

CANADA / JUDGMENT

De Silva v. Fraser Health Authority

2013 BCSC 659

COURT

Supreme Court of British Columbia

DECIDED

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2013 BCSC 659 De Silva v. Fraser Health Authority

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

De Silva v. Fraser Health Authority,

2013 BCSC 659

Date: 20130416

Docket: S130333

Registry: New Westminster

Between:

Sheeli De Silva

Plaintiff

And

Fraser Health Authority, Royal Memorial Hospital, Surrey Memorial Hospital, British Columbia Nurses Union and Does 1 through 10

Defendants

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

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Place and Date of Trial/Hearing:

Vancouver, B.C.

February 27, 2013

Place and Date of Judgment:

New Westminster, B.C.

April 16, 2013

Introduction

- [1] The plaintiff Sheeli De Silva is a registered nurse who was employed by the defendant Fraser Health Authority (the "FHA") from 1998 to 2010. The defendant British Columbia Nurses Union (the "BCNU") represents Ms. De Silva in matters relating to the terms and conditions of her employment with the FHA, which are governed by the collective agreement between the respective bargaining agents of the FHA and the BCNU.
- [2] Ms. De Silva became disabled in 2006/2007 due to injuries suffered outside her work place.
- [3] The essence of Ms. De Silva's claims in this action, and before other tribunals, is that the FHA failed to accommodate her disability in the workplace and that the BCNU failed to adequately represent and protect her interests in securing appropriate accommodation from the FHA for her.
- [4] As a result of numerous proceedings brought by Ms. De Silva since 2009 to the present time to address what is essentially the same issue, the BCNU, with the support of the FHA, now applies for an order prohibiting Ms. De Silva from commencing any further proceedings against the BCNU or the FHA, save and except with leave of the court.

Background

- [5] Ms. De Silva has brought numerous proceedings to address her issues in this Court, before the British Columbia Human Rights Tribunal (the "HRT"), and before the British Columbia Labour Relations Board (the "LRB"). Further proceedings have also been taken in the Court of Appeal.
- (a) The Human Rights Tribunal Proceedings

- [6] On August 24, 2009, and as later amended in October 2009, Ms. De Silva filed a complaint with the HRT against the BCNU and the FHA under the Human Rights Code, R.S.B.C. 1996, c. 210, alleging discrimination on the basis of disability (the "Human Rights Complaint"). Specifically, Ms. De Silva alleges that the BCNU did not pursue a claim against the FHA for failing to accommodate her, resulting in discrimination. The Human Rights Code provides in s. 13 that no person may discriminate against a person regarding employment or any term or condition of employment on the basis of physical disability. Similarly, s. 14 of the Human Rights Code provides that a trade union must not discriminate against any person on this basis. A complaint must be filed within six months of the alleged contravention: Human Rights Code, s. 22(1).
- [7] Initially, the BCNU attempted to persuade Ms. De Silva to have the matter heard by the LRB in place of the HRT, but it was unsuccessful in those pursuits. Eventually, on March 1, 2010, the HRT determined that the Human Rights Complaint had been brought within the prescribed time limits: *De Silva v. Fraser Health Authority and BCNU*, 2010 BCHRT 65.
- [8] On July 25, 2011, HRT member Norman Trerise dismissed the Human Rights Complaint against the BCNU on the grounds that it had no reasonable prospect of success, pursuant to s. 27(1)(c) of the Human Rights Code: *De Silva v. Fraser Health Authority and BCNU* (No. 2), 2011 BCHRT 195 at paras. 106-117 ("De Silva (No. 2)"). The complaint against the FHA was similarly dismissed on the grounds that the claims against it had been settled, pursuant to s. 27(1)(d)(ii) of the Human Rights Code: paras. 119-135. The dismissal related to complaints up to and including April 2009, notwithstanding Ms. De Silva's attempt to complain about matters past April 2009: paras. 93-98.
- [9] On September 8, 2011, Ms. De Silva filed a petition in this Court for judicial review of the HRT's dismissal of the Human Rights Complaint. After a hearing in October 2012, Madam Justice Loo issued reasons on November 16, 2012 dismissing the application and awarding costs in favour of the BCNU and the FHA: *De Silva v. Fraser Health Authority*, 2012 BCSC 1710. Loo J. similarly rejected Ms. De Silva's arguments that, in failing to consider fresh allegations after April 2009, the HRT's decision was patently unreasonable: para. 20. Costs awarded included the costs of preparing the petition record, which Ms. De Silva did not do: para. 21.
- [10] Ms. De Silva has filed an appeal from Loo J.'s decision, which remains to be addressed by the Court of Appeal.
- (b) The British Columbia Supreme Court Civil Action
- [11] On September 24, 2010, while the HRT proceedings were underway but before its disposition by the HRT, Ms. De Silva filed, on her own behalf, a claim in this action against the FHA and the BCNU (the "Civil Action"). The complaints are fairly wide-ranging, but include, in substance, the very facts and issues that were before the HRT at the time. Ms. De Silva again pleaded that the FHA and the BCNU failed in their duty to accommodate her, resulting in discrimination. Ms. De Silva also pleaded conspiracy, economic loss, undue duress,

intentional and unintentional infliction of emotional distress, and personal injury, all in relation to the principal claim that the FHA failed to accommodate her and that the BCNU failed to represent her interests.

- [12] In November 2010, both the BCNU and the FHA filed applications in this Court seeking to have this action struck. The first ground was that this action was an abuse of process, principally on the basis that there was an outstanding complaint before the HRT. They also alleged that the action was outside the jurisdiction of this Court; rather, they contended that the claims were within the jurisdiction of an arbitrator, the LRB, or the HRT, but not this Court.
- [13] On November 19, 2010, the parties appeared before Mr. Justice Truscott and obtained a Consent Order whereby Ms. De Silva agreed not to take any further steps in this action until the applications in the Civil Action were finally determined. A Consent Order was entered on December 2, 2010.
- [14] On May 4, 2011, Ms. De Silva applied to have the Consent Order set aside, alleging, among other things, that her lawyer acted without her consent and that the Consent Order contained a mistake. On May 18, 2011, in her Reply to Application Response, Ms. De Silva further alleged bias on the part of Truscott J.
- [15] On June 17, 2011, Mr. Justice Schultes dismissed Ms. De Silva's application to set aside the Consent Order. I am advised that there was no reasonable basis advanced upon which the Consent Order should have been set aside.
- [16] On July 29, 2011, almost immediately after the issuance of the HRT decision, Mr. Justice Dley granted the applications of the FHA and the BCNU to dismiss the Civil Action on the basis that this Court had no jurisdiction to address the issues. He declined to order special costs against Ms. De Silva, but awarded costs to the FHA and the BCNU on Scale A.
- [17] Despite the dismissal of this action, the FHA and the BCNU continued to face substantial roadblocks in wrapping up ancillary matters. Numerous further court applications were necessary.
- [18] Ms. De Silva refused to settle the Bill of Costs for the action, and the matter proceeded to an assessment before Master McDiarmid. On April 4, 2012, Master McDiarmid assessed the BCNU's costs in this action in the amount of \$5,173.42 and the FHA's costs in the amount of \$6,059.17. Ms. De Silva appealed the costs award in favour of the BCNU. Although her appeal was dismissed on July 6, 2012 by Mr. Justice Davies, the BCNU has been unable to enter Mr. Justice Davies' order dismissing her costs appeal because Ms. De Silva has refused to sign it. It appears that a further application will be necessary to settle the terms of that order.

- [19] Efforts to collect the costs awarded also proved difficult. Although the FHA has yet to take any action to collect its costs, on April 24, 2012, counsel for the BCNU sent Ms. De Silva a letter seeking immediate payment of the costs. Ms. De Silva replied by letter dated April 26, 2012, refusing to pay the BCNU's costs on the basis that the award was being appealed and, in any event, it did not require immediate payment.
- [20] Collection efforts ensued. On July 4, 2012, the BCNU obtained a Garnishing Order After Judgment against Healthcare Benefit Trust for the amount of \$5,459.86, arising from Master McDiarmid's award (the "First Garnishing Order"). Since November 2010, Ms. De Silva has received monthly long-term disability benefit payments from the Healthcare Benefit Trust, which provides disability insurance benefits to members of the BCNU in accordance with the collective agreement. Service of the First Garnishing Order was unsuccessful, however, because Ms. De Silva's disability benefits for July had already been paid by the time of service of the First Garnishing Order. Therefore, no funds were attached.
- [21] On July 17, 2012, Ms. De Silva, again acting on her own behalf, filed an appointment seeking to have the First Garnishing Order set aside. On July 20, 2012, the appointment came before Registrar Sainty, who dismissed Ms. De Silva's application as moot because no money attached under the First Garnishing Order.
- [22] On July 24, 2012, the BCNU obtained a second Garnishing Order in the amount of \$5,746.30, arising from Master McDiarmid's costs award and including garnishment costs (the "Second Garnishing Order"). This time service of the Second Garnishing Order was successful. On August 31, 2012, the Healthcare Benefit Trust paid into Court the sum of \$3,896.31.
- [23] On July 30, 2012, Ms. De Silva filed an application seeking to set aside the First Garnishing Order. Although the relief sought related only to the First Garnishing Order, Ms. De Silva's material in support referred to both the First and Second Garnishing Orders. There were various procedural wrangles between the parties relating to the quality of the application materials, the date set for the hearing, and the completeness of the application record, which Ms. De Silva was required to file. Ms. De Silva chalks up any deficiencies to the fact that she was representing herself on the matter. There is no doubt that the BCNU was frustrated in dealing with Ms. De Silva in ensuring that the required procedures were followed so that the matter could properly be addressed by the court.
- [24] The BCNU's application response contended that Ms. De Silva's application to set aside the Garnishing Orders should be dismissed because it was: (a) *res judicata*, having been decided by Registrar Sainty; and (b) moot, as no monies were attached pursuant to the First Garnishing Order.

- [25] Ms. De Silva and the BCNU finally appeared before Truscott J. on August 10, 2012 for the hearing of the applications. Initially, Truscott J. stood the matter down so he would have the opportunity to review the materials that were not included by Ms. De Silva in her application record. After the morning recess, Truscott J. advised that he did not have sufficient court time to deal with the application and advised Ms. De Silva that she would have to reset the application.
- [26] The issue of whether the BCNU could garnish Ms. De Silva's disability payments then came on before Mr. Justice N. Brown on September 7, 2012. He refused to set aside both the First and Second Garnishing Orders. I understand that this decision was not appealed.
- [27] I also understand that further amounts were paid into court by the Healthcare Benefit Trust, pursuant to a later garnishing order obtained by the BCNU. In light of this Court's decision on the ability to garnish Ms. De Silva's disability payments, the BCNU wrote to Ms. De Silva on September 18, 2012 seeking her consent to payment out of the remaining amounts that had been garnished. She refused.
- [28] In the face of an application for payment out, the parties again appeared before Registrar Sainty on October 3, 2012. The Registrar found that Ms. De Silva had demonstrated some hardship. Therefore, she ordered that half of the garnished money be released to Ms. De Silva and that Ms. De Silva make regular monthly payments of \$300 to the BCNU in payment of the costs award. At no time before this order did Ms. De Silva offer to enter into a payment plan with respect to the costs awarded to the BCNU. I am advised, however, that she has made the monthly payments of \$300 pursuant to the Registrar's order and that she continues to do so at this time.
- [29] Despite the costs and garnishment issues being finally determined, both in this Court and at the Court of Appeal (see below), Ms. De Silva continues to refuse to consent to payment out of the remainder of the monies in court to the BCNU. This will, of necessity, now require a further application for a court order allowing payment from the court to the BCNU.
- [30] Accordingly, the outstanding matters in this Court include: (i) the settling of the orders of Davies and Loo JJ.; (ii) the collection of the outstanding costs awarded by Dley J., together with further collection costs; and (iii) the assessment and collection of the costs awarded by Loo J. in the petition proceeding for the HRT judicial review.

(c) The Appeal Proceedings

- [31] On July 30, 2012, Ms. De Silva filed a Notice of Appeal from Davies J.'s July 6, 2012 order to the Court of Appeal. Although the Notice of Appeal related only to a costs award, Ms. De Silva did not seek leave to appeal pursuant to s. 7(1) of the Court of Appeal Act, R.S.B.C. 1996, c. 77, and Rule 2.1(f) of the Court of Appeal Rules, B.C. Reg. 297/2001, as amended.
- [32] On September 5, 2012, Ms. De Silva served a motion in the Court of Appeal seeking to have the court stay execution of the costs award. The BCNU filed an application in the Court of Appeal seeking to have Ms. De Silva's Notice of Appeal struck out as a nullity, since Ms. De

Silva did not seek leave as required. The applications were heard by Madam Justice Levine on September 11, 2012, resulting in a dismissal of Ms. De Silva's application. Levine J.A. also indicated that Ms. De Silva would have to apply for leave to appeal and would have to request an extension of time to make that application.

- [33] As on earlier applications, I am advised that Ms. De Silva raised new arguments on the application before Levine J.A. regarding the merits of her appeal that were not raised at the hearings before Master McDiarmid and Davies J., contrary to the general rule that such matters will not be considered on appeal: *More v. Bauer Nike Hockey Inc.*, 2011 BCCA 419 at para. 34.
- [34] The final hearing before the Court of Appeal was an application by Ms. De Silva for leave to appeal. That application was heard and dismissed by Madam Justice MacKenzie on October 5, 2012.
- [35] At this time, the costs of the two applications before the Court of Appeal have not been addressed. In addition, the order of Levine J.A. has not been settled. And as already stated, appeal from Loo J.'s order dismissing the HRT judicial review is yet to be heard.
- (d) The Labour Relations Board Proceedings
- [36] On August 15, 2011, just 20 days after the dismissal of the Human Rights Complaint and 16 days after the dismissal of the Civil Action, Ms. De Silva filed a complaint with the LRB against the BCNU under s. 12 of the Labour Relations Code, R.S.B.C. 1996, c. 244. Section 12 provides that a union must not act in a manner that is arbitrary, discriminatory, or in bad faith in representing employees in a bargaining unit. As with the HRT complaint, Ms. De Silva alleged that the BCNU breached its duty of fair representation owed to her. The BCNU contends, and I agree, that the LRB complaint was founded upon substantially the same factual basis and included many of the same allegations as in both the Human Rights Complaint and the Civil Action, both of which were dismissed just days before the filing of this LRB complaint.
- [37] The LRB considered this new complaint in accordance with the procedures set out in s. 13 of the Labour Relations Code, by which the LRB considers the complaint first before requiring any response from the BCNU and the FHA. On January 31, 2012, even without the BCNU alleging abuse of process by reason of the earlier HRT proceedings and decision, the complaint was dismissed out of hand in BCLRB No. B27/2012 (the "First LRB Decision").
- [38] Ms. De Silva then applied for reconsideration of the LRB dismissal. On March 9, 2012, in BCLRB No. B58/2012, the LRB remitted the matter back to Vice Chair Elena Miller to consider further information from Ms. De Silva.

- [39] At the rehearing on May 30, 2012, after again considering only Ms. De Silva's submissions, once more the LRB complaint was dismissed in BCLRB No. B113/2012 on the basis that Ms. De Silva did not show an apparent case of a breach of s. 12 of the Labour Relations Code (the "Second LRB Decision").
- [40] Ms. De Silva sought leave and reconsideration of the Second LRB Decision, but the LRB found that she did not disclose a good, arguable case of reviewable error. On June 26, 2012, the LRB denied leave in BCLRB No. B134/2012.
- [41] Ms. De Silva has indicated that it is her intention to seek a judicial review of the LRB decision(s). In light of the dates of the LRB decisions, however, she will be required to apply to this Court for an extension of the 60-day time limit provided in the Administrative Tribunals Act, S.B.C. 2004, c. 45, s. 57.

Discussion

- [42] The FHA and the BCNU seek an order that Ms. De Silva may not institute further legal proceedings in this Court without leave. The application is brought pursuant to s. 18 of the Supreme Court Act, R.S.B.C. 1996, c. 443:

If, on application by any person, the court is satisfied that a person has habitually, persistently and without reasonable grounds, instituted vexatious legal proceedings in the Supreme Court or in the Provincial Court against the same or different persons, the court may, after hearing that person or giving him or her an opportunity to be heard, order that a legal proceeding must not, without leave of the court, be instituted by that person in any court.

- [43] Consistent with the earlier difficulties experienced by the BCNU and the FHA in having the various court applications addressed in a proper and timely manner, it was no easy task to have this application scheduled.
- [44] Dates for this hearing were sought in August 2012. Based on the availability of the parties, dates in October 2012 were set. Just before that hearing, Ms. De Silva sought an adjournment because she had subsequently scheduled a medical appointment on that same day. The BCNU agreed on the condition that she would not commence any further proceedings or make any further applications in this Court until the application could be heard. She refused.
- [45] At the contested adjournment application on October 10, 2012, Loo J. granted the adjournment on the terms sought by the BCNU. Ms. De Silva refused to sign the order within the stipulated time frame, so it was entered without her signature. The imposition of that stay has prevented the BCNU from setting down its application for payment out of the remaining garnished funds in court and has also prevented Ms. De Silva from filing her application to allow the LRB judicial review proceedings to be filed outside of the time limits.

[46] The principles to be considered by the court in determining whether to exercise its discretion under s. 18 of the Supreme Court Act are set out in *Re Lang Michener and Fabian* (1987), 37 D.L.R. (4th) 685 at 691 (Ont. H.C.J.):

the following principles may be extracted:

- (a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction constitutes a vexatious proceeding;
- (b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious;
- (c) vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;
- (d) it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;
- (e) in determining whether proceedings are vexatious, the court must look at the whole history of the matter and not just whether there was originally a good cause of action;
- (f) the failure of the person instituting the proceedings to pay the costs of unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious;
- (g) the respondent's conduct in persistently taking unsuccessful appeals from judicial decisions can be considered vexatious conduct of legal proceedings.

[47] The principles from *Lang Michener* have been adopted by this Court in *British Columbia (Public Trustee) v McGreal*, [1993] B.C.J. No. 873 (S.C.) at para. 26, and in *Holland v. Marshall*, 2010 BCSC 1560 at para. 8.

[48] Consistent with *Lang Michener* principle (e), that of looking at the whole history of the matter, the court may take note not only of the proceedings before this Court, but also proceedings before other tribunals and courts. In *Stark v. School District No. 39 (Vancouver)*, 2007 BCSC 301, various proceedings had been taken before the LRB, the B.C. Supreme Court, the Court of Appeal, and then back to this Court. Madam Justice Ross found that the plaintiff was clearly attempting to vexatiously relitigate matters:

- [38] Mr. Stark has now brought a number of applications seeking to re-litigate an issue that has already been determined by both this court and the Court of Appeal. Given the reasons of Ballance J., the Court of Appeal, and Bauman J., it is obvious that the Amended Petition cannot succeed. As in Callow, the grounds and issues have been rolled forward. The costs awarded to the School Board in relation to the proceedings before Ballance J., the Court of Appeal, and Bauman J. have not been paid.
- [39] Mr. Stark has a clear sense of grievance. He is convinced that the decisions of the Arbitrator and the Board were wrong. He is convinced that those decisions have cost him dearly. In my view, this is not a case in which the litigation is being pursued for some collateral, improper purpose. However, I am satisfied that the evidence establishes that there has been a vexatious effort to re-litigate matters. An order is required in order to bring some measure of control, see *Callow v. West Vancouver School District No. 45*, 2004 BCCA 19, 193 B.C.A.C. 165. In the circumstances, there will be an order, pursuant to s. 18 of the Supreme Court Act, that Mr. Stark may not institute further applications or proceedings related to this matter in this court without leave of the court. Mr. Stark will be required to give notice to the School Board and to the Board of any application brought to obtain leave.
- [49] Similarly, *Bajwa v. British Columbia Veterinary Medical Association*, 2012 BCSC 878, involved an application to declare a veterinarian a vexatious litigant in light of extensive and various proceedings before the College of Veterinarians of British Columbia, the HRT, the B.C. Supreme Court (including judicial review petitions), and the Court of Appeal. Again, the entire history of the proceedings was relevant in the court's consideration of the issues and its conclusion that Dr. Bajwa was a vexatious litigant:
- [207] The defence says that these proceedings are vexatious in light of the whole history of the matter and not simply looking to the quality of the plaintiff's cause of action. There has been a lengthy process before the Human Rights Tribunal, a judicial review and appeal on the issue of institutional bias, and alternate actions which have been discontinued in the past. It seems to me that the plaintiff's conduct, viewed as part of the whole history, meets the criteria of a vexatious litigant.
- [208] Another part of the test is a litigant's persistent pursuit of unsuccessful appeals from judicial decisions. In this regard, the plaintiff appealed the first Council decision which was dismissed by Mr. Justice Blair. He appealed the decision of Allan J. and pursued an appeal to the Supreme Court of Canada.
- [209] It seems to me that the 2008 decision of Davies J. in *Bajwa*, supra, was intended to address this very issue in that same year. The details of the 2005 *Bajwa* actions are clearly rolled over or extended into this action. These factors are important in my consideration of the defendants' application.

...

- [211] In my view, the plaintiff has repeatedly raised issues of discrimination, bias, and malice before this court, in the Human Rights Tribunal, and the Court of Appeal. When the plaintiff's conduct is viewed in the context of the actions he has personally commenced, his association with the BC Vets for Justice, and the pursuit of his important discrimination issues before the BC Human Rights Tribunal, it is my view that this is an appropriate case for an order under section 18 of the Supreme Court Act.
- [50] To begin, I will address the first substantial overlapping of proceedings arising from the Human Rights Complaint and the Civil Action (which was commenced while the former proceedings were underway and not yet decided by the HRT).
- [51] Ms. De Silva initially argued on this application that the Civil Action was justified, as it related to "breach of contract and compensation". During argument, however, counsel for Ms. De Silva candidly conceded that the Civil Action was "misguided". That this Court lacked jurisdiction in relation to the matter, even though different causes of action were pleaded before this Court, is quite apparent from the authorities cited by Dley J., including *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929. In *Ancheta v. Joe et al.*, 2003 BCSC 93, the court dismissed the action on the basis that there was no jurisdiction after finding that the "essential character" of the claims was that the union had breached the duty of fair representation under s. 12 of the Labour Relations Code: paras. 107-109.
- [52] It is quite apparent from reading the reasons of Mr. Trerise of the HRT from July 25, 2011 in *Da Silva* (No. 2) and the Notice of Civil Claim that the substance or essential character of the allegations was the same.
- [53] It was Ms. De Silva's decision to file the Notice of Civil Claim that would spawn a myriad of applications, thereby requiring the expenditure of substantial time and resources on the part of the BCNU and the FHA to address the matter. To summarize those proceedings, they included: three applications before judges to finally address the merits; five applications before judges, a Master, and the Registrar regarding costs and garnishing orders; two applications in the Court of Appeal; and then a further two applications, including this one, to address the vexatious litigant issue. All told, twelve court applications have been necessary. All of these required a substantial amount of this Court's resources, a precious commodity these days, in dealing with an action that should never have been started in the first place.
- [54] In addition, the costs consequences of this misguided strategy were not adequately addressed by Ms. De Silva. Most of the costs have not yet been paid by her. I accept the BCNU's submissions that she was not forthcoming with a proposal to pay the assessed costs over time, which would have been a reasonable proposal and would have avoided the very many later applications. Rather, she took the "come and get me" approach, which again led to unwarranted and no doubt expensive procedures relating to the assessment of costs and the garnishing orders. No explanation has been given for her continued refusal to allow the monies in court to be paid to the BCNU, even in light of N. Brown J.'s decision on the BCNU's

ability to garnish the disability payments, which decision has not been appealed.

- [55] Ms. De Silva explains that she was struggling with the process in bringing the proceedings in this Court. She filed the Notice of Civil Claim on her own behalf. In addition, it appears that early in these proceedings she was assisted by a law school graduate who had not been called to the bar, which resulted in the Law Society's involvement to stop that person's unauthorized practice of law. But she was later represented in the Civil Action by counsel from November 2010 to approximately March 2011 and at the hearing before Dley J. in July 2011. She does not contend that she received inadequate legal advice from these lawyers, which leads me to conclude that her instructions must have been to proceed even in light of a clear lack of jurisdiction of this Court.
- [56] I turn now to the interplay between the Human Rights Complaint and the complaint before the LRB.
- [57] The filing of the LRB complaint and the timing of that filing is troubling. This complaint was filed by Ms. De Silva herself only days after the HRT and this Court released their decisions in late July 2011 dismissing her claims. Three points arise. First, this was the same proceeding that the BCNU had initially suggested that she take up in place of the HRT complaint, which she refused to do. Second, she alleges the same duty to accommodate as she had alleged earlier before the HRT. Third, in her complaint before the LRB, she makes no mention of the HRT's recent dismissal of her claim.
- [58] As a result of the filing of the LRB complaint in August 2011, the BCNU and the FHA now had to address the substance of these allegations on two fronts: before the LRB (which was, however, later dismissed without any submissions from the BCNU or the FHA) and on the judicial review of the HRT decision.
- [59] In the case of discrimination arising from a failure to accommodate a person with a physical disability or such discrimination giving rise to a breach of the duty of fair representation by the BCNU, there is concurrent jurisdiction as between the LRB and the HRT: *Judd v. Communications, Energy and Paperworkers Union of Canada, Local 2000*, BCLRB No. B63/2003, 91 C.L.R.B.R. (2d) 33 at paras. 55-56. In that case, the LRB indicated that where there is such concurrent jurisdiction, the LRB will be alive to the issue of not proceeding on a dual track:
- [55] Rayonier gives examples of grounds on which representation could be considered discriminatory; one is unequal treatment on the basis of race or sex or any of the other prohibited grounds set out in the Human Rights Code. It is important to note that both the Labour Relations Board and the B.C. Human Rights Tribunal have jurisdiction over discriminatory representation on the basis of the prohibited grounds set out in the Human Rights Code. The Board's policy is, if a complaint is filed with both the Board and the Tribunal and is primarily an allegation that the union discriminated on the basis of one of those grounds, the Board will hold its complaint in abeyance until the Tribunal renders its decision provided the Board is satisfied that the Tribunal's decision is likely to resolve any

outstanding issues before the Board and the complainant will have access to an effective remedy: Carol Ilicic, BCLRB No. B235/95; Julie Sutherland, BCLRB No. B63/99.

[Emphasis added.]

[60] In fact, Mr. Trerise at the HRT in *Da Silva* (No. 2) expressly rejected the BCNU's argument that the matter was within the exclusive jurisdiction of the LRB and that the HRT proceedings should be dismissed on that basis:

[102] The Union argues that the complaint is not within the jurisdiction of the Tribunal because, in essence, it is a complaint within the exclusive jurisdiction of the B.C. Labour Relations Board ("LRB"), and s. 139 of the Labour Relations Code provides the LRB with the exclusive jurisdiction to decide issues arising under the Labour Relations Code. The same set of circumstances can raise issues under both the Code and the Labour Relations Code.

[103] Section 27 of the Code states:

- (1) A member or panel may, at any time after a complaint is filed... dismiss all or part of the complaint if that member or panel determines that any of the following apply:
- (f) the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding.

[104] Therefore, the Legislature has expressly affirmed that human rights complaints can be dealt with through other proceedings. Section 25 of the Code provides a discretion to the Tribunal to defer a complaint until it has been dealt with in an alternative proceeding if the Tribunal determines that other proceeding is capable of appropriately dealing with the substance of the complaint. Clearly, therefore, jurisdiction is preserved in the Tribunal even where the issues are parallel between the human rights proceeding and the alternative proceeding, *Workers Compensation Board of British Columbia v. British Columbia (Human Rights Tribunal)*, 2010 BCCA 77 (leave to appeal to the Supreme Court of Canada granted July 8, 2010).

[105] I am not persuaded that the Union has raised a successful jurisdictional argument. I find that it is more appropriate to consider the application under section 27(1)(c).

[61] Having succeeded in her jurisdictional argument before the HRT, it is inexplicable why Ms. De Silva would then further commence proceedings before the LRB unless she simply wanted to argue the same issues again on the chance that her claim might find more favour at the LRB.

[62] The interplay between these two types of proceedings was discussed in *Sharrock v. Nanaimo Forest Products Ltd.*, 2009 BCHRT 339. In that case, there were also proceedings before both the HRT and the LRB against both the employer and the union relating to allegations of discrimination on the basis of physical disability. The HRT had stayed their proceedings pending a decision of the LRB under s. 12 of the Labour Relations Code. After the LRB dismissed the complaint, the union applied for dismissal of the HRT complaint. After

recognizing the overlapping jurisdiction between the HRT and the LRB, at para. 42, Tribunal member Lindsay Lyster found that issue estoppel had been made out and that it would be unjust to require the employer and the unions to defend themselves again on the same issues as were before the LRB: paras. 47-53.

- [63] Ms. De Silva argued on this application that discrimination under s. 12 of the Labour Relations Code is not limited to the grounds set out in the Human Rights Code: see Judd at paras. 7, 56. I agree. But it is apparent from a reading of Ms. De Silva's complaints before both the HRT and the LRB that the essential character of her claims - both factually and legally - was that the BCNU and the FHA had discriminated against her on the basis of their failure to accommodate her physical disability: for example, see Mr. Trerise's comments in De Silva (No. 2) at para. 113. No allegations of bad faith, arbitrariness, or other grounds of discrimination under s. 12 of the Labour Relations Code were raised by her: see the First LRB Decision at para. 20. In fact, based on further submissions received, the LRB on May 30, 2012 found that she failed to disclose any facts beyond bald assertions to support a breach of the Labour Relations Code: the Second LRB Decision at paras. 25-28, 33-34.
- [64] Ms. De Silva also says that she was seeking different remedies as between the HRT and the LRB proceedings. However, she did not set out the remedy she sought in either proceeding so no point of distinction on that basis exists.
- [65] Ms. De Silva's conduct of the litigation before the HRT, the LRB, this Court, and the Court of Appeal comes within many of the principles set out in *Lang Michener*. She brought actions (i.e., the LRB proceeding) where the same issues had already been decided against her (ie. the HRT proceedings). She brought the Civil Action when this Court had no jurisdiction and, again, where similar claims had already been dismissed by the HRT. Many of the issues raised have been "rolled forward" into subsequent proceedings where the same facts and allegations have been "repeated and supplemented". Her proceedings in the Court of Appeal were also misguided in terms of procedure. Other unsuccessful appeals include the application to set aside the Consent Order, the reconsideration by the LRB, and the judicial review of the HRT decision.
- [66] Costs remain a factor to be considered. Ms. De Silva appears to believe - mistakenly so - that she should bear little cost consequences in the various proceedings simply because she has acted on her own behalf for much of the time. When costs have been awarded against her, she does not address her obligations, instead seeming to rely on the (unsuccessful) argument that her income is immune from execution.
- [67] Furthermore, although Ms. De Silva asserts that her strategy has been largely driven by the fact that she has represented herself on the various applications, this is not entirely untrue. She has, at times, benefited from the advice of legal counsel. She was represented in respect of the Human Rights Complaint until approximately August 2010, in the Civil Action from approximately November 2010 until approximately March 2011, and at the July 28/29, 2011 hearings before Dley J. In addition, as set out above, she had assistance from a law school

graduate with respect to her HRT complaint from approximately August 2010, and in the initial stages of the Civil Action. Lastly, Ms. De Silva has, of course, been represented on this application, and her counsel's submissions have assisted in resolving the matter in an expeditious manner.

- [68] The fact that many people represent themselves in proceedings before the courts and before tribunals is now a fact of life. They do so for several reasons. They may decide that they do not need or want a lawyer to represent them. Or they may, as is often the case, be unable to afford counsel's fees. Whatever the reason, the self-represented litigants face many challenges in preparing and presenting their cases properly before the court, particularly in complex areas of the law. This is so despite the many written and online resources (including this Court's website) available to litigants.
- [69] Although a self-represented litigant faces these challenges, it remains the responsibility of that litigant to follow the applicable rules of procedure. These rules are intended to ensure a level of fairness in how the litigation is started and conducted. In large part, these rules allow the matter to proceed to a hearing on the merits on a proper basis. Following the rules therefore ensures that the proper material is before the court in a timely matter, all of which assists in resolving the issues at hand in a timely and fair manner.
- [70] I do not know why Ms. De Silva chose to represent herself during much of the relevant time frames here. Nevertheless, it was incumbent on her to abide by the applicable procedures, to the extent she was able. In this case, it is apparent that she ignored many rules of procedure, even after opposing counsel advised her of the proper procedures. Examples include the second hearing before Truscott J. and the hearing relating to the garnishing orders.
- [71] It is also apparent that she was obstreperous with opposing counsel in refusing to sign orders and setting hearings without consultation with opposing counsel. While these acts of cooperation are not technically required by the Supreme Court Civil Rules, and while procedures are available to deal with any issues that arise, Ms. De Silva's approach is consistent with her general disregard of the rules of procedure, particularly as they provide for fairness to the opposing party.
- [72] In fact, counsel for the BCNU and the FHA were helpful in pointing out that this Court lacked jurisdiction to adjudicate her claims, advice that she ignored - perhaps even after receiving her own legal advice. Opposing counsel also from time to time recommended that she obtain independent legal advice, advice that she only sporadically took up, but without any apparent effect on her ill-founded campaign for redress.
- [73] Ms. De Silva argues that she is not "vexatious". She says that while she was unsuccessful in the various proceedings, she had some "mixed success" in showing merit in the matters taken up by her. She points to some of these "successes", such as the HRT's decision to allow the complaint to go forward in March 2010, Dley J.'s decision to not award special costs, the LRB's decision to remit the matter back for a reconsideration, and Registrar Sainty's order to

allow the monthly payment of costs. At best, I consider these to be successes in minor procedural skirmishes. They do not detract from the overall result that Ms. De Silva failed to obtain any meaningful relief for the complaints advanced against the BCNU and the FHA in any of the proceedings.

- [74] Ms. De Silva's fervour in seeking justice for her claims is admirable, but only to a point. She clearly feels wronged and has doggedly pursued the matter. I do not consider that her conduct and attitude toward this litigation has risen - or more accurately, sunk - to the level of the plaintiffs in *Holland* (para. 10) or, in particular, *McGreal* (paras. 11, 30), where the parties had quite openly declared their intention to continue their vexatious campaigns through the court system. As the court found in *Stark*, I do not consider that Ms. De Silva has filed these various actions for a collateral and improper purpose, but rather out of a misguided and self-centered goal of achieving her ends. She has been determined to attempt every conceivable avenue for redress, even though those avenues may be duplicative of dead ends she has already followed. As a result, the BCNU and the FHA have been required to spend countless hours and expend substantial legal fees to deal with her tortuous journey before this Court, the Court of Appeal, the HRT, and the LRB.
- [75] Overall, I am satisfied that Ms. De Silva has re-litigated this claim in a vexatious manner. She should be precluded from instituting any further legal proceedings in this Court against the BCNU and the FHA without leave of this Court, pursuant to s. 18 of the Supreme Court Act. In this way, as in *Stark*, a "measure of control" can be brought to bear upon Ms. De Silva's future litigation strategy, if any. In that way, leave will be required by which the court may consider, at an early stage, whether continuing with the proceedings is warranted. This will avoid hopeless and expensive litigation between the parties.

Disposition

- [76] There will be an order on the terms sought that Ms. De Silva is prohibited from instituting further legal proceedings in this Court as against the FHA and the BCNU, including their agents, employees and representatives, without first obtaining leave of this Court.
- [77] Ms. De Silva's approval as to form of the order is dispensed with.
- [78] Costs are also awarded against Ms. De Silva on Scale B in favour of the BCNU and the FHA. Costs are payable by Ms. De Silva forthwith after assessment.

"Fitzpatrick J."

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