

CANADA / JUDGMENT

Franklin v. B.C. Buildings Corp.

2000 BCSC 389

COURT

Supreme Court of British Columbia

DECIDED

2 March 2000

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Citation:	Franklin v. B.C. Buildings Corp.
Date:	20000302 2000 BCSC 389
Docket:	C995278 Registry: Vancouver IN THE SUPREME COURT OF BRITISH COLUMBIA
BETWEEN:	EDWARD FRANKLIN PLAINTIFF
AND:	BRITISH COLUMBIA BUILDINGS CORPORATION DEFENDANT

REASONS FOR JUDGMENT

OF

MASTER PATTERSON

(IN CHAMBERS)

Counsel for the Plaintiff:

Shelan Miller

Counsel for the Defendant:

Patrick C. Cronin

Date and Place of Hearing:

February 10, 2000

Vancouver, BC

- [1] The defendant applies to strike out paragraph 16(c) of the statement of claim pursuant to Supreme Court Rule 19(24).
- [2] The action arises out of the claim by the plaintiff that his contract of employment with the defendant was terminated on April 22, 1999, without notice and without cause. Subsequent to his termination, the plaintiff was offered a settlement which was apparently unsatisfactory.
- [3] Starting in June 1999, there were a series of letters between the plaintiff's solicitors and first the defendant and then the defendant's solicitors containing offers and counter-offers and other matters. Some of the letters were marked "Without Prejudice" and some were not.
- [4] On June 28, 1999, the defendant's solicitors forwarded to the plaintiff's solicitors two letters, one marked "Without Prejudice" and one not. The letter which was not marked contains two paragraphs which start "On a without prejudice basis ". The second letter dated June 28, 1999, is marked "Without Prejudice" and contains the following paragraphs:

We have your "without prejudice" letter dated June 23, 1999 for reply.

We have replied to many of the issues raised in both your letters in our second letter of this date.

Should you decide to proceed to litigate, we will take the position that the Corporation did have cause for this termination. However, as you will have recognized, the litigation will be lengthy and difficult.

- [5] The statement of claim contains the following paragraphs:
- 13. On April 22, 1999 the defendant terminated the plaintiff's employment without notice. At the time the defendant told the plaintiff the reason for termination was that he did not fit to corporate culture of the defendant. The defendant refused to give reasons for the termination but advised the plaintiff that the termination was without cause.
- 14. The defendant offered the plaintiff pay in lieu of notice, but the amount offered was inadequate in the circumstances.
- 15. As a result of the defendant's termination of the plaintiff's employment the plaintiff suffered loss and damages.
- 16. When the plaintiff did not accept the defendant's offer, the defendant:
 - a) cut off the plaintiff's salary and benefits;
 - b) failed or refused to pay the statutory minimum required under the Employment Standards Act, R.S.B.C. 1996, c. 113; and,
 - c) threatened to allege cause for the termination.

[6] The defendant has pleaded as follows in response to paragraph 16(c) of the statement of claim:

16. In answer to paragraph 16(c) of the Statement of Claim, this statement is an improper pleading because it represents disclosure of without prejudice communications between counsel for the Plaintiff and Defendant, and is made for the purpose of attempting to prejudice the Defendant's interests and deny it a fair trial in this action.

[7] The only portion of the statement of claim which the defendant seeks to strike out is paragraph 16(c), the argument being that the statement pleaded was contained in a letter marked "Without Prejudice" and thus is scandalous, frivolous, or vexatious, or otherwise in contravention of Rule 19(24):

(24) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that

- (a) it discloses no reasonable claim or defence as the case may be,
- (b) it is unnecessary, scandalous, frivolous or vexatious,
- (c) it may prejudice embarrass or delay the fair trial or hearing of the proceeding, or
- (d) it is otherwise an abuse of the process of the court,

and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[8] The defendant argues that it is inappropriate to refer in pleadings to matters contained in a without prejudice letter written in the course of settlement discussions. The defendant argues that it is in the public interest to foster settlement and that therefore this allegation taken from a settlement letter might put a chill on full and frank settlement discussions.

[9] Counsel for the defendant refers to several cases including *Belanger v. Gilbert* (1984), 58 B.C.L.R. 191 and *Middelkamp v. Fraser Valley Real Estate Board* [1992], 71 B.C.L.R. (2d) 276. Neither of those cases assists the defendant. *Middelkamp* deals with production of documents and a claim of privilege while *Belanger* deals with the question whether a letter not marked without prejudice was privileged or not in the context of the extension of the limitation period.

[10] Defence counsel also referred to *Pyke v. Price Waterhouse Ltd.* [1995] B.C.J. 1172. In that case, Smith, J. was sitting on the appeal of a master's decision striking out a portion of a paragraph in the statement of claim. That case concerned a claim for wrongful dismissal coupled with a claim for mental distress. The paragraph of the statement of claim referred to an offer made by the defendant with a seven-day expiry. The plaintiff alleged that the defendant's conduct was high-handed and reprehensible. The master held that only the dollar amount of the offer should be struck out as it might be prejudicial to the defendant and that otherwise the paragraph should stand. The defendant's appeal was dismissed.

[11] In the course of his reasons at paragraph 18 Smith J. writes:

Finally, the defendant submits that the offer cannot be pled because it was made "without prejudice" and the evidence called to prove it would be privileged and inadmissible. I disagree. The rule excluding evidence of privileged communications is a rule of evidence, not a rule of pleading. It is concerned with the nature of the material that may be placed before the court at the trial for the purpose of providing the pleaded facts and does not control what issues of fact may be defined by the pleadings. The latter is a function of the substantive law. Here, the substantive law provides that damages for mental distress may be awarded in an action for wrongful dismissal where the manner of dismissal was high-handed or reprehensible. The plaintiff has pled that the defendant's conduct can be so characterized. That her mental distress was exacerbated by the settlement offer is a relevant evidentiary fact she is entitled to plead in support of that material fact. Whether any particular piece of evidence is admissible to prove this evidentiary fact is a matter to be determined by the trial judge according to the rules of evidence.

[12] Counsel for the plaintiff argues that the statement contained in paragraph 16(c) in the statement of claim is a threat, and that threats even if contained in without prejudice correspondence may be admissible. See *Schetky v. Cochrane* [1918] 1 W.W.R. 821 (B.C.C.A.). In addition a threat of alleging cause may lead to damages for bad faith. Reference was made to *Wallace v. United Grain Growers Ltd.* (1997), 36 C.C.E.L. (2d) 1 (S.C.C.).

[13] For the defendant's application to succeed at this stage of the action it must be absolutely clear that the impugned paragraph offends Rule 19(24). All the arguments concerning privilege relate to admissibility of the evidence of the threat. I agree with Smith, J. that counsel have to keep in mind that this application deals with the rules of pleading and not with rules concerning the admissibility of evidence.

[14] It may well be that the plaintiff will be unsuccessful in introducing evidence to support the pleading of threat, but that is a matter for the trial judge to consider.

[15] Counsel's argument that full and frank discussions of settlement are in the interests of the public and of litigants is so, but, in my view, any privilege attaching to terms offered may well not extend to threats to allege cause for dismissal when none exists.

[16] In my view, the defendant's application should be dismissed. The pleading attacked is neither unnecessary, scandalous, frivolous or vexatious, nor is it prejudicial or an abuse of process. The threat to allege cause when none exists is, in my view, highly improper and quite properly a matter that should be before the court when the question of damages is to be considered.

[17] The defendant's application is dismissed. The plaintiff is entitled to costs of this application.

"Master A. Patterson"

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