

CANADA / JUDGMENT

Ossudallah v. Swiss Consulting Management Ltd.

2020 BCSC 567

COURT

Supreme Court of British Columbia

DECIDED

14 April 2020

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2020 BCSC 567 Ossudallah v. Swiss Consulting Management Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ossudallah v. Swiss Consulting Management Ltd.,

2020 BCSC 567

Date: 20200414

Docket: S197388

Registry: Vancouver

Between:

Mersedeh Ossudallah aka Mercedes Ossudallah

Plaintiff

And

Swiss Consulting Management Ltd. and Sassan Pourfar

Defendants

Before: The Honourable Mr. Justice Wilson

Reasons for Judgment

Counsel for the Plaintiff:

M. Sheard

Counsel for the Defendants:

T.A. Hakemi

L. Shepherd

Place and Date of Trial/Hearing:

Vancouver, B.C.

March 13, 2020

Place and Date of Judgment:

Vancouver, B.C.

April 14, 2020

- [1] The defendants apply to strike portions of the plaintiff's notice of civil claim. They say the statement of claim goes beyond what is required in a wrongful dismissal action and that the impugned paragraphs are irrelevant, scandalous, vexatious and do not provide for a cause of action.
- [2] The plaintiff worked as a sales person with the defendant company for over a year when she was terminated on May 23, 2019. The incident that led to her termination involved the sale of eight watches by the plaintiff to a customer.
- [3] There is no question that the plaintiff was terminated. This is not a constructive dismissal case. The company in its response to civil claim agrees that the plaintiff was terminated, but says the sale of the eight watches was undertaken contrary to company policy and that it had just cause for the termination.

The pleadings

- [4] The notice of civil claim alleges more than a wrongful termination of her employment. At paragraphs 23 to 26 of the notice of civil claim, the plaintiff pleads as follows:
 - 23. Mr. Pourfar engaged/engages in a course of conduct which is sexually inappropriate with respect to his female staff including, without limitation, the Plaintiff.
 - 24. On several occasions, Mr. Pourfar groped the Plaintiff on her breast(s) and/or buttocks and/or made inappropriate sexual remarks to her. This was non-consensual and there was no objective reason for Mr. Pourfar to believe it was consensual.
 - 25. On other occasions Mr. Pourfar made sexually inappropriate remarks to the Plaintiff and/or other workers.(the "Conduct Allegations").
- [5] At paragraphs 26 to 30, the plaintiff pleads the following:

26. Throughout the Plaintiff's employment, Mr. Pourfar routinely engaged in a process of falsely and retroactively re-arranging numerical data which the Plaintiff and/or others had correctly entered using a software provided by Swiss Consulting called SWIM.
27. SWIM formed part of the Defendant's accounting and/or bookkeeping records.
28. Mr. Pourfar altered these records in order to give the appearance of discounts and/or refunds having been applied to the sales in question when in fact the merchandise had been sold at full price. Particular transactions include, without limitation:

[five transactions are identified]

[the "Financial Allegations"].

29. The Plaintiff and other staff were made aware of the [Financial Impropriety Allegations]. As such they were put in a compromising position including:

- a. By being forced to lie to customers;
- b. By being forced to compromise their own values; and/or
- c. By being left to wonder what misdeeds they might be complicit in and/or liable for (including both civil and criminal liability).

30. The Plaintiff was not privy to all details of the [Financial Allegations], but had the impression they were deceitful and/or fraudulent and yet that she should have to keep quiet about the practices for fear of losing her job.

[6] Finally, the plaintiff pleads the following under the heading "General":

31. Mr. Pourfar is wealthy.
32. Swiss Consulting is wealthy.
33. Pursuant to the foregoing two paragraphs, a large financial penalty is required to achieve any deterrent effect.
34. The Defendants' conduct with respect to the sexual impropriety and financial impropriety set out herein:
 - a. caused the Plaintiff stress, anxiety and sleeplessness;
 - b. created an objectively intolerable working environment;
 - c. was malicious;
 - d. was reprehensible;
 - e. represented a marked departure from the standard that should be expected in a Canadian workplace; and
 - f. is deserving of rebuke.

- [7] The plaintiff has filed her own application for production of documents, including a request for the following:

Delivery to counsel for the plaintiff for inspection by an expert of the plaintiff's choosing of any and all computer drives capable of revealing when the subject information was entered, and when it was altered and/or by whom it was altered.

- [8] The documents sought by the plaintiff, including the computer drives, are only relevant if the Financial Allegations remain. If they are struck, the documents would not be relevant.

Legal test on an application to strike pleadings

- [9] The court has authority to strike pleadings, or portions of pleadings, pursuant to Rule 9-5 which provides the following:

- (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a 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 pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

- (2) No evidence is admissible on an application under subrule (1) (a).

- [10] The test on application under Rule 9-5 is whether it is plain and obvious that the plaintiff's claim discloses no reasonable cause of action. Evidence is not admissible, and it is assumed that the plaintiff will be able to prove the truth of the allegations in the pleadings. An exception is if the allegations are based on assumptions or speculations, or are based upon facts that are incapable of being proven.

- [11] Pleadings will be struck when they do not establish a cause of action or a claim known to law. A pleading is unnecessary or vexatious if it does not go to establishing the plaintiff's cause of action or does not advance a claim known in law. That said, the law evolves over time and the fact that there has never been a claim successfully advanced does not preclude a plaintiff from advancing it if the court is satisfied that there is a possibility the claim might succeed.

- [12] The word "embarrassing" referred to in Rule 9-5 refers to allegations that are irrelevant such that allowing them to stand would be a waste of time and expense and engages the parties in a dispute that is irrelevant from the issues.

- [13] The defendant does not dispute that the wrongful dismissal claim is properly pleaded. The impugned pleadings on this application are the Conduct Allegations and the Financial Allegations.

Discussion

- [14] The majority of the argument surrounded the Conduct Allegations. The plaintiff agrees that she is not pursuing damages for breach of the Human Rights Code, R.S.B.C. 1996, c. 210. She also agrees that a claim for harassment can only be brought under human rights legislation, and that the law in Canada is that harassment is not an independent tort.
- [15] A claim for wrongful dismissal is based upon a breach of an obligation, whether express or implied, in the employment contract to give reasonable notice of termination, in the absence of just cause. Damages for the breach of contract are generally expressed by way of a number of months of notice to which the wrongfully terminated employee was entitled. However, there may be circumstances in which a terminated employee is entitled to additional compensation.
- [16] A plaintiff may be awarded aggravated damages if the employer's conduct results in additional harm to the employee. In *Wallace v. United Grain Growers Ltd.*, [1997] 3 SCR 701, the Court held that employers have an obligation of good faith and fair dealing in the manner of dismissal and that employers can be expected to be "candid, reasonable, honest and forthright with their employees". In *Honda Canada Inc. v. Keays*, 2008 SCC 39, the Supreme Court of Canada reaffirmed that obligation, and held at para. 58:
- [58] . . . At least since that time, then, there has been expectation by both parties to the contract that employers will act in good faith in the manner of dismissal. Failure to do so can lead to foreseeable, compensable damages. . . .
- [17] Punitive damages may also be awarded in the context of an employment situation. In *Keays*, the Supreme Court of Canada confirmed at para. 62 that punitive damages may be awarded in contractual matters. The Court confirmed that an independent tort was not required and clarified that a breach of a contractual duty of good faith can suffice as an independent wrong.
- [18] Aggravated damages and punitive damages are fundamentally different in nature. Aggravated damages are compensatory, designed to compensate the specific plaintiff for the harm suffered. Punitive damages are intended to punish and are focused on the conduct of the wrongdoer as opposed to the consequences visited upon the plaintiff. Neither aggravated damages nor punitive damages are independent causes of action. Rather, they are heads of damage that may be awarded in the appropriate circumstances when a legal wrong has been proven.

- [19] The plaintiff argues that the impugned paragraphs of the notice of civil claim should not be struck and refers to the Court of Appeal's recent decision in *Lewis v. WestJet Airlines Ltd.*, 2019 BCCA 63. In that case, the plaintiff brought an action for breach of contract against her employer, WestJet, for failing to fulfil a promise to implement and enforce an anti-harassment policy.
- [20] WestJet argued that sexual harassment was exclusively within the domain of human rights legislation and that since harassment was not a tort, the plaintiff's claim was outside the purview of the courts. The Court of Appeal disagreed and concluded that the plaintiff's claim should not be struck because the claim was about the terms of the employment contract, not harassment. At paras. 26 and 27, the Court held as follows:
- [26] First, a contract is a recognized source of legal rights grounding remedies for breach in the courts. It is no answer to say, as suggested by WestJet, that the common law does not recognize the tort of discrimination. This is so because the plaintiff alleges a breach of contract not a tort. Here, there is no dispute that the relationship between WestJet and its employees is governed by contracts of employment that incorporate terms and conditions relating to harassment and discrimination. Indeed, WestJet acknowledges that it relies on these contracts to enforce discipline, sanction employees, and, where necessary, justify dismissal for cause. It is not merely a fictitious argument to contend that, although the alleged facts involve discrimination and harassment, the wrong alleged is a breach of contractual rights not breaches of statutory obligation. The underlying subject matter may be the same, but gives rise to different legal wrongs and arguably different relief.
- [27] In this respect, the plaintiff's case does not appear to me to be different from a case in which one party agrees to convey property that meets legislated building code standards, but fails to do so. The building code standards have been expressly incorporated into the contract, the standards have not been complied with, but the claim still sounds in contract. The alleged wrong remains the breach of the agreement.
- [21] The Court of Appeal then went on to address the matter using the analogy of constructive dismissal cases. At paras. 28 to 30, the court said:
- [28] Perhaps more relevant are cases of constructive dismissal. WestJet accepts that the courts have jurisdiction to address alleged breaches of contract amounting to constructive dismissal even though the facts pertinent to that issue engage discrimination or harassment within the meaning of human rights legislation. It says that these cases are simply an exception to the general propositions it advances. I do not agree. In my opinion, a constructive dismissal case is a particular type of a breach of contract claim. I see no distinction in principle between this case and a constructive dismissal case over which the courts have jurisdiction.
- [29] This view of the matter finds support in decided cases. In *Alpaerts v. Obront* (1993), 46 C.C.E.L. 218 (Ont. C.J.), Spence J. refused to strike a statement of claim that alleged constructive dismissal arising from sexual harassment and resulted in the plaintiff's

inability to continue with employment. The defendants contended that the claim properly should be brought under Ontario's Human Rights Code, R.S.O. 1990, c. H.19. The judge distinguished *Seneca College of Applied Arts & Technology v. Bhadauria*, [1981] 2 S.C.R. 181 [Seneca], as follows:

- [5] With respect to the Ontario Human Rights Code as a barrier to the plaintiff proceeding in Court, the defendants rely on the decision in *Seneca College of Applied Arts & Technology v. Bhadauria*, [1981] 2 S.C.R. 181, 22 C.P.C. 130 and on certain other cases. In *Seneca*, the Court determined that "the Code forecloses any civil action based directly upon a breach thereof" and "any common law action based on an invocation of the public policy expressed in the Code". In *Seneca*, the plaintiff had no cause of action apart from the Code, but, in the instant case, the plaintiff alleges facts which disclose a cause of action for constructive dismissal, which distinguishes *Seneca*.
- [30] I agree with this reasoning. The plaintiff's civil action, in this case, is not based directly on the breach of statutory rights like *Seneca* or *Macaraeg*; the plaintiff does not argue that WestJet's failure to fulfil the Anti-Harassment promise is, in and of itself, a discriminatory act.
- [22] The issue in *WestJet* was not whether a claim for sexual harassment could be brought in the court. Rather, the issue was whether the employer had breached the employment contract.
- [23] Allegations of harassment or sexually inappropriate conduct in the workplace could be the subject of a complaint before the Human Rights Tribunal. It does not necessarily follow, however, that those same facts could not also give rise to a claim before this court if the conduct complained of is also a breach of the employment contract. That is, a continuum of sexually inappropriate conduct that includes but goes beyond harassment could be both contrary to human rights legislation and also a breach of the terms of the employment contract.
- [24] Against that backdrop, I return now to consider the pleadings filed in this case. The underlying cause of action in this matter is a wrongful dismissal, but it is not a case of constructive dismissal as the termination is admitted.
- [25] There are only three paragraphs that constitute the Conduct Allegations. All refer to the individual defendant but not the company.
- [26] Paragraph 23 is flawed as it makes no specific allegations for the individual defendant to respond to. It is further complicated by the allegation that the conduct is still ongoing:
- 23. Mr. Pourfar engaged/engages in a course of conduct which is sexually inappropriate with respect to his female staff including, without limitation, the Plaintiff. [emphasis added]

- [27] This pleading is problematic because the plaintiff can only advance claims on her own behalf. It is apparent that she has not been employed with the defendant company since May 2019. It is therefore unclear whether the plaintiff intends to advance allegations of ongoing conduct on behalf of unidentified employees, or whether the ongoing conduct is directed against the plaintiff herself, in which case it would be wholly outside the scope of any employment arrangement.
- [28] Paragraph 25 also appears to make allegations that lack specificity and are potentially made on behalf of others.
- [29] Paragraph 24 suffers from the same lack of precision and particularity. However, the allegations include that the individual defendant "groped" the plaintiff:
24. On several occasions, Mr. Pourfar groped the Plaintiff on her breast(s) and/or buttocks and/or made inappropriate sexual remarks to her. This was non-consensual and there was no objective reason for Mr. Pourfar to believe it was consensual.
- [30] According to the Canadian Oxford Dictionary, "grope" is slang for "fondle clumsily for sexual purpose".
- [31] On an application to strike pleadings, the facts alleged must be assumed as proven. If the individual defendant touched the plaintiff for sexual purpose without consent, such conduct would be tortious and would give rise to a claim. The pleading, however, is deficient. There are no specifics or details pleaded - no date, time, nor place. More importantly, however, the use of "and/or" renders the pleading meaningless. It alleges that the defendant groped her breast or groped her buttocks or made inappropriate sexual remarks, or some combination of those. The first two if proven would be tortious, but the third would probably not. Therefore, if the first two did not occur, and the plaintiff does not specifically allege that they did, there could be no tort claim. The defendant does not have to disprove a fact that the plaintiff does not specifically allege happened.
- [32] The plaintiff argues that the defendant's application is premature because there has been no demand for particulars. I do not agree. It is not incumbent upon the defendant to take steps to try to make sense of the pleadings or to try to tease out of the plaintiff the specific allegations it will need to answer at trial. I am satisfied that the defendants have brought the deficiencies in the pleadings to the plaintiff's attention well before it filed this application to strike. It is the plaintiff's onus to plead its case.
- [33] If pleadings are found to be deficient, the court must consider whether they can be saved by amendment. The plaintiff sought an opportunity to amend the pleadings in oral submissions, although no such application has been brought. Because the plaintiff has already taken out a notice of trial, leave of the court is required for any amendment. The plaintiff has not provided the defendants or the court with any proposed amendments.

- [34] The plaintiff says that the necessary revisions could be accomplished by revising one sentence in each of Part II [Relief Sought] and Part III [Legal Basis] of the notice of civil claim. I do not agree. The deficiencies in the pleading are much broader.
- [35] Unlike the circumstances in *WestJet*, the dispute in this case is not about the terms of the plaintiff's employment contract. There is no allegation here that the Conduct Allegations between the plaintiff and Mr. Pourfar constituted a breach of the plaintiff's employment contract. There is also no allegation that the Financial Allegations, even if proven, would be a breach of the plaintiff's employment contract. She was employed as a salesperson and does not allege that she was terminated for reasons related to financial matters. Absent some connection between either the Conduct Allegations or the Financial Allegations and the dismissal, neither can ground a claim for punitive or aggravated damages.
- [36] In these circumstances, it is not necessary to decide whether the defendant company could be held liable in punitive damages for Mr. Pourfar's tortious conduct, as the plaintiff asserts. Without some connection between Mr. Pourfar's allegedly tortious conduct and the plaintiff's dismissal, it is neither necessary nor appropriate to come to any conclusions on that question on this application.
- [37] In short, the impugned paragraphs disclose no apparent connection with the plaintiff's wrongful dismissal claim. As pleaded, they are incapable of supporting the plaintiff's claim against the defendants, and should be struck accordingly. Aggravated damages and punitive damages are not causes of action.
- [38] The question is whether the plaintiff should be given leave to amend her pleadings to address the deficiencies I have identified above. I agree with the defendants that the impugned paragraphs have no real or potential relevance to her wrongful dismissal claim; no amendment will change that. However, the Conduct Allegations potentially contain the germ of a separate claim in sexual battery, insofar as they appear to allege that Mr. Pourfar touched the plaintiff in an inappropriate manner.
- [39] Denying the plaintiff leave to amend would prevent her from pursuing these allegations as part of the same action as her wrongful dismissal claim. It would not prevent her from pursuing these allegations as part of a separate action. While it is certainly possible for the two claims to be heard together, this is not necessary. The two actions would involve different causes of action and the allegations are made against different defendants. There does not appear to be a limitation issue with regard to any tort claim. There is nothing preventing the plaintiff from bringing a separate claim in battery at a later time, nor any compelling reason why that claim should be heard together with her wrongful dismissal claim.
- [40] At the same time, permitting such an amendment potentially threatens to delay the trial of this matter. The plaintiff has scheduled the matter for trial and intends to proceed by jury. She has taken out a notice of trial. Document disclosure is not yet complete, and examinations for discovery have not yet taken place. The trial is scheduled to take place in

approximately 10 months. If the plaintiff were to make minor amendments to the pleadings as she says, it is inevitable that the parties would return before the court on the sufficiency of the pleadings, resulting in a risk that the trial date would be lost.

- [41] Nevertheless, the bar for granting leave to amend is a low one. In considering an application under Rule 9-5, the court must consider the pleadings not only as they are, but as they may reasonably be amended: *British Columbia/Yukon Association of Drug War Survivors v. Abbotsford (City)*, 2015 BCCA 142 at para. 15. Despite my concerns, I cannot conclude that the Conduct Allegations entirely fail to disclose a triable issue, either as they exist, or as may be amended. In these circumstances, it would be inappropriate for the plaintiff to be "driven from the judgment seat": *Woolsey v. Dawson Creek (City)*, 2011 BCSC 751 at paras. 29-30.
- [42] I am not prepared to grant the plaintiff leave to amend the Conduct Allegations at this time, or in the manner her counsel proposes. I am not persuaded the proposed changes are sufficient to address my concerns about the adequacy of the pleadings. I acknowledge, however, that the plaintiff has raised at least the possibility of a serious claim; it is for her to decide how best to pursue these allegations.
- [43] Accordingly, I grant the plaintiff leave to apply to amend her pleadings to incorporate a claim in sexual battery. If she wishes to advance these allegations as part of this action, she may apply for leave to make the necessary amendments at a later time. At that point, the court may decide whether it would be appropriate to allow the amendments in light of the circumstances then prevailing, and with the benefit of a more concrete and considered proposal before it. In the meantime, the Conduct Allegations must be struck as failing to disclose a cause of action in their current form.
- [44] I therefore conclude that the allegations in paragraphs 23 to 36 must be struck, with leave for the plaintiff to apply to amend, and without prejudice to her ability to bring a separate claim in battery at a later time.

Plaintiff's application for production

- [45] The plaintiff applies for an order for the company to produce its computer drives to plaintiff's counsel, along with some financial documents.
- [46] Because the Financial Allegations have been struck, the documents sought are not relevant. However, even if the Financial Allegations remained, the application would fail because there is nothing in the plaintiff's application that sets out to whom the hard drives would be provided, the qualifications of the unnamed and perhaps unascertained expert, and security protections that would be afforded to the defendant's confidential records.
- [47] Moreover, there is no evidence that would lead to the conclusion that an expert would be able to ascertain that records had been altered. Not every type of electronic document or recordkeeping system will reveal when alterations were made and if so, by whom. Some bookkeeping programs do not allow previously entered information to be overridden.

[48] The only evidence in support of the application is a brief affidavit from the plaintiff. However, there is nothing to suggest the plaintiff, who was employed in retail jewelry sales while she was with the company, has any skill, knowledge or expertise in the field of computers and searching for metadata. As such, even if the Financial Allegations remained, the application would be dismissed as the evidentiary foundation for the order sought is lacking.

Costs

[49] If a party is successful in having pleadings struck under Rule 9-5, the court has the jurisdiction to award special costs. Special costs are generally awarded where a litigant has engaged in reprehensible conduct deserving of rebuke. In *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914, the court outlined the circumstances when special costs may be ordered at para. 11:

[11] Special costs may be ordered in the following circumstances:

- (a) where a party pursues a meritless claim and is reckless with regard to the truth;
- (b) where a party makes improper allegations of fraud, conspiracy, fraudulent misrepresentation, or breach of fiduciary duty;
- (c) where a party has displayed "reckless indifference" by not recognizing early on that its claim was manifestly deficient;
- (d) where a party made the resolution of an issue far more difficult than it should have been;
- (e) where a party who is in a financially superior position to the other brings proceedings, not with the reasonable expectation of a favourable outcome, but in the absence of merit in order to impose a financial burden on the opposing party;
- (f) where a party presents a case so weak that it is bound to fail, and continues to pursue its meritless claim after it is drawn to its attention that the claim is without merit;
- (g) where a party brings a proceeding for an improper motive;
- (h) where a party maintains unfounded allegations of fraud or dishonesty; and
- (i) where a party pursues claims frivolously or without foundation.

[50] I am not satisfied that any of the circumstances listed above are applicable in this case. The parties disagreed on the propriety of the pleadings, which necessitated this application. However, the fact that the plaintiff was unsuccessful on the application does not in and of itself mean that her conduct was reprehensible. The application before me proceeded in an orderly manner and proceeded before discovery. Moreover, the striking of the Conduct Allegations does not equate to a finding that the underlying allegations were improper, false, or could not found a valid claim at law. Nothing in this decision prevents the plaintiff from bringing a tort claim.

[51] The defendants are entitled to their costs assessed at Scale B.

"Wilson J."

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