

CANADA / JUDGMENT

Taylor v. British Columbia

2020 BCSC 1936

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1936 Taylor v. British Columbia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Taylor v. British Columbia,

2020 BCSC 1936

Date: 20201208

Docket: S192747

Registry: Victoria

Between:

Wendy-Lou Taylor

Plaintiff

And

Her Majesty the Queen in Right of British Columbia

and Kim Henderson

Defendants

Before: The Honourable Mr. Justice Steeves

Reasons for Judgment

Counsel for the Plaintiff:

J.M. Hutchison, Q.C.

Counsel for the Defendants:

L.J. Zivot

Place and Date of Hearing:

Victoria, B.C.

October 2, 2020

Place and Date of Judgment:

Victoria, B.C.

December 8, 2020

INTRODUCTION

- [1] In an application filed January 27, 2020, the defendants seek orders that the plaintiff provide particulars (as previously demanded) and that the part of the plaintiff's claim related to misfeasance in public office be struck.
- [2] The defendants rely on the following from the Supreme Court Civil Rules: Rule 3-1(2) (Contents of notice of civil claim), Rule 3-7(18) (When particulars necessary) and (22) (Order for particulars), Rule 9-5(1) (Scandalous, frivolous or vexatious matters) and Rule 14-1 (Costs).
- [3] The plaintiff opposes the defendants' application. She says her claim pleads material facts in support of her claim and to which subsequent evidence will be directed. She also says that she has plead specific and necessary circumstances of bad faith and the claim of misfeasance in public office against the defendant Kim Henderson. In addition, according to the plaintiff, the defendants seek the disclosure of evidence but pleadings must not contain evidence, and the information the defendants are seeking can and should be sought at examination for discovery.

BACKGROUND

- [4] The plaintiff was employed by the defendant from May 18, 1987 to June 29, 2017, according to her claim. Her position in June 2017 was Executive Director, Cross Government Compliance and Enforcement Secretariat, for the Government of British Columbia. Her claim describes her as an exemplary employee with glowing assessments of her work.
- [5] The following paragraphs from the plaintiff's notice of civil claim describe the background for her claim and the defendants' application (these paragraphs are not challenged in the subject application):
 - 11. In June 2012, the plaintiff was seconded by her employer to the Ministry of Health to participate in a team of investigators charged with investigation of apparent problems with the management, safeguarding and use of private health information records of the public.

12. The plaintiff was not the lead investigator, as the team operated without a lead or head investigator rather relying upon each member with respect to their areas of experience and expertise.
13. One of the investigation team was a representative of the Public Service Agency (hereinafter the "PSA") and she and the plaintiff principally met with the government officials overseeing the investigation to report on the progress of the investigation.
14. At a preliminary stage in the investigation, it became apparent that significant problems did exist with respect to the private health data management, and the investigators advised their supervisors accordingly
15. The PSA representative and the Director of Strategic Human Relations for the Ministry of Health, along with the Deputy Minister for the Public Service Agency, separately advised the Deputy Minister of Health regarding the terminations and cancellations of contracts. The other members of the investigative team, including the plaintiff, were not involved in the giving of that advice, following which the Deputy Minister ordered the firing of identified persons and the terminations of contracts with respect to the problems emerging.
16. The plaintiff and the other members of the investigative team were not aware of the advice or recommendations made to the Deputy Minister that led to his orders and were surprised when they became known.
17. At the time that the terminations occurred, the investigative team had not completed the investigation nor provided a final report to government. In fact, when publicity of the terminations occurred, BC stopped the investigation and prevented the team from either completing its work or making a report.
18. When the terminations ordered by the Deputy Minister became known, a considerable public furor erupted criticizing the government.
- [6] The claim also describes the plaintiff's participation as an employee of the Government of British Columbia in an investigation by the Ombudsperson of British Columbia into the terminations described above. The plaintiff was "directed and required to respond to the inquiries of the Ombudsperson" and she received \$25,000.00 as an indemnity for legal expenses from the Ombudsperson (paras. 27-29). When a draft report was issued by the Ombudsperson, the plaintiff retained legal counsel and she says in her claim that she "was entitled to and expected indemnity for the legal expenses which she would incur in excess of the allowance made by the Ombudsperson" (para. 32).

- [7] The claim states that, prior to the publication of the Ombudsperson's report, the plaintiff was required to respond to a personal investigation by the British Columbia Public Service Agency for which she obtained other legal advice. She claims indemnification for the cost of this advice, \$3,461.57. The plaintiff was further interviewed by the Public Service Agency for which she also obtained legal advice. She claims indemnification for the cost of this advice, \$14,542.26.
- [8] The plaintiff says in her claim that the defendant Kim Henderson maliciously and recklessly terminated her employment with disregard for the plaintiff and therefore the termination was outside the authority of Ms. Henderson. The termination was without cause and the defendants breached their duty of good faith, relying on recent authority from the Supreme Court of Canada (*Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26). In addition, Ms. Henderson knew or ought to have known that her conduct would cause harm to the plaintiff. That conduct was while Ms. Henderson was a public officeholder and, therefore, it constituted misfeasance in public office.
- [9] The plaintiff's notice of civil claim was filed on June 24, 2019. The relief sought is for damages for wrongful dismissal (including aggravated damages), breach of good faith, breach of "obligation of BC to indemnify" the plaintiff for legal expenses and punitive damages. In the legal basis of the claim there are references to malice and misfeasance. There is an issue as to what causes of action are the basis of the claim.
- [10] The defendants filed a response to civil claim on October 18, 2019. They describe this as a pro forma response (apparently with the agreement of counsel for the plaintiff) because the claim did not include sufficient particulars to make a complete response.
- [11] Among other things, the defendants plead that the plaintiff was terminated without cause from her employment and paid the maximum amount of severance pay under the Employment Termination Standards, B.C. Reg. 379/97. The defendants also plead that the termination of the plaintiff was neither malicious nor high-handed. And the defendants stated that the defendant Henderson acted within her authority and no act on her part constitutes misfeasance in public office.
- [12] On August 1, 2019 the defendants delivered a demand for further and better particulars on the plaintiff. This covered a number of areas including requests for information about the names and dates for: the allegation of bad faith, the allegation by the plaintiff that the defendants failed to protect its employees, and the allegation that the defendants erroneously identified the plaintiff in public and other matters.
- [13] On October 6, 2019 counsel for the plaintiff provided a response to the defendants' demand for particulars. My summary of the response is:
- (a) The plaintiff's response identified 13 named people who it was alleged "acted in bad faith." The demand asked for particulars of the alleged acts of bad faith that were attributable to the individuals and what dates those acts occurred. These particulars were not provided.

- (b) It restated that as a member of the public service the plaintiff was required to respond to inquiries by the Ombudsperson, she was directed to respond by her employer and it was reasonably necessary for her to obtain legal counsel.
 - (c) To four of the defendants' demands the plaintiff replied that she declined to respond because the demand was directed at the legal basis for her claim and it was not appropriate to respond.
 - (d) In response to five demands the plaintiff said her pleading was sufficient and in another she referred back to two paragraphs in her claim.
 - (e) To 28 of the demands made by the defendants the plaintiff replied: "The plaintiff declines to respond to this request, and asserts that it is properly a matter for discovery and is not necessary for pleading in response to her claim."
- [14] The defendants now apply to court to obtain further particulars. They also seek to have the plaintiff's claim struck.

ANALYSIS

[15] The defendants' application raises two issues with respect to the plaintiff's notice of claim:

- (a) Did the plaintiff's response to the defendants' demand for particulars provide sufficient particulars and are further and better particulars required?
- (b) Should the claim against the defendant Kim Henderson be struck because the claim of misfeasance by a public official is not properly pleaded?

I will consider these two issues in turn.

(a) Particulars

[16] As above, the plaintiff's notice of civil claim was filed on June 24, 2019 and a pro forma response was filed by the defendants on October 18, 2019. On August 1, 2019 the defendants delivered to the plaintiff a demand for further and better particulars. The plaintiff replied on October 6, 2019, but the defendants say it was not sufficient.

[17] I will set out the legal context for consideration of the defendants' demand for particulars and then address the specific parts of the plaintiff's claim that are in dispute.

(i) The legal context

[18] Rule 3-1(2) describes what is required in a notice of civil claim:

Rule 3-1

Contents of notice of civil claim

- (2) A notice of civil claim must do the following:

- (a) set out a concise statement of the material facts giving rise to the claim;
- (b) set out the relief sought by the plaintiff against each named defendant;
- (c) set out a concise summary of the legal basis for the relief sought;
- (g) otherwise comply with Rule 3-7.

[19] The plaintiff says she has complied with this Rule and the defendants say Rule 3-1(2)(a) has not been complied with (and perhaps Rule 3-1(2)(g)).

[20] The objectives of a civil claim have been previously discussed (*Sahyoun v. Ho*, 2013 BCSC 1143):

[16] The new Rules alter the structure in which pleadings are to be prepared. The core object of a notice of civil claim, however, remains the same. That object is concisely captured in Frederick M. Irvine, ed., *McLachlin and Taylor, British Columbia Practice*, 3rd ed., vol. 1 (Markham, Ont.: LexisNexis Canada Inc., 2006) at 3-4 - 3-4.1:

If a statement of claim (or, under the current Rules, a notice of civil claim) is to serve the ultimate function of pleadings, namely, the clear definition of the issues of fact and law to be determined by the court, the material facts of each cause of action relied upon should be stated with certainty and precision, and in their natural order, so as to disclose the three elements essential to every cause of action, namely, the plaintiff's right or title; the defendant's wrongful act violating that right or title; and the consequent damage, whether nominal or substantial. The material facts should be stated succinctly and the particulars should follow and should be identified as such...

[17] These requirements serve two foundational purposes: efficiency and fairness. These purposes align with Rule 1-3 which confirms that "the object of [the] Supreme Court Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits."

[21] The defendants' demand for particulars was made under Rule 3-7(22):

Rule 3-7

Order for particulars

(22) The court may order a party to serve further and better particulars of a matter stated in a pleading.

[22] In *Sahyoun Justice Voith* (as he then was) also usefully distinguished between material facts and particulars:

[27] At the same time, though the distinction can be difficult to apply, material facts are not particulars. In *McLachlin and Taylor* at 3-6, the authors state:

There is a distinction between material facts and particulars. A material fact is one that is essential in order to formulate a complete cause of action. If a material fact is omitted, a cause of action is not effectively pleaded. Particulars, on the other hand, are intended to provide the defendant with sufficient detail to inform him or her of the case he or she has to meet. Particulars are provided to disclose what the pleader intends to prove.

[23] In another decision, Justice Forth set out the functions of particulars as follows (Sidhu v. Hiebert, 2018 BCSC 401):

[33] Particulars are an extension of pleadings, the purpose of which is to ensure a fair and open proceeding conducted with clarity around the issues so that the parties may prepare their case without being taken by surprise. The functions of particulars, as summarized in Cansulex Ltd. v. Perry, [1982] B.C.J. No. 369 at para. 15 (C.A.) , are:

- (1) to inform the other side of the nature of the case they have to meet as distinguished from the mode in which that case is to be proved;
- (2) to prevent the other side from being taken by surprise at the trial;
- (3) to enable the other side to know what evidence they ought to be prepared with and to prepare for trial;
- (4) to limit the generality of the pleadings;
- (5) to limit and decide the issues to be tried, and as to which discovery is required; and
- (6) to tie the hands of the party so that he cannot without leave go into any matters not included.

[34] The guiding principle to the exercise of the court's discretion is whether particulars are "necessary" to achieve one of the functions of particulars set out above: G.W.L. Properties Ltd. v. W.R. Grace & Co. of Canada Ltd., 1993 CanLII 187 at 3 (B.C.S.C.) .

[24] Rule 3-7(18) states "full particulars, with dates and items if applicable, must be stated" in claims relying on misrepresentation, fraud, breach of trust, wilful default or undue influence. The subject claim is not such a claim.

(ii) The claim in this case

[25] The plaintiff's response to the defendants' demand for particulars was essentially to say that there would be no further information provided. The reasons given by the plaintiff were primarily that the information sought by the defendants was "properly a matter for discovery." Other reasons were that the plaintiff did not have to disclose the legal basis of its claim and the pleadings are sufficient. The list of names who are alleged to have acted in bad faith is simply that: a list without any reference to circumstances or dates.

- [26] With those comments in mind I will turn to the specific parts of the plaintiff's claim that the defendants seek particulars. I emphasize that I am not deciding the plaintiff's claim. My role here is to decide if the plaintiff has adequately responded to the defendants' demand for particulars.
- [27] In one section of the claim there is reference to problems with the "management, safeguarding and uses of private health information records" within the Government of British Columbia. The plaintiff was a member of an investigation team to investigate the problems (she denies being the lead investigator) and problems were identified. The employment contracts of some employees were terminated. When the terminations became known, "a considerable public furor erupted criticizing the government." These events are described in paragraphs 11-18 of the plaintiff's claim and no particulars are sought about those paragraphs.
- [28] The defendants do seek particulars of the next five paragraphs in the claim, as well as paragraph 25:
19. In response to the criticism, BC acted in bad faith and failed to protect its employees, including and particularly the plaintiff, by identifying the plaintiff and naming her incorrectly as the "lead investigator" in the media reports and during the public discussion of the events. thus assigning responsibility to her, wrongly, for the termination decisions made by the Deputy Minister, and humiliating her publicly.
 20. As a result of the erroneous identification of the plaintiff publicly by BC, she was confronted by members of the public and made fearful for her personal safety and that of her family, when she reported the incidents to BC, no steps were taken.
 21. As a result of the erroneous identification of the plaintiff publicly by BC, and as a result of the erroneous assignment of responsibility for the terminations and cancellation of contracts at the heart of the public discourse, the plaintiff's integrity and reputation was harmed, when BC knew, or ought to have known, that the information it allowed to circulate in public would have that effect and was erroneous.
 22. For public relations reasons and without any reasonable examination of the circumstances, BC reacted to the public furor created by arbitrarily and erroneously taking the position that the investigation team, asserting the plaintiff to have been the lead of that team, had acted improperly and without justification in causing the terminations and cancellation of contracts with the Ministry of Health.
 23. After having taken a public position critical of the investigative team, asserting blame for the firings and suspensions, BC did make some inquiries into the activities of the investigative team, but without putting to the plaintiff assertions that were made, and without providing her with reasonable support and assistance in respect of the inquiries nor any opportunity to respond to the assertions, published results of the inquiries without notice to her, criticizing her. As a result, without assistance from her employer, the plaintiff was subjected

to media publication of her name and media attempts to speak with her.

25. Notwithstanding the personal embarrassment and humiliation that the plaintiff suffered because of the publication of her name deliberately, or alternatively recklessly, by BC, as a dedicated public servant she refrained from making public statements or responding to media inquiries to defend herself.
- [29] In their demand for particulars the defendants sought a number of particulars. These included the names of those people with the Government of British Columbia who acted in bad faith and the dates when this occurred; the protections the plaintiff says that the Government failed to provide; the identification of the media reports that the plaintiff refers to; the names and circumstances of the public forums referred to; and other matters. These were part of about 19 specific requests.
- [30] In her response of October 5, 2019 the plaintiff provided the list of 13 employees of the Government of British Columbia. In direct response to the requests, counsel for the plaintiff declined to respond and stated the requests were "properly a matter for discovery and it is not necessary for pleading in response to her claim."
- [31] The plaintiff also filed an affidavit on March 3, 2020. She repeated the responses in her response to the demand for particulars. She also deposed:
7. With respect to paragraph 19 of my Notice of Civil Claim, the fact of public identification of me as the "lead investigator" in media reports and public discussion of the events caused me to believe that such identification came from government sources, the details and particulars as to whom and when they were made are not all known to me and I understand will be the subject of my examination for discovery of the defendants.
8. The full particulars of public press releases and responses to media inquiries are not yet known to me.
- [32] In truth, this does not say very much and is not very responsive. Some particulars of the "media reports and public discussion" are appropriately sought by the defendant, including what media and discussions and what dates. They have not been provided. The plaintiff says that these matters are "not all known to me" (emphasis added) so she has some knowledge. The purpose is to assist the defendants to prepare their response and to prepare for discovery.
- [33] The clear meaning of Rule 3-1(2) is that the material facts that support a claim should be part of pleadings that have been prepared before discovery. Put another way, discovery should not be a fishing expedition to find facts to justify a claim. In contrast, particulars can be a legitimate technique for assisting with the preparation of a defence, as in the subject claim.

- [34] It is unfortunately necessary to add a general comment. Demands for particulars are not an opportunity to make repeated demands that create delay and unnecessary complications. The overall objective of the Rules about pleadings is to get litigation into the courtroom in a manner that is just, speedy and inexpensive (and encourage settlement) and it is quite unrealistic to expect that all will be known in every case prior to discovery or even prior to trial. Repeated demands for particulars are to be avoided. At some point the pleading is what it is and counsel need to proceed.
- [35] Returning to the subject application, I do not agree with the plaintiff's reliance on discovery as a reason to refuse to provide particulars. The purpose of particulars is to permit a party to investigate a pleading in order to prepare for discovery. The objective is to make discovery more efficient and to avoid having more than one discovery session and/or numerous outstanding questions from discovery. "Discovery is not a substitute for particulars" and particulars cannot be refused on the basis that the information requested can be obtained in discovery (*G.W.L Properties v. W.R. Grace & Co. of Canada Ltd.* (1993), 79 B.C.L.R. (2d) 126 (S.C.), 1993 CanLII 187, at 3).
- [36] This conclusion alone requires the plaintiff to respond again to the defendants' request for particulars without deferral to discovery. I do not agree with the plaintiff that the particulars given for the above paragraphs of the claim are sufficient.
- [37] With respect to the list of 13 people provided by the plaintiff who are alleged to have acted in bad faith, it is not sufficient to simply provide such a list. Nor is it sufficient to simply refer to "BC" in the claim. If the allegation is that all of these people acted in bad faith then the plaintiff needs to particularize that allegation. Specifically, what is needed are material facts about whether they all participated in the same acts or whether there was more than one act, as well as when and where the act or acts occurred. The defendants' demand for particulars is an appropriate description of the information required.
- [38] This is not an exercise requiring the plaintiff to make her case in full; that will be for trial. What is required now, and what is lacking, are particulars from the plaintiff that will permit the defendants to investigate her claim for the purposes of preparing a response and for preparing for discovery. I agree with the defendants that the plaintiff's claim and her response to the demand for particulars do not permit that.
- [39] The next paragraphs of the plaintiff's claim that are at issue with respect to sufficient particulars relate to her allegation that the Government of British Columbia was required to indemnify her for her legal costs. The paragraphs at issue in the claim are:
32. At all times with respect to the responses to the Ombudsperson's draft report, the plaintiff was entitled to and expected indemnity for the legal expenses which she would incur in excess of the allowance made by the Ombudsperson.

34. As a consequence of her detailed responses to the Ombudsperson, the plaintiff incurred legal expenses in excess of the Ombudsperson's allowance, and sought indemnity for those expenses from her employer, but received no response to her request for the indemnity. At the date of the commencement of this action, the defendant has obligation for those legal expenses in the total amount of \$34,038.00.
36. In cooperating with the investigation, the plaintiff expected to be treated with reasonable dignity and fairness, which any employee of BC would be entitled, but was denied that expectation and was treated in an accusatory and aggressive manner.
37. The plaintiff has incurred legal costs for the assistance of counsel with respect to the personal investigation in the amount of \$3,461.57 plus interest, which have not yet been paid by her, and in respect of which she is entitled to be indemnified by BC.
38. Subsequently, on or about 25 April 2017, the Deputy Minister for the BC Public Service Agency in reliance upon be content [sic] of the report of the Ombudsperson directed the plaintiff to participate in an interview to examine her reaction to the, the observations and findings about her involvement in the investigation. The direction of the Deputy Minister entitled the plaintiff to engage counsel to assist her in that process, which she did, but she was specifically directed not to discuss the instruction of the Deputy Minister with her colleagues or in her workplace at all and to otherwise keep it strictly confidential except as to a spouse or legal advisor.
40. At the interview, the plaintiff asked for a copy of the tape recording being made and any transcript from it during the interview, and was told she would receive it. To the date of the commencement of this action, she has not received any such tape recording or transcript of the interview by the lawyer for the Public Service Agency.
41. The plaintiff has incurred legal costs for the assistance of counsel with respect to the further interview as directed by the Deputy Minister for the BC Public Service Agency in the amount of \$14,542.26 plus interest, and in respect of which she is entitled to be indemnified by BC.
42. Apart from continuing to seek the indemnities to which she was entitled as an employee of BC, from June 2017 until June 2019, the plaintiff has had no engagement with BC with respect to the Ministry of Health investigation, Ombudsperson's Report or the investigation by the Public Service Agency and the subsequent interview.
- [40] In their demand for particulars the defendants requested, among other things, that the basis for the entitlement to legal expenses claimed and the name(s) of the person or persons who agreed to pay these expenses.

- [41] The plaintiff's response to the defendants included reliance on the fact that the plaintiff was a member of the public service as the basis of her entitlement to legal costs. It also stated that the defendants' requests were properly a matter for discovery and the pleading was sufficient. With respect to paragraph 36, the plaintiff stated in her response that she had been treated without reasonable dignity and fairness by the representatives of the Public Service Agency.
- [42] I agree with the defendants that particulars are needed at this early stage about the entitlement the plaintiff asserts for legal expenses beyond the money she has already received. On the other hand, if the only basis for the entitlement is that the plaintiff was simply an employee of the Government of British Columbia then she needs to say that clearly and that may be as far as this part of the claim goes. If the plaintiff relies on some other entitlement then this is the time and place to make that claim, not in detail but with relevant material facts. To be clear, she cannot participate in discovery without fully disclosing the basis of her entitlement for additional legal expenses (and it certainly could not be raised at trial for the first time). I add that she is certainly entitled to explore this issue in discovery (and trial) but, at the pleadings stage, she is required to set out the material facts of her claim.
- [43] As for the other paragraphs of this section of the plaintiff's claim, they appear to be in the spirit of the plaintiff telling her story rather than having any legal consequence. For example, the plaintiff needs to explain what legal issues are relevant to her because she was not given a copy of a tape recording as described in paragraph 40.
- [44] The next group of paragraphs the defendant seeks particulars for relate to the termination of the plaintiff's employment, including an allegation of malice and misfeasance in public office.
- [45] The paragraphs at issue are:
45. On 29 June 2017, at 4:00 pm and without prior consultation with the plaintiff, the defendant Kim Henderson, then Deputy Minister to the Premier, Cabinet Secretary and Head of the B.C. Public Service, maliciously and contrary to normal procedures terminated the employment of the plaintiff.
 48. The press releases inevitably also led to contemporaneous publication of the termination of the plaintiff, tied to the Health Ministry issues, which caused further humiliation and embarrassment to the plaintiff.
 59. Public notice of the termination of the plaintiff was made by BC contemporaneously with the publication of the intention of BC to make compensatory payments. In making public notice of the termination of the plaintiff, BC knew or ought to have known alternatively was reckless, that it would cause further humiliation, embarrassment, damage to her reputation and emotional and mental injury. The said harm to the plaintiff has occurred.

- [46] The defendants' demand for particulars for these paragraphs is for information about the "normal procedures" relied on by the plaintiff and the dates and circumstances of the publications referred to. The plaintiff's response included reference to discovery and reliance on the claim as being sufficient. As above, reliance on discovery is not an appropriate response to a demand for particulars and the plaintiff is required to respond again where discovery was relied on.
- [47] I agree with the defendants that further particulars are required about the plaintiff's claim that "normal procedures" were not followed when she was terminated from her employment. Specifically, the plaintiff needs to set out what was not normal about her termination, including what was unusual and objectionable about paying the maximum severance available under legislation to her. And particulars are required with respect to paragraph 48; specifically, the date(s) of the press publication(s) and a cited reference to at least one publication. Similarly, with respect to paragraph 59, the date(s) of publication(s) and particulars of the "public notice" relied on, including date(s) and authorship.
- [48] As can be seen, the plaintiff makes a broadly stated claim of malice in paragraph 45 and the defendants seek further particulars of that issue. However, an allegation of malice in a claim is a question of fact, it is sufficient by itself and particulars of malice are not required (*Samaroo v. Canada Revenue Agency*, 2013 BCSC 482, at paras. 19-23). This appears to be codified in Rule 3-7(17).
- [49] Better particulars are ordered in respect of paragraphs 19-24, 25, 32, 34, 36-38, 40-42, 45 (except for malice), 48, and 59 of the plaintiff's notice of civil claim.
- (b) Misfeasance in public office
- [50] The following paragraphs in the Legal Basis of the plaintiff's claim set out her claim for misfeasance in public office:
7. The defendant Kim Henderson, acting as an agent of BC, was a public officeholder and so acting in that capacity when she terminated the employment of the plaintiff.
 8. The decision to terminate the plaintiff was deliberate.
 9. The decision to terminate the plaintiff was made maliciously, and therefore outside the authority of the said defendant.
 10. The said defendant knew or ought to have known, or at least was reckless, that her conduct in terminating the plaintiff was malicious.
 11. The said defendant knew or ought to have known, or at least was reckless, that her conduct would be likely to cause harm to the plaintiff, and it did.
 12. The harm caused by the said defendant was caused by her conduct as a public officeholder.

13. The plaintiff has suffered harm including public humiliation and embarrassment, damage to her reputation, emotional injury, and the loss of a reasonable expectation for the continuation of her employment and the benefits derived therefrom.
 14. The severance period determined unilaterally by BC was inadequate in the circumstances.
 15. The manner of the dismissal of the plaintiff was malicious, high-handed and caused her to suffer further public embarrassment, humiliation and damage to her reputation as well as emotional injury and was deliberate.
 16. The conduct of the defendant Kim Henderson constituted misfeasance in public office.
 17. As a result of the actions of the defendants, the plaintiff is entitled to damages, aggravated damages and punitive damages, and in the circumstances special costs.
- [51] As can be seen, paragraph 16 raises misfeasance in public office and, indeed, raises that issue for the first and only time in the claim. I also note that no damages for misfeasance are sought by the plaintiff under the Relief Sought section of the claim. There is a reference to damages, aggravated damages and punitive damages in paragraph 17 of the Legal Basis, as above. Presumably that is a claim for damages for the allegation of misfeasance in the previous paragraph.
- [52] The defendant says that the plaintiff's claim of misfeasance of a public official should be struck in its entirety under Rule 9-5(1)(a). That sub-rule states that, at any stage in a proceeding, the court may strike out or amend the whole or part of a pleading on the grounds that it discloses no reasonable cause of action. A claim will be struck when it is plain and obvious that the pleading discloses no reasonable cause of action, assuming the facts plead are true (*R. v. Imperial Tobacco*, 2011 SCC 42, at para. 17). I take the defendants' alternate position to be that, if the claim of misfeasance is not struck, more and better particulars are required.
- [53] Misfeasance by a public official is an intentional tort and it arises when there is deliberate unlawful conduct in the exercise of public functions or awareness that the conduct is unlawful and likely to injure the plaintiff (*Odhavji Estate v. Woodhouse*, 2003 SCC 69, at paras. 23, 32; *Carlhoun & Sons Enterprise Ltd. v. Canada (Attorney General)*, 2015 BCCA 163, at para. 130). It has been described as "among the most egregious of tortious misconduct" and "[p]articularized pleadings are essential for responding to a claim of this nature" (*J.P. v British Columbia (Children and Family Development)*, 2017 BCCA 308, at paras. 308, 320).
- [54] Not all decisions of government officials involve the exercise of public authority and at times they are exercising what has been called private authority (*Des Champs v. Conseil des écoles séparées catholiques de langue française de Prescott-Russell*, [1999] 3 S.C.R. 281, at paras. 26, 52, 57).

- [55] In *Des Champs*, the facts were that superintendent positions in a school board were declared redundant by the school board. One of the incumbent superintendents was given a different position under the applicable regulation; one that was not full-time, that put him back in the classroom and that he considered a lesser position. He commenced a lawsuit eight months later and the employer challenged this as being beyond the six month limitation period in provincial legislation.
- [56] The motions judge concluded the limitation period did not apply because the conduct complained of did not entail a public aspect (para. 9). The Ontario Court of Appeal allowed an appeal, concluding the action was barred by the limitation period. A majority at the Supreme Court of Canada allowed a subsequent appeal and agreed with the motions judge that the applicable legislation did not apply because the board's actions were separate and distinct from its public duty and powers.
- [57] Relying on previous authority the court did not agree that an act under the authority of a public body extended to everything that is incidental to the doing of that act (paras. 25-26; citing *Bradford Corp. v. Myers*, [1916] 1 A.C. 242 (H.L.)). In the case of *Des Champs*, the Supreme Court of Canada described the regulation at issue as a matter of "routine labour relations issues" and "indoor management" related to employment, something akin to employment standards legislation. The appellant's claim was not an attack on the board's reorganization but a challenge to the "in-house implementation of its reorganization." This was some remove from the board's public authority and the application of the limitation period in the legislation (paras. 52, 57, 72).
- [58] A previous judgement of this court is also instructive. In *Keene v. British Columbia*, 2005 BCSC 1547, the subject matter of the claim was the placing of children by the government in the care of the plaintiffs. An investigation took place which resulted in the end of the contract the plaintiffs had with the government and they sought damages for this loss. A claim of misfeasance in public office was made against three employees of the Government of British Columbia and it was also claimed that their employer was vicariously liable for the misfeasance (there was also a claim of breach of contract).
- [59] In his judgement on *Keene*, Justice Parrett struck the claim because by "investigating the plaintiffs' care homes and in deciding to place no further wards in it, the Director and/or his delegates were not exercising any public powers" under the applicable legislation. Instead the Director was exercising his guardianship and contractual rights and "doing no more than re-taking day-to-day care and control of his ward from the caregiver" (paras. 51-56).
- [60] In the subject claim there is no dispute that the plaintiff was terminated from her employment with the defendant Government of British Columbia. She identifies the defendant Kim Henderson as the person who conducted the termination and the defendants accept that Ms. Henderson was a public official at the material times. The plaintiff challenges the termination of her employment because it was done by means of misfeasance by Ms. Henderson acting in her capacity as a public official. As above,

misfeasance by a public official is deliberate unlawful conduct in the exercise of public functions or awareness that the conduct is unlawful and likely to injure the plaintiff.

- [61] For the reasons given in *Les Champs* and *Keene* I conclude that the decision to terminate the plaintiff was a private, employment matter and that misfeasance does not apply. While Ms. Henderson was employed as a public official at the time when she terminated the plaintiff's employment, not every act of a public official relates to the exercise of public authority. Ms. Henderson was not exercising public authority under any legislation, nor is it alleged that she was acting contrary to any legislative authority. She was acting in the capacity of an employer vis-à-vis an employee and not as a public official vis-à-vis a member of the public. I do not agree with the plaintiff that because she is a member of the general public that means misfeasance by a public official is engaged. The Government of British Columbia, like any employer, is entitled to dismiss an employee (and the employee is entitled to challenge that dismissal) but that does not mean that the act of dismissal is misfeasance by a public official for the purposes of this tort.
- [62] For the above reasons I conclude that the plaintiff's claim based on misfeasance by a public official must be struck because it discloses no reasonable cause of action. Paragraphs 7-12 and 16 of the Legal Basis of the claim are struck.

SUMMARY

- [63] The plaintiff's response to a demand for particulars is not sufficient. Among other problems, answering a demand by saying the information sought can be obtained through discovery is not appropriate. Better particulars are ordered.
- [64] The plaintiff's claim includes a claim of misfeasance by a public official. She says this cause of action arose when she was terminated from her employment. However, the decision to terminate the plaintiff's employment was a private, employment matter and not one relating to the exercise of any public authority. The claim based on misfeasance by a public official is struck because it discloses no reasonable cause of action.
- [65] The claim remaining relates to the plaintiff's allegation of wrongful dismissal.
- [66] I retain jurisdiction to decide any disputes over changes to the plaintiff's pleadings that follow from this judgement.
- [67] The defendants have been substantially successful and the plaintiff had the opportunity to correct the problems with her claim when she received the demand for particulars. The defendants are entitled to their costs under Scale B in any event of the cause.

"J. J. Steeves, J.

The Honourable Mr. Justice Steeves

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