CANADA / JUDGMENT

Muldoe v. Red Chris Development Company Ltd.

2020 BCSC 1966

COURT
Supreme Court of British Columbia

DECIDED
25 September 2020

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2020 BCSC 1966 Muldoe v. Red Chris Development Company Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Muldoe v. Red Chris Development Company Ltd.,

2020 BCSC 1966

Date: 20200925

Docket: S18363

Registry: Smithers

Between:

Gregory Keith Muldoe

Plaintiff

And

Red Chris Development Company Ltd.,

Michael Derzak and Workers Compensation Board

Defendants

Before: The Honourable Mr. Justice G.C. Weatherill

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

I.B. Lawson

Counsel for the Defendant, Red Chris Development Company Ltd., appearing by teleconference:

C. Scheuer

Counsel for the Defendants, Derzak and Workers Compensation Board, appearing by teleconference:

D. Eleff

Place and Date of Hearing:

Smithers, B.C.

September 25, 2020

Place and Date of Judgment:

Smithers, B.C.

September 25, 2020

[1] THE COURT: The defendants, Michael Derzak and the Workers' Compensation Board (the "Board") (collectively, the "applicants"), seek an order pursuant to Rule 9-5(1) of the Supreme Court Civil Rules striking out or, alternatively, pursuant to Rule 9-6 dismissing the claims against them.

[2] The defendant, Red Chris Development Company Ltd. ("Red Chris") takes no position on the application.

Background

[3] On February 27, 2018, the plaintiff was injured in an accident while in the course of his employment with Red Chris. He filed a claim for compensation with the Board. Mr. Derzak, an employee of the Board, was assigned as the plaintiff's case manager. Mr. Derzak assessed the plaintiff, determined that he had a lower back strain as well as an acute exacerbation of his chronic low back pain, and accepted the plaintiff's claim for compensation. The plaintiff received temporary disability or wage loss benefits from the date of the injury.

[4] On September 25, 2018, Mr. Derzak notified the plaintiff that he was no longer temporarily disabled and that he was able to return to work. The plaintiff alleges that he was directed to return to work by Mr. Derzak on October 1, 2018. The plaintiff returned to work at Red Chris on October 1, 2018.

[5] By letter dated October 17, 2018, Mr. Derzak advised the plaintiff that his injuries were not considered to have resulted in permanent injury and that his benefits were being concluded as of that date (October 17, 2018). The plaintiff was also advised that he was entitled to apply for a review of Mr. Derzak's decision within 90 days. The plaintiff applied for a review to the Board's Review Decision Division.

[6] On November 2, 2018, the plaintiff was dismissed from his employment by Red Chris. Red Chris pleads that the plaintiff's dismissal was the result of his poor attendance at work.

[7] On April 17, 2019, the Board's Review Division ruled in favour of the plaintiff, found that his condition had not stabilized or resolved as of October 17, 2018, and ordered the payment of wage loss benefits beyond October 17, 2018, referring the extent and duration of the plaintiff's continued entitlement to the Board (the "April 2019 Decision").

[8] The plaintiff did not appeal the April 2019 Decision to the Workers Compensation Appeal Tribunal ("WCAT").

[9] Following the April 2019 Decision, Andrew White was assigned by the Board to act as the plaintiff's case manager for his claim.

[10] On June 11, 2019, the Board implemented the April 2019 Decision and awarded the plaintiff additional wage loss benefits from October 17 to November 14, 2018. The Board advised the plaintiff of its decision that his injury did not result in permanent partial disability (the "June 2019 Decision").

[11] The plaintiff did not seek a review of the June 11, 2019 Decision.

[12] On July 8, 2019, the Board approved the plaintiff for 12 weeks of retroactive vocational rehabilitation benefits from November 19, 2018 to February 10, 2019 (the July 2019 Decision").

[13] The plaintiff did not seek a review of the July 2019 Decision.

[14] On October 9, 2019, the plaintiff commenced this action alleging that he was wrongfully dismissed by Red Chris. He also alleges that under Part 1 of his notice of civil claim as follows:

16. On September 25, 2018, the Defendant Derzak concluded that the Plaintiff was no longer temporarily disabled and directed him to return to work on October 1, 2018. The Defendant Derzak so directed the Plaintiff despite being aware of the following facts:

(a) the Defendant Red Chris informed the Defendant Derzak on September 17, 2018 that they were unable to accommodate a modified return-to-work schedule for the Plaintiff, and they required him to be 100% fit for duty when he returns to work;

(b) the Defendant Derzak was told by the Plaintiff that the Plaintiff continued to be disabled and that his employer required that he be fully recovered before he returned to work;

(c) the Plaintiff was scheduled to receive steroid injections on October 17, [2]018 as treatment for his symptoms;

(d) the Plaintiff's employment as a millwright required regular lifting of 50 pounds or more; and

(e) orthopedic surgeon Dr. Charles Fisher gave an opinion on August 24, 2018 that the plaintiff "must be protected from any heavy lifting or repetitive bending and lifting" if he returns to work.

17. On October 17, 2018, the Defendant Derzak made a written decision that the Plaintiff was "no longer temporarily disabled" despite being aware of the following facts:

(a) the Plaintiff informed him on October 2, 2018 that he had been sent home from work on account of ongoing back pain;

(b) the Plaintiff's family physician reported to the Defendant Board on October 2, 2018 that the Plaintiff was unable to walk or stand for long periods and was unable to lift heavy objects.

18. The Defendant Derzak's conduct was more than negligent in the performance of his duties as an adjudicator. The Defendant Derzak used his power for the purpose of causing the Plaintiff to suffer harm.

[15] Under the legal basis for the claim, the plaintiff alleges that:

3. By directing the Plaintiff to return to work while knowing the employer had no modified return-to-work schedule for him and further required the Plaintiff to be "100%" before returning to work, the Defendant Derzak committed the tort of intentional interference with economic interests, which resulted in the Plaintiff's dismissal and caused him to suffer damage and loss.

4. By doing the acts set out in paragraphs 16 to 18 at Part 1, the Defendant Derzak acted with the express purpose of harming the Plaintiff and so committed the tort of misfeasance in public office, which caused the Plaintiff to suffer damage and loss. A public officer does not have authority to exercise his or her powers for an improper purpose.

5. The Defendant Board is vicariously liable for torts committed by its employees in the course of their employment.

[Citations omitted.]

[16] No particulars have been pleaded as to the illegal or unlawful means by which Mr. Derzak is said to have committed the tort of intentional interference with economic relations, one of the required elements of the tort, Low v. Pfizer Canada Inc., 2015 BCCA 506, at para. 39.

[17] In Carhoun & Sons Enterprises Ltd. v. Canada (Attorney General), 2015 BCCA 163, our Court of Appeal summarized the necessary elements of the tort of misfeasance in public office at para. 130:

[130]

1. A public officer engaged in deliberate and unlawful conduct in his or her capacity as a public officer;
2. The public officer was aware both of his or her conduct was unlawful and it was likely to harm the plaintiff; and
3. The public official's action caused legally recoverable damages.

[18] Again, no particulars have been pleaded as to the unlawful means by which Mr. Derzak is said to have committed the tort of misfeasance in public office. Rather, the plaintiff simply pleads bare allegations of the torts having been committed.

Analysis

[19] The Workers' Compensation system in British Columbia established by the Workers Compensation Act, R.S.B.C. 2019, c. 1 [Act] together with the Regulations under the Act is a comprehensive scheme in which workers give up their right to sue employers and other workers for their work-related injuries, disease, or death. Instead, they are entitled to no-fault compensation for injuries which is administered by the Board.

[20] Section 122 of the Act is a full privative clause, giving the Board exclusive jurisdiction to inquire into, hear, and determine all matters and questions of fact and law arising in respect of, among other things, a workplace injury, its existence, degree, and permanence. Decisions of the Board in this regard are final and not open to review by a court.

[21] A decision of the Board may be challenged through a series of internal review processes called a "review decision" followed by an appeal to the WCAT. Once all internal remedies under the Act, including an appeal to WCAT, have been exhausted, the final decision may be challenged by way of judicial review. Such a review must be brought by way of a petition to the Supreme Court of British Columbia.

[22] Section 332 of the Act provides:

Protection for Board, directors, officers and employees

332 An action may not be maintained or brought against the Board or a director, officer or employee of the Board in respect of any act, omission or decision

(a) that was within the jurisdiction of the Board, or

(b) that the Board, director, officer or employee believed was within the jurisdiction of the Board.

[23] That section makes it clear that an injured worker may not bring or maintain an action arising out of a workplace-related injury against the Board or its staff, in relation to any act, omission, or decision that was within or believed to be within the Board's jurisdiction.

[24] There is no pleading alleging that the actions of the Board and Mr. Derzak in this case were outside of the jurisdiction of the Board. Rather, as I will deal with in a moment, the plaintiff pleads that they were within the jurisdiction of the Board.

[25] The plaintiff submits that he is not challenging the Board's decision by way of a collateral attack or seeking compensation under the Act. Rather, he submits that his claim against Mr. Derzak and the Board is a novel one (not yet embedded in existing legal rules) and falls outside the Act's privative clause, just as would be the case if Mr. Derzak had punched the plaintiff instead of causing him to lose his job.

[26] The difficulty with that submission is that it does not reflect the reality of the plaintiff's claim. All of the allegations against Mr. Derzak involve the carrying out of his case manager function while employed by the Board and within the jurisdiction of the Board.

[27] Although evidence is not generally admissible on an application under Rule 9-5(1)(a), it is admissible on applications under Rules 9-5(1)(b), (c), and (d), all of which are engaged in this application. Moreover, a court dealing with an application under Rule 9-5(1)(a) may look behind and subject allegations based on assumption and speculation, rather than on asserted facts to sceptical analysis: Union Road Properties Ltd. v. British Columbia (Agricultural Land Commission), 2018 BCSC 1349, at paras. 3 and 4.

[28] The plaintiff's claims against the Board and Mr. Derzak directly engage issues in respect of which the Board has exclusive jurisdiction. It alleges negligence by Mr. Derzak in his public office. Such claims are barred by s. 332 of the Act.

[29] There is no claim by the plaintiff that Mr. Derzak was acting outside of his authority as an employee of the Board, indeed, as I have mentioned, the plaintiff has pleaded the contrary by alleging at paragraph 5 of his notice of civil claim under "Legal Basis":

The Defendant Board is vicariously liable for torts committed by its employees in the course of their employment.

[30] I agree with Mr. Lawson that pleadings should only be struck in the clearest of cases. However, in my view, this is one of those cases. The plaintiff's claim against the Board and Mr. Derzak discloses no reasonable claim, is unnecessary, in my view, is scandalous, frivolous, and/or vexatious and, plainly, in my view, is an abuse of the process of the court. It is plain and obvious that the claim has no reasonable prospect for success as there is no genuine issue for trial.

[31] The application is granted striking the claim against the Board and Mr. Derzak pursuant to each of Rules 9-5(1)(a) and/or (b) and/or (d).

[32] The applicants are entitled to their costs at Scale B.

"G.C. Weatherill J."

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