[32] The applicant must show irreparable harm. As Mr. Kainth points out, the loss of his employment results in lost income. Mr. Kainth has provided the Court with the sort of evidence needed to assess his loss.

[33] In *Boni v. Leonardo Worldwide Corporation,* 2018 ONSC 1875*,* the loss of Mr. Boni's position as Chief Executive Officer gave rise to a claim for lost salary. In *Shipka v. Trevoy*, 2012 ABQB 416, the loss of the position resulted in lost salary. Lost salary is a claim which is fully compensable in damages: *Boni* at para. 60; *Shipka* at para. 35. Neither plaintiff succeeded in his injunction application for reinstatement of employment.

[34] In *Short v. Ewachniuk*, 2018 BCSC 1686 at para. 51, the Court ordered that, on an interim basis, a marina's assistant manager's employment should continue and that a resolution dismissing him be set aside. In that case, the assistant manager was integral to the operation of the company. That is not the situation in the case at bar.

[35] Mr. Kainth does not disclose any harm suffered other than a diminishment of income occasioned by the dismissal from employment. Mr. Kainth received a period of six months' working notice. There is no claim by him for anything other than monetary compensation or a "diminished standard of living". These claims are fully compensable in damages and do not meet the test of irreparable harm as set out in the authorities, including *RJR-MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311, or *British Columbia (Attorney General) v. Wale* (1986), 9 B.C.L.R. (2d) 333 (C.A.), aff'd [1994] 1 S.C.R. 62.

[36] Further, the applicant has not moved with the requisite urgency. He knew as of August 3, 2022 about this dismissal with six months' notice. He took no steps to seek to set aside that decision by filing a wrongful dismissal action or otherwise. During this period of time he had counsel in the First Action; counsel was familiar with the background and events herein, Mr. Kainth could have moved with greater speed to seek relief from the courts. This calls into question the *bona fides* of this application.

[37] Newton Whalley, has evidence of its means to pay a judgment. An injunction is not necessary here to avoid a situation of the petitioner obtaining an unenforceable judgment. This is an operating company with predictable revenue. Ontario cases, such as *Boni,* have followed the reasoning of the House of Lords in *Co-operative Insurance Society Ltd. v. Argyll Stores*, [1997] 3 All E.R. 297 at 305 (H.L.):

> [65] It cannot be in the public interest for Courts to require someone to carry on business at a loss if there is any possible alternative by which the other party can be given compensation. It is not only a waste of resources but yokes the parties together in a continuing hostile battle. To order specific performance prolongs the battle.

[38] It is permissible that a respondent to an injunction application explain how the injunction will affect its operations: *West Moberly First Nations v. British Columbia*, 2018 BCSC 1835. Here, I agree with the respondent that an order to reinstate the petitioner will cause disharmony and more hostility between the parties.

[39] It appears for the purposes of this application that Mr. Kainth is the party who first brought about the alteration of the relationship by, and considering the manner of, his interactions with the Company's manager, dispatcher and other employees, including filing the First and Second Actions; and further, to use the language of the House of Lords, "yoking" these parties together in a continuing hostile battle - by reinstating the petitioner - is not an appropriate solution at this time.

[40] The petitioner, I find, is unable to satisfy the Court that there is a strong *prima facie* case, nor that he will suffer irreparable harm if an injunction is not granted. Elsewise, the balance of convenience at best does not favour one party or the other.

[41] I therefore decline to exercise my discretion to order such extraordinary relief in the circumstances of this case and I dismiss the application brought by the petitioner.

[42] Now, is there anything else from that before we discuss the matter of costs, counsel?

[43] CNSL T. BHULLAR: No. No, Madam Justice.

[SUBMISSIONS ON COSTS.]

[44] THE COURT: Costs to the respondent for their costs thrown away for the chambers application on February 21 and otherwise on the application, costs to the respondent in event of the cause.

“Wilkinson J.”