COURT OF APPEAL FOR ONTARIO

CITATION: Williams v. VAC Developments Limited, 2024 ONCA 713
DATE: 20240926
DOCKET: COA-23-CV-1093

Miller, Trotter and Copeland JJ.A.

BETWEEN

Agin Williams

Plaintiff/Defendant by Counterclaim
(Respondent)

and

VAC Developments Limited

Defendant/Plaintiff by Counterclaim
(Appellant)

Thomas McRae, for the appellant

Melissa Mustafa, for the respondent

Heard: September 18, 2024

On appeal from the order of Justice Heather A. McGee of the Superior Court of Justice, dated September 21, 2023, with reasons reported at 2023 ONSC 4679, and from the costs order dated November 20, 2023, with reasons reported at 2023 ONSC 6561.

REASONS FOR DECISION

[1] Mr. Williams was employed by VAC Development ("VAC") as an Aerospace Sheet Metal Mechanic. Multiple racially motivated threats against his life were made by unknown person(s) at his workplace, including a drawing on his locker of

a noose on March 11, 2021, and graffiti on a washroom stall reported on May 12, 2021. After each threat, the management team met to discuss the incidents and attached a note to each employee's paystub requesting information. No one came forward. After the second incident, Mr. Williams requested that VAC involve the police, which it did. Police attended but the investigation was fruitless. Mr. Williams was dissatisfied with VAC's response.

[2] Shortly after these events, on June 16, 2021, VAC advised Mr. Williams that he was being laid off. The reasons for the layoff are disputed. VAC states that the layoff was due to a temporary slowdown in business resulting from lockdown related disruptions, that Mr. Williams was one of several employees laid off, and that the layoffs were authorized by the *Infectious Disease Emergency Leave*, O. Reg. 228/20, regulations made under the *Employment Standards Act, 2000*, S.O. 2000, c. 41.

[3] Mr. Williams believed the layoff to be permanent, and that he had been dismissed as a reprisal for having requested that VAC involve the police in investigating the threats made against his life. Mr. Williams believed that a new employee was hired to fill his role after he was laid off.

[4] On June 24, 2021, Mr. Williams approached CTV News and other news agencies with the story that his employer had failed to take racist threats against him seriously, and had dismissed him as a reprisal for insisting the police be

involved. CTV News subsequently published an article on its website entitled, "'I do not feel safe at work': Black man says noose drawn on his office locker". The article named VAC as Mr. Williams' employer, and contained statements attributed to Mr. Williams to the effect that VAC failed to protect him from racist death threats, failed to take the threats seriously, and failed to involve the police promptly. He was also reported to have said that he believed he was laid off in part because he got the police involved.

[5] VAC was contacted by CTV prior to publication but chose not to comment.

[6] VAC takes the position that the statements contained numerous falsehoods and, contrary to Mr. William's allegations, (1) VAC took the situation seriously; (2) Mr. Williams was laid off due to a downturn in business and not as a reprisal; and (3) on the one occasion when Mr. Williams requested police involvement, the police were contacted the next business day.

[7] VAC did not at any point seek a retraction from CTV or bring proceedings against CTV.

[8] Three months after his lay off, Mr. Williams brought an action against VAC seeking damages for wrongful dismissal, as well as damages and other remedies for breaches of the *Human Rights Code*, R.S.O 1990, c. H.19, and the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1.

[9] VAC responded with a $1,500,000 counterclaim for defamation, interference with economic relations, and punitive, aggravated, and exemplary damages.

[10] Mr. Williams then brought a motion to have the counterclaim dismissed under s. 137.1 of the *Courts of Justice Act*, R.S.O 1990, c. C.43 (an anti-SLAPP motion). The motion judge granted the motion and dismissed VAC's counterclaim as an abuse of process. She concluded that the appellant had not discharged its burden of establishing grounds to believe that the counterclaim had substantial merit. In the event she was incorrect, she would have found that although there were grounds to believe that Mr. Williams' defence of fair comment would not succeed, Mr. Williams would nevertheless prevail in the final interest balancing, primarily on the basis that VAC had not established that it had suffered any loss.

Grounds of Appeal

[11] VAC advances two primary grounds of appeal. First, VAC argues that the motion judge erred in the assessment of the substantive merits of the defamation claim. Second, VAC argues that the motion judge carried out the public interest balancing stage incorrectly when considering both the harm to VAC and the public interest in Williams' expression.

[12] To succeed in this appeal, VAC must succeed on both grounds of these grounds. For the reasons set out below, we conclude that the motion judge did not err in the public interest balancing analysis, and consequently dismiss this appeal.

Analysis

[13] Section 137.1 of the *Courts of Justice Act* provides in part:

> **Order to dismiss**
>
> (3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest.
>
> **No dismissal**
>
> (4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,
>
> (a) there are grounds to believe that,
>
> (i) the proceeding has substantial merit, and
>
> (ii) the moving party has no valid defence in the proceeding; and
>
> (b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

[14] VAC concedes that the counterclaim arises from Mr. Williams' expressions related to a matter of public interest: claims of anti-Black racism and workplace harassment.

[15] But VAC argues that the motion judge's analysis with respect to the balance of the s. 137.1 test is in several respects faulty and intermittently departs from the path of analysis for s. 137.1 motions set out in *1704604 Ontario Ltd. V. Pointes*

Protection Association, 2020 SCC 22, [2020] 2 SCR 587, and other cases. It contends, in particular, that the motion judge's analysis of whether there are grounds to believe the counterclaim has substantial merit – in particular, whether the words complained of were defamatory – is truncated by an out of place discussion about what VAC could have done to mitigate the situation, what losses VAC suffered, and speculation that "unreported anti-Black racism is ubiquitous within Canadian workplaces". None of this, it argues, is relevant to determining whether there are grounds to believe the words spoken by Mr. Williams would tend to lower the reputation of VAC in the minds of others. Furthermore, VAC argues that the motion judge erred by requiring VAC to prove too much with respect to damages at the merits stage, and in effect imposes the onus appropriate to the overall balancing stage; all VAC was required to do was establish some basis in the record for believing that it had suffered loss.

[16] We do not agree that the motion judge made a reversible error.

[17] There are some problems with the motion judge's analysis at the merits stage. The analysis of whether the statements would tend to lower the appellant's reputation is underdeveloped and included discussion of extraneous issues. It also rested on a contested assumption – without an evidentiary basis in the record – that racist abuse in the workplace of the type alleged by Mr. Williams is so ubiquitous, inevitable, and unremarkable that such occurrences would not cause a reasonable person to form a low view of management.

[18] That said, the motion judge made no error in finding the public interest in allowing the action to proceed is outweighed by the public interest in protecting the expression. The motion judge identified the single greatest obstacle to the appellant: its inability to identify sufficiently serious harm. As the Supreme Court held in *Hansman v. Neufeld*, 2023 SCC 14, 481 D.L.R. (4th) 218, a claimant "must provide evidence that enables a judge 'to draw an inference of likelihood' of harm of a magnitude sufficient to outweigh the public interest in protecting the defendant's expression… Presumed general damages are insufficient for this purpose, as are bare assertions of harm." VAC has simply provided nothing beyond the assertion that it will likely suffer commercial loss because its reputation has been besmirched and the CTV article – which it has taken no steps to have removed or amended – remains publicly accessible.

[19] That is not enough to outweigh the competing interests on this analysis. The appellant urged this court to accept that Mr. Williams' statements were not made sincerely but were advanced for the collateral purpose of putting pressure on VAC to force an advantageous settlement of his action. But it is not clear that this was argued before the motion judge, or that there was evidence in the record in support of this assertion. In any event, we see no basis to interfere with the motion judge's balancing and would dismiss the appeal.

The motion for fresh evidence

[20] In the respondent's factum in this appeal, counsel for Mr. Williams referenced litigation that VAC brought against counsel for defamation. This was done in support of the allegation that VAC has a practice of bringing defamation actions to stifle expression. The reference was inappropriate because it was not supported by the record and no fresh evidence motion had been brought. To counter the allegation contained in the factum, VAC brought a motion for fresh evidence to admit transcripts from the examination for discovery of counsel for Mr. Williams in that action.

[21] Because the reference to the extraneous action was not supported by the record, we disregarded that paragraph of the respondent's factum. Accordingly, the proposed fresh evidence was not relevant to any live issue, and the motion is therefore dismissed.

Disposition

[22] The appeal is dismissed. If the parties are unable to agree on costs of the appeal (and if the parties and counsel for Mr. Lakhani are unable to agree on costs of the motion), they may each make written submissions to be received within 10 days of the date of these reasons, and limited to two pages, excluding bills of costs.

"B.W. Miller J.A."
"Gary Trotter J.A."
"J. Copeland J.A."