IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Hartley v. Durante,*
2024 BCSC 1006

Date: 20240611
Docket: S243118
Registry: New Westminster

2024 BCSC 1006 (CanLII)

Between:

Amye Elizabeth Hartley

Plaintiff

And

Adam Durante and Protrans BC Operations Ltd. and SNC-Lavalin

Defendants

Before: The Honourable Madam Justice Sharma

Reasons for Judgment

Counsel for the Plaintiff:	M. Sheard N. Chhina
Counsel for the Defendant Adam Durante:	P.I.A.D. Parsons K.Y. Chieh
Written submission from the Plaintiff:	March 20, 2024
Written submission from the Defendant Adam Durante:	February 29, 2024
Place and Date of Judgment:	New Westminster, B.C. June 11, 2024

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Background

[1] This judgement addresses costs arising from a judgement pronounced on January 15, 2024. The matter was originally set for trial beginning that day, but the defendants had filed an application to dismiss the action. I granted the application and dismissed the action pursuant to Rule 9-5(1)(d) of the *Supreme Court Civil Rules,* B.C. Reg. 168/2009.

[2] The parties were given leave to provide written submissions on costs which I have now reviewed, along with further affidavits filed by both parties.

[3] Although other defendants are listed in the style of cause, the only remaining defendant is Adam Durante (the "defendant"). He seeks special costs, or, in the alternative, that costs of the action be payable to him.

[4] I will not repeat the entire background to the action as that is set out in the previous unpublished oral reasons for judgement dated January 15, 2024, at paras. 9–29, and I adopt the definitions therein:

> [9] In early 2009, the plaintiff and Mr. Durante started working together for the defendants Protrans BC Operations Ltd. and/or SNC-Lavalin (the "corporate defendants"). Mr. Durante was, and is, in a managerial role. The corporate defendants are no longer part of this lawsuit.
>
> [10] The plaintiff alleges that at a work-sponsored social event in March 2010, the individual defendant engaged in conduct amounting to sexual assault and/or sexual harassment, intimidation, and threatening conduct. In the notice of civil claim ["NOCC"], she describes the behaviour as sexual battery and related menacing, harassing, and intimidating actions. …
>
> …
>
> [15] She deposed that she considered going through her union with regard to her complaint. With respect to that, to her June affidavit she attached an email of February 8, 2022, which appears to be from a union representative. Part of the email addressed issues in the collective agreement relating to sexual harassment.
>
> [16] In May 2022, the corporate defendants filed a request for certification under s. 311 of the *Workers Compensation Act*, R.S.B.C. 2019 c. 1. They sought a determination as to the status of each of the parties to the court action from the Workers' Compensation Appeal Tribunal ("WCAT"), in order to determine the extent to which any of the allegations fell within the scope of that tribunal as opposed to the court. WCAT did not issue its decision on that application until March 2023.

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[17] In the meantime, however, the corporate defendants filed an application to strike the [NOCC]. Justice Loo heard the application on November 18, 2022, and he issued reasons on December 2, 2022, indexed at 2022 BCSC 2106 (the "*2022 Decision*")…

…

[19] The individual defendant bases his argument about abuse of process in large part on what he says was inappropriately missing from the plaintiff's June 2022 affidavit. That is an April 2022 email from the same union representative who sent the February email. In it, she tells the plaintiff that she has advanced her grievance to full arbitration. The status of that grievance is a matter of contention between the parties before me.

…

[22] As noted, Loo J. already issued reasons in the *2022 Decision* relating to the application in this litigation…I will review his decision in detail.

[23] As set out in the *2022 Decision* at para. 2, the issue before Loo J. was whether to dismiss the plaintiff's claim against the corporate defendants under Rule 9-6 for want of jurisdiction, or under Rule 9-5 on the basis that the [NOCC] disclosed no claim. In that sense the application before Loo J. was similar to the application before this Court. In the alternative, the corporate defendants sought a stay of the trial pending the determination to be issued by WCAT. In result, Loo J. granted the alternative request for a stay.

…

[25] At paras. 9–11 of the *2022 Decision*, Loo J. … found that the authorities held disputes between parties to a collective agreement that arise from that agreement must proceed by arbitration and the courts have no power to entertain an action… At para. 11, Loo J. applied the authorities to determine if the dispute did indeed arise from the collective agreement such the court's jurisdiction was ousted:

> [11] In this case, the Collective Agreement specifically addresses the issue of sexual harassment in the workplace. …

[26] … Loo J. concluded the claim fell within the jurisdiction of the collective agreement (*2022 Decision* at para. 15).

[27] However, he went on to follow an Alberta Court of Appeal authority that held in exceptional circumstances, a court may choose to take jurisdiction of a claim which would otherwise be subject to arbitration: *Wanke v. University of Calgary*, 2011 ABCA 235…

…

[29] Ultimately, Loo J. agreed to grant the stay, but he declined to dismiss the action. He explained his reasons for declining to strike it at para. 21:

> [21] Given the serious consequences that would result if this Court were to strike the plaintiff's claim on the basis that the Court's jurisdiction is ousted by the *Labour Relations Code*, and WCAT declines jurisdiction, there appears to be a viable argument based on *Wanke* that the Court ought to exercise its residual discretion if the plaintiff would otherwise be left with no forum in which to advance

> her claim. I am unable to conclude that it is plain and obvious that the claim has no reasonable prospect of success or that there is no genuine issue for trial.
>
> [30] In my view, it is clear that Loo J. came to that conclusion on the basis of the plaintiff's evidence indicating that she abandoned her claim under the grievance procedure. Noting that the WCAT decision at that time was not yet issued, he stated that "if WCAT declines jurisdiction, the plaintiff may be left with no remedy at all and no forum in which to have her complaint heard": para. 18.

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[5] On March 29, 2023, WCAT issued its decision that it had jurisdiction over aspects of the claim and had exclusive jurisdiction with respect to the alleged injuries the plaintiff sustained due to the alleged sexual battery.

[6] After the hearing in front of Loo J., the plaintiff disclosed the correspondence to the defendant, who then filed the application to dismiss the claim. As noted, the parties agreed to address the application on the first day of trial, January 15, 2024. I granted the defendant's application, and the defendant now seeks special costs based on the allegation that the plaintiff "intentionally misled" the court.

Legal Principles

[7] Rule 9-5(1) of the *Supreme Court Civil Rules* provides that where there has been a successful application to strike pleadings for an abuse of process, the court may order costs be paid as special costs. More broadly, the court may order special costs pursuant to Rule 14-1(1)(b).

[8] The test for special costs is well known as set out in *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 at paras. 27–75; *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 at paras. 11–17, 1994 CanLII 2570 (C.A.); and *Grosz v. Royal Trust Corporation of Canada*, 2021 BCSC 1313 at paras. 160–164. There is a single standard for awarding special costs: the conduct during litigation is properly categorized as "reprehensible". That concept encompasses a wide range of circumstances, which includes scandalous or outrageous conduct as well as milder forms of misconduct, but a common theme is the conduct is deserving of rebuke.

[9] The standard for "reprehensible" conduct has been met where there is evidence of improper motive, abuse of the court's process, misleading the court, or persistent breaches of professional conduct.

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[10] The defendant relies on *Skyllar v. The University of British Columbia*, 2022 BCSC 439 at paras. 106–114 (application for leave to appeal to SCC filed but not heard, no. 41030), although he concedes the plaintiff's conduct in that case was more extreme than in this case. In that case, the party had altered material submitted to the court by removing certain paragraphs, which changed the tone and meaning of certain correspondence. The court held that those steps were taken in furtherance of an action that the court found should never have been commenced because there was a separate process available: para. 129.

[11] As noted in *Lim v. Zhu*, 2019 BCSC 88 at paras. 113–115, the court should exercise restraint in awarding special costs. Even where claims of fraud or dishonesty are unsuccessful, in and of itself does not justify an exceptional circumstance or reprehensible conduct: *Finness Yachting Inc. v. Menzies*, 2015 BCSC 2351 [*Finness*] at para. 8.

<u>Positions of the Parties on Special Costs</u>

[12] The defendant submits that the plaintiff "intentionally misled" the court. This is based on the timing of certain documents being disclosed in the litigation.

[13] The plaintiff's June 20, 2022 affidavit attached an email to her lawyer from a union representative dated February 8, 2022. That affidavit was before Loo J. The plaintiff deposed:

> I considered pursuing my complaint through my union, as such my union representative at the time … advised me of the steps to file a complaint and begin a grievance procedure. [That representative] advised me that the Corporate Defendants denied step two and that I was past the timelines to report. She further advised that if I wanted to pursue a civil action, I could do so and then the grievance would be deemed abandoned. The way she explained the process to me made it clear that pursuing my claims in the civil system, in light of the short timelines for making complaints and grievance [*sic*] under the collective agreement, was an option open to me.

[14] However, what came to light during document disclosure in this litigation, and after Loo J.'s judgment, was further communication that the plaintiff had with the same representative. Specifically:

a) a February 11, 2022 email exchange in which the plaintiff asked about when "step 2" in the grievance procedure could be initiated. The union representative responded that could take place the earlier of the date that the employer responded to the complaint, or after 30 days had passed.

b) a February 18, 2022 email in which the plaintiff asked what happens after "step 2" and whether she could initiate arbitration.

c) a February 22, 2022 email in which the union representative provides an answer, and gave other timelines.

d) an April 11, 2022 email in which the union representative advised the plaintiff that they have "advanced [her] grievance to full arbitration .. [and in her] collective agreement, complaints under Article 1.7 - Sexual Harassment, must proceed to full arbitration", and the file was being transferred to a new contact in the Advocacy Department that week.

[15] Mr. Durante affirmed that he had not seen any of that correspondence before May 9, 2023.

[16] The defendant submits that with respect to her first affidavit before Loo J., the plaintiff intentionally only produced the correspondence from the union representative dated February 8, 2022. In that communication, reference is made to Article 8.10 that states that if the grievance is pursued through another channel, then the union might agree it was considered to be abandoned. It is likely that is the section Loo J. had in mind when he stated that it appeared the plaintiff had abandoned her grievance.

[17] The defendant submits the plaintiff misled Loo J. by intentionally withholding the correspondence referred to above, in order to bolster her case that the civil

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action should not be dismissed. His position is that at the time the plaintiff swore her June 20, 2022 affidavit, she knew that “her grievance and the union's involvement remained active". He also submits that the correspondence clearly shows the union viewed pursuing a grievance as the proper course. He contends that the plaintiff mischaracterized that exchange as the union in essence providing “its blessing" to the plaintiff to proceed with a civil action.

[18] The defendant also points out that the plaintiff wrote to the union the day after the action was dismissed on January 15, 2024, to confirm that she wanted to withdraw her grievance from arbitration, without prejudice. He submits that is consistent with the view that the grievance had not previously been abandoned.

[19] The plaintiff opposes the application for special costs. She points out that in his affidavit made on January 2, 2024, the defendant stated that the status of the grievance was ascertainable to him given his job duties. She also points out that the corporate defendants attended the hearing before Loo J. She submits neither Mr. Durante nor the companies put the status of the grievance before the Court even though they must have had that information available.

[20] I do not agree. It is not clear to me that the employer or the defendant would have known the exact status of the plaintiff’s grievance at the same time that she did. Certainly, it is highly improbable that either would have had access to the communication between the union representative and the plaintiff at that time.

[21] The plaintiff filed an affidavit in response to the application for special costs. In it, she deposed that she “inadvertently did not produce all documents that should have been produced as quickly as [she] should have". She stated she never wanted to mislead the court and never wanted to unfairly gain an advantage. In response to the allegation that she knew she could still proceed with the grievance, she stated the following:

> I want to set the record straight that my Union advised me that if I wanted to pursue a civil action, I could do so. I understood from my numerous conversations with my union representative that my grievance had stagnated and while it was still technically “there” it would not be proceeding to

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> arbitration. I understood that this stagnation meant that it would not end in any form of resolution. I understood that my civil action was the only viable and real way forward for me to achieve any form of justice.

[22] She also points out that at her examination for discovery in December 2023, she was questioned at length about her understanding of the grievance procedure and what correspondence she had disclosed. She stated that she was confused and apologized if she had missed revealing a document.

Analysis

[23] The defendant submits the plaintiff engaged in an abuse of process by advancing an action over which the court had no jurisdiction. I do not agree. The intersection of procedures under the regimes governing workers' compensation, the collective agreement, and civil litigation, is not necessarily easy to understand nor navigate. I note that in early February 2022, the union representative advised the plaintiff that her grievance may be considered abandoned if she pursued justice through another channel. In March 2022, the plaintiff filed the NOCC, thereby pursuing justice through another channel. Then in April 2022, the union representative informed her that her claim was being advanced to arbitration. I find it reasonable that the plaintiff may not have fully appreciated the legalities of how the different procedures intersected.

[24] Moreover, the reason the action was struck was because WCAT took jurisdiction and, arguably, the dispute about whether or not her grievance was alive did not matter. Justice Loo noted that the court might have residual discretion but only if WCAT did not take jurisdiction. The outcome was that within the court system, the plaintiff's claim was unsuccessful. However, the dismissal was on the grounds of jurisdiction rather than merits. In that respect, I note, in *Finness* at para. 8, Justice Fleming held that special costs are not awarded because a plaintiff did not succeed in allegations of serious misconduct, unless it is shown that the plaintiff made meritless claims with serious allegations improperly in the sense that the allegation was wrong and obviously unfounded, reckless or made out of malice. I find that the defendant has not met this standard.

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[25] In light of Loo J.'s statement and the fact that WCAT did take jurisdiction, I also do not agree with the defendant that the late disclosure of certain emails is as egregious as he claims.

[26] I am not persuaded on a balance of probabilities that the plaintiff's omission of emails in her June 2022 affidavit was in furtherance of an intentional litigation strategy to mislead the Court. I also decline to draw that inference from any other facts in the evidence. She provided evidence of inadvertence and confusion respecting document disclosure in the context of the various proceedings.

[27] However, the defendant also submits that the allegations in the NOCC are scandalous and reckless. He refers specifically to his being referred to as a "repeat sexual offender". His position is that no facts are pled in the NOCC that could support an allegation that he is a "repeat" sexual offender, making the pleading scandalous and outrageous. He wholly denies all the allegations in the NOCC and points out he has never been convicted of or charged with any criminal offence, nor has he been accused or sued civilly for sexual assault or sexual battery. He contends the NOCC was made recklessly or deliberately to sensationalize the claim in an attempt to gain advantage in the litigation. His position is that the allegations amount to an inflammatory pleading, rising to the level of reprehensible conduct.

[28] I do not find the allegations to be scandalous or outrageous. There is a paragraph in the NOCC that supports the plaintiff's characterization of the defendant as a repeat sexual offender:

> 13. The Plaintiff, as a survivor, was entitled to choose and did choose not to pursue anything with respect to Durante's Sexual Misconduct at that time. Many years later, in 2021, the Corporate Defendants made her do so, when another complainant made a complaint against Durante and opened an investigation as to his present and historical conduct …

[29] The description of Mr. Durante as a "repeat" offender follows this paragraph.

[30] Supplementing this is the plaintiff's affidavit evidence stating that she believed the secondary complaint involved sexual misconduct since it led to an investigation into her own sexual misconduct complaint. Lastly, the plaintiff pointed out that her

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allegations involve multiple instances of sexual misconduct in the sense that she alleges sexual battery (rubbing of erect penis) plus sexual harassment (searching for her in the hotel's rooms, and a temporally separate instance of sexual remarks). I do not agree with the defendant's argument for a narrow read of the word "offender" as "describing a person who has been convicted of a criminal offence of a sexual nature, and who is listed on the sex offender registry" because the phrasing is easily understood in a more general sense, in the context of a civil case, informed by the preceding paragraph describing the additional complaint against the defendant, as well as the plaintiff's own allegation of more than one instance of sexual misconduct.

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[31] The defendant argues that some of the plaintiff's allegations are based on hearsay and "[a]t a trial, the Plaintiff would clearly have required other witnesses to establish those allegations". The difficulty I have here is that there was no trial on the merits. In other words, the defendant is not in a position where the allegations have been tested and proven as false. Returning to *Finness,* I agree that the allegations are serious, but I do not find that they are "wrong and obviously unfounded, reckless or made out of malice".

[32] The defendant referred to *MicroCoal Inc. v. Livneh*, 2014 BCSC 1288 as authority that "where the plaintiff advances allegations of very serious wrongdoing with no basis in law, no particulars, and no material facts to support the allegations, the court may exercise its discretion to award special costs although the case has not proceeded to a trial on the merits": para. 33. The court in *MicroCoal*, however, did not award special costs. Rather, it distinguished cases where courts chose to exercise that discretion on the basis that in those cases "the court struck out the plaintiff's notice of civil claim in its entirety on the ground that none of the allegations made disclosed a reasonable cause of action": para. 34.

[33] I make the same distinction between this case and cases where the court exercises discretion. This case is more similar to *MicroCoal* in that a major issue was jurisdiction (para. 38) and it "did not involve a proceeding which was dismissed because all of the claims alleging serious wrongdoing were obviously unfounded or

disclosed no reasonable cause of action" (emphasis in original): para. 36. I cannot say that there was "no basis in law, no particulars, and no material facts to support the allegations."

[34] Accordingly, I do not agree that the NOCC lacked any foundation for that description, or that I should exercise discretion to award special costs although the case has not proceeded to a trial on the merits.

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Conclusions

[35] For all those reasons, I am not persuaded that this is a case where the plaintiff's conduct deserves rebuke entitling the defendant to special costs.

[36] The plaintiff agrees that costs are payable at the normal scale for the defendant's success with the application to strike. However, she submits that the parties should bear their own costs for all other steps. This is based on her submission that Mr. Durante could have supported the first application to strike with evidence that the grievance was not abandoned, but he did not do so.

[37] I do not agree. It was not just the status of the grievance that underlay the defendant's application. He relied on the decision to disclose only some of the correspondence the plaintiff had with her union representative; that is not information that was available to him until after further litigation disclosure occurred.

[38] In my view, the defendant is entitled to costs of the action.

"Sharma J."