

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Vernon v. British Columbia (Liquor
Distribution Branch)*,
2010 BCSC 1688

Date: 20101201
Docket: S104016
Registry: Vancouver

Between:

Stephanie Vernon

Plaintiff

And

**Her Majesty the Queen in right of the
Province of British Columbia as represented by
the BC Ministry of Housing and Social Development
(Liquor Distribution Branch)**

Defendant

Before: The Honourable Mr. Justice Goepel

Reasons for Judgment

Counsel for the Plaintiff:

J.A. McKay

Counsel for the Defendant:

J.E. Gouge, Q.C.

Place and Date of Hearing:

Vancouver, B.C.
November 4, 2010

Place and Date of Judgment:

Vancouver, B.C.
December 1, 2010

INTRODUCTION

[1] The plaintiff was continuously employed by the defendant's Liquor Distribution Branch from August 1, 1980, until she was terminated on May 21, 2010. She now seeks damages for wrongful dismissal together with aggravated damages as a result of the manner of her dismissal.

[2] The defendant submits that the plaintiff was terminated for cause. In particular, it alleges that the plaintiff verbally abused and humiliated her subordinates and her misconduct justified her termination.

[3] The trial of this matter is scheduled for November 22, 2010. The parties appeared before me at a Trial Management Conference ("TMC") on November 4, 2010. At the TMC the defendant sought the following:

1. an adjournment of the trial;
2. a publication ban with regard to the evidence of certain subordinates who the defendant intended to call at trial; and
3. an order that the defendant present its opening statement and evidence first.

[4] The plaintiff opposed all three orders.

[5] The defendant did not file any affidavit evidence in support of its applications. On the adjournment application, it relied on its counsel's oral statements concerning the need for an adjournment. Counsel advised that he had been unable in the limited time available before trial to obtain certain expert reports on which he intended to rely. The plaintiff filed an affidavit detailing the prejudice she would suffer if the trial was delayed.

[6] In regard to the publication ban the defendant provided the court with copies of two expert reports and certain medical records concerning counselling treatments the witnesses are presently undergoing. In its written submissions it advised that the

witnesses were seeking as much protection for their personal privacy as the law allows. No evidence was forthcoming from the two prospective witnesses detailing the reasons why they sought the publication ban or the prejudice to them if the ban was not granted.

[7] I held that the first two applications required affidavit evidence and could not be heard at a TMC. I dismissed the third application and directed that the plaintiff call her evidence first. These are the reasons for those decisions.

TRIAL MANAGEMENT CONFERENCES

[8] TMCs are a creation of the new Supreme Court Rules. The provisions governing TMCs are found in Rule 12-2. Rule 12-2(9) sets out a list of orders that a trial judge can make at a TMC.

[9] While Rule 12-2(9) gives the court broad powers to make orders at a TMC, Rule 12-2(11) limits the nature of applications that can be heard at a TMC. The rule states:

- (11) A trial management conference judge must not, at a trial management conference
 - (a) hear any application for which affidavit evidence is required, or
 - (b) make an order for final judgment, except by consent.

Thus, a judge cannot hear any application at a TMC that requires affidavit evidence.

[10] I note that the rules governing a Case Planning Conference (“CPC”) have similar provisions. Rule 5-3(1) authorizes a judge to make certain orders while Rule 5-3(2) prohibits applications that require an affidavit.

[11] The new rules, with their limits on applications that can be heard at a TMC or CPC, are to be contrasted with the old Rule 35 that governed procedures at a pre-trial conference. Rule 35(3.1) specifically authorized that interlocutory applications

could be heard and decided at a pre-trial conference. That provision has not been carried forward into the new rules.

COUNSEL'S STATEMENTS AS EVIDENCE

[12] An application made at a TMC or a CPC is by definition a "chambers proceeding" (Rule 22-1(1)(c)). On a chambers proceeding, evidence must be given by affidavit, but the court may also receive other forms of evidence (Rule 22-1(4)(formerly Rule 52(8)). Other forms of evidence have been held to include statements of counsel: *Fomo Products Inc. v. Solkan Enterprises Ltd.* (1986), 4 B.C.L.R. (2d) 264 (C.A.).

[13] In this case, the defendant cites *Fomo* and submits the court can make the orders he seeks concerning the adjournment and publication ban based on counsel's statements. This submission requires consideration of when a chambers judge can rely on counsel's statements.

[14] *Fomo* was an appeal from a decision of a trial judge who had dismissed an application for summary judgment brought under Rule 18A. The court held that Rule 52(8) permitted the acceptance of statements by counsel as to evidentiary matters. In support of that proposition, the court relied on its earlier decision in *Nichols v. Gray* (1978), 9 B.C.L.R. 5 (C.A.).

[15] In *Nichols*, the issue was whether a trial should proceed by jury. Lambert J.A., who also wrote the decision in *Fomo*, in discussing the statements of counsel, said at 16:

In my opinion, if such statements of counsel stand alone then it would be a rare case where they would be sufficient to justify a finding of fact that would permit the exercise of the discretion to grant an order under subr. 39(20). However, where the statements of counsel are made in explanation of affidavit evidence and to relate that evidence to the conduct of the trial then those statements may be of some assistance to the Judge in the first stage of making his findings of fact, and may be an indispensable aid in the second stage of exercising his discretion on the basis of his findings of fact.

[16] In *MTU Maintenance Canada Ltd. v. Norman G. Jensen Inc.*, 2007 BCCA 552 at paras. 23-31, the court reviewed the authorities concerning a chambers judge's entitlement to rely on counsel's statements. In addition to *Fomo* and *Nichols*, the court referred to *Winter v. Winter*, [1993] B.C.J. No. 2275 (S.C.) (Q.L.) where a master refused to consider counsel's statement because the fact in issue was of singular importance to the determination of an application. It also referred to *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) Inc.*, 2004 SCC 18, [2004] 1 S.C.R. 456, where the court stated that counsel's unsworn statement as to the nature of documents should not be accepted for the purpose of ruling on whether the document should be produced to the other party in the litigation.

[17] In *MTU*, the court held that the chambers judge should not have relied on counsel's statements that the plaintiff's operations were limited to British Columbia because it was not a situation where counsel was explaining the affidavit material; he was providing a new fact which was of importance to the application.

[18] In *MTU*, the court noted that it was particularly important that the court rely only on the court record in deciding whether it has jurisdiction to hear a claim against a foreign defendant because a court in a foreign jurisdiction, in deciding whether it will recognize the judgment, will look to the court record in the domestic jurisdiction to make that determination.

[19] The importance of the record in chambers proceedings was highlighted by Chief Justice Finch in a speech he gave at a Continuing Legal Education Conference on November 22, 2007. In the course of his speech, he noted that the primary function of an appellate court is to correct serious errors made in the courts below. All decisions of this court are, of course, subject to appeal.

[20] In his address, Chief Justice Finch warned of the consequences of making orders from minimal material and how a reviewing court must be able to determine whether there is a proper foundation in law or fact for the order in question. He said in part:

[28] In promoting considerations of expense and expediency by granting judges a broad mandate to make discretionary decisions on the basis of minimal material, the new rules may be taking dangerous steps towards creating the equivalent of Cadis who sit beneath palm trees, dispensing justice according to their views.

[29] To quote Vice-Chancellor R.E. Megarry:

One of the qualities so often attributed to palm tree justice is that there is no appeal. Freed from compliance with any legal rules or fixed principles, the Cadi does what seems to him to be justice on the facts of the particular case. It may be that no two Cadis would decide any one case in precisely the same way, for individual views of what is fair and just vary more than individual views of the law; yet for that reason it is rarely possible to say with certitude that the decision of any Cadi is wrong.

[30] Will the rule changes I have addressed lead to the creation of a system of "palm tree justice"? Such a system would severely limit access to the Court of Appeal for review of important orders or rulings. We must be vigilant in ensuring that this does not occur.

[31] Orders of course speak from the time of their pronouncement. Those present when the order is made may know, or at least believe, that they have a clear understanding of the basis on which a judge was asked to act, or to exercise discretion. My fundamental concern is that the basis on which an order is made should be equally clear, and demonstrable, when the time comes for review of the order at some later date in the Court of Appeal.

DISCUSSION

A. Adjournment and Publication Ban

[21] The issue in this case is whether counsel's statements provide a sufficient evidentiary foundation for the orders that the defendant seeks. The applications for an adjournment and a publication ban both require the exercise of judicial discretion to consider competing interests. In the case of the adjournment, the contest is between the defendant's need for additional time to prepare its case and the potential prejudice to the plaintiff if the case is adjourned. With regard to the publication ban, the court must weigh the salutary effects of the publication ban against the deleterious effects to the free expression of those affected by the ban: *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835.

[22] The adjournment and publication ban applications both require a proper evidentiary foundation. Statements of counsel alone are not sufficient. To

paraphrase Lambert J.A. in *Nichols*, where statements of counsel stand alone, it will be a rare case that such statements will be sufficient to justify a finding of fact that would permit the exercise of judicial discretion. This is not such a case.

[23] While CPCs and TMCs have a role to play in the orderly progress of litigation, they are not generally the forum to determine contested applications. Such applications will usually require affidavit evidence and pursuant to the provisions of Rule 12-2(11) and 5-3(2) applications requiring affidavit evidence cannot be heard at such conferences. In this case affidavit evidence is necessary to determine the defendant's applications for an adjournment and a publication ban. Those applications cannot be heard at a TMC.

[24] This is not to say that a judge cannot make orders at a CPC or a TMC. Clearly, a judge can. Many of the orders contemplated at such a conference will not require applications or affidavit evidence. The Rules allow a judge to make an order absent an application. Many of the orders suggested in the respective rules are procedural in nature and more in the nature of directions. Such orders can be based on the representations of counsel. An example is the present application concerning the order of proceedings at trial.

B. Order of Proceedings

[25] The defendant seeks an order that it should present its opening statement and evidence first, followed by the plaintiff's opening statement and evidence. The plaintiff takes a contrary view and asserts the right to go first. It is important that this issue be resolved at the TMC so that the parties can make appropriate arrangements with respect to the attendance of their witnesses.

[26] Evidence and procedure at trial is governed by Rule 12-5. While Rules 12-5(4),(5), and(6) appear to presume that a plaintiff will always proceed first, Rule 12-5(72) suggests otherwise. That rule reads in part:

(72) Addresses to the jury or the court must be as follows:

(a) the party on whom the onus of proof lies may open his or her case before giving evidence;

(b) at the close of the case of the party who began, the opposite party, if that party announces his or her intention to give evidence, may open his or her case;

(c) at the close of all of the evidence, the party who began may address the jury or the court, and the opposite party may then address the jury or the court and the party who began may then reply and the court may allow the opposite party to be heard in response to a point raised in the reply.

[27] The Court of Appeal reviewed the history and purpose of the rule in *Brophy v. Hutchinson*, 2003 BCCA 21 at paras. 15-38. The right to open one's case first can be of tactical importance. As noted by Finch C.J.B.C. in *Brophy* at para. 25:

The right of a plaintiff to open is a considerable advantage. It enables counsel to explain in a few minutes a case which may take days or weeks to develop in evidence, and to state her case in the way most favourable to her client's interests. The opening can give the trier of fact a framework within which to understand and evaluate the plaintiff's case as it unfolds. For the party bearing the burden of proof, that can be a most useful tool.

[28] In this case the plaintiff sues for damages for wrongful dismissal. The defendant admits the contract of employment and the termination of the plaintiff. It alleges that it dismissed the plaintiff for cause and that the plaintiff failed to mitigate her loss. The defendant carries the onus of proof on both of those issues. The defendant submits that in these circumstances it is entitled to go first because the primary issue in the case is whether or not it had cause to dismiss the plaintiff.

[29] Pursuant to Rule 12-5(72), the right to begin is tied to the onus of proof. In this case, as in many others, there is a shifting burden of proof. While the plaintiff, as the party initiating the action and asserting the claim, has the initial burden, the defendant has the burden with regard to the question of termination and the assertion that the plaintiff failed to mitigate her damages.

[30] A useful discussion concerning the general principles governing the burden of proof and the obligation to begin is found in *Moravian Church of Newfoundland and Labrador v. Newfoundland and Labrador*, 2005 NLTD 123, 22 C.P.C. (6th) 175 at paras. 37 to 51. Green C.J.T.D. summarizes his conclusions at para. 51:

In the end, the issue of which party should be required to present his case first boils down to considerations of trial convenience and fairness. In the vast majority of cases both convenience and fairness will dictate that the plaintiff, with the burden of proof on at least one major issue, should proceed first with the presentation of his case on all issues regardless of the incidence of the burden of proof on the other issues, unless by so doing the plaintiff can show, notwithstanding pre-trial disclosure and opportunities for discovery, he would be prejudiced in so doing, or matters of practical trial management dictate otherwise.

[31] In the circumstances of this case, the plaintiff has the burden of establishing the terms of her employment contract and the damages she has suffered as a result of its termination. While the defendant has admitted the terms of the contract, it has not admitted damages. Damages in a wrongful dismissal case require the court to consider various factors including the character of the employment, the length of service, the age of the employee and the availability of similar employment having regard to the experience, training and qualification of the employee: *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.) at 145. The plaintiff carries the onus on that question. That question is a major issue in this litigation and in the circumstances of this case, I find that considerations of trial convenience and fairness dictate that the plaintiff proceed first with the presentation of her case on all issues, regardless of the incident of the burden of proof on the other issues.

SUMMARY

[32] The defendant's applications for an adjournment and a publication ban cannot be brought at the TMC. The defendant is at liberty to reset those applications in chambers or at trial. The defendant's application to present its evidence first is dismissed.

"R.B.T. Goepel J."

The Honourable Mr. Justice Richard B.T. Goepel