
CANADA / JUDGMENT

Wright v. Jones

2017 BCSC 1515

COURT

Supreme Court of British Columbia

DECIDED

28 July 2017

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2017 BCSC 1515 Wright v. Jones

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wright v. Jones,

2017 BCSC 1515

Date: 20170728

Docket: S159824

Registry: Vancouver

Between:

Elenore Ann Wright

Petitioner

And

Chief Constable David Jones

and Chief Constable Robert Rich

Respondents

Before: The Honourable Madam Justice Adair

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:

M.K. Woodall

Counsel for the Respondents:

J.D. Hughes

K.E. Webber

Place and Date of Hearing:

Vancouver, B.C.

July 27 and 28, 2017

Place and Date of Judgment:

Vancouver, B.C.

July 28, 2017

[1] THE COURT: This proceeding has been brought by the petitioner, Ms. Wright, for judicial review in relation to a discipline proceeding in which it is alleged that, following the conclusion of the proceeding, Chief Constable David Jones issued a Police Act Form 3 in which he found that Ms. Wright had violated s. 77(3)(i)(i) of the Police Act. This section, which I will call the impugned provision, provides:

Subject to subsection (4), any of the conduct described in the following paragraphs constitutes a disciplinary breach of public trust when committed by a member:

. . .

(i) "improper disclosure of information", which is intentionally or recklessly

(i) Disclosing, or attempting to disclose, information that is acquired by the member in the performance of duties as a member . . .

[2] In her petition, Ms. Wright asserts that, on its face, the impugned provision is nonsensical and void for vagueness, and the phrase "improper disclosure of information" is so vague as to be void and unenforceable.

[3] She seeks the following orders (in Part 1 of the petition):

1. A declaration that s. 77 (3)(i)(i) of the Police Act is null and void and without effect.
2. A declaration that s. 77(3)(i)(i) of the Police Act violates s. 7 of the Canadian Charter of Rights and Freedoms, and is not saved by s. 1, and is null and void and without effect.
3. A declaration that the Form 3 (Findings of Discipline Authority) of Chief Constable Jones is null and void and without effect.

4. Interim, interlocutory and final orders in the nature of prohibition to prohibit Chief Constable Robert Rich from implementing the disciplinary or corrective measures recommended by Chief Constable Jones, and to prohibit Chief Constable Rich from delegating that power to any other person.
- [4] The Attorney General for British Columbia (the "AGBC"), who appears in this proceeding pursuant to s. 16 of the Judicial Review Procedure Act and s. 8 of the Constitutional Question Act, applies, by notice of application filed May 30, 2017, for an order striking out the petition without leave to amend, on the ground that it discloses no reasonable claim. The application is brought pursuant to Rule 9-5(1)(a).
- [5] Ms. Wright opposes the AGBC's application, which she says must be dismissed. She says that her essential claim is that, since the impugned provision is devoid of meaning and legally void, she was found to be guilty of misconduct, but the misconduct is unknown to law. She says for that, there must be a remedy.
- [6] The legal test on an application to strike a pleading is very well known. The claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable claim. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial or hearing on the merits. See *R. v. Imperial Tobacco Ltd*, 2011 SCC 42, at para. 17.
- [7] A motion to strike proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven. No evidence is admissible on the application. It is incumbent on the claimant to clearly plead the facts upon which she relies in making the claim. The facts pleaded are the firm basis on which the possibility of success of the claim must be evaluated. If the facts are not pleaded, the exercise cannot be properly conducted. See *Imperial Tobacco* at para. 22.
- [8] While the power to strike a claim that has no reasonable prospect of success is a very valuable tool, it must be used with care. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to a trial or hearing. See *Imperial Tobacco* at paras. 20 and 21. The motion to strike will be considered on the basis of the pleading as it stands or as the pleading may be amended: see *Minnes v. Minnes*, (1962) 39 W.W.R. 112 (B.C.C.A.)
- [9] In *E.B. v. Director of Child, Family and Community Services*, 2016 BCCA 66, at para. 42, Groberman J.A. described how the traditional test should be applied where an application is brought to strike a petition and said:

- [42] . . . The test must be modified, somewhat, when the application is to strike a petition rather than a Notice of Civil Claim. A petition need not disclose a "cause of action", but must set out a foundation for a type of proceeding authorized to be brought by petition. Accordingly, the correct inquiry under Rule 9-5(1)(a) in this case is whether the petition disclosed the type of claim that may be brought by petition.
- [10] Ms. Wright pleads the following facts in the petition:
5. At all material times the Petitioner was a sergeant employed by the Abbotsford Police Department.
 6. At all material times Chief Constable David Jones was the Chief Constable of the New Westminster Police Department, and had been appointed external Discipline Authority for the purposes of the Police Act.
 7. Chief Constable Rich is the Chief Constable of the Abbotsford Police Department.
 8. On 23 June 2014 the Petitioner received information from a mother ("the Mother") of an 11 year old child ("the Child"). The Mother and the Petitioner had a personal relationship. The Mother was concerned that the Child's father (who was separated from the Mother) was in the habit of leaving the Child with an unmarried middle-aged man as the Child's babysitter. The Mother had concerns about whether it was safe to leave the Child alone with the man.
 9. The Petitioner was a senior and experienced investigator of sexual offences. Based on the information that the Mother provided to her, the Petitioner also had concerns about whether it was safe to leave the Child alone with the man.
 10. The Petitioner made inquiries on police databases. Proceedings under the Police Act have exonerated the Petitioner of any wrongdoing in conducting the data base queries.
 11. As a result of the data base queries, the Petitioner learned that the man (hereinafter, the "Sex Offender") had been convicted of a sexual offence involving an 11 year old child. At the material times in this case the Child was also 11 years old. The Petitioner also learned that the man was required by law to register himself on sex-offenders' registry, but had failed to do so. The Sex Offender had been convicted for this as well.
 12. At the moment when the Petitioner learned these facts, the Child was alone in the home of the Sex Offender.
 13. Police later learned that the Sex Offender was having the Child sleep in the Sex Offender's bed at night, and that the Sex Offender and others had been smoking marijuana in the presence of the Child.

14. The Petitioner determined that: (1) it was necessary to remove the Child forthwith from the custody of the Sex Offender; and (2) the Mother had to be told the reason why it was unsafe to leave the Child alone in the care of the Sex Offender. This was both to explain the urgency of removing the Child forthwith from the Sex Offender's home, and so the Mother could explain to the Child's father why the father should not use the Sex Offender as a babysitter in the future.
15. Accordingly, the Petitioner advised the Mother that the Sex Offender had been convicted of a sexual offence, and took steps to have the Surrey RCMP apprehend the Child forthwith.
16. When the Surrey RCMP interviewed the Child's father, the father stated that he would not accept, solely on the word of the Mother and the Petitioner, that it was not appropriate for him to use the man as a babysitter. It was not until the Surrey RCMP disclosed to the father full details of the Sex Offender's record that the father understood that it was not appropriate to leave the Child alone with the Sex Offender.
17. The Petitioner did not violate any statute, rule, or policy that prescribes that disclosure of information she disclosed to the Mother that the Sex Offender had been convicted of a sexual offence.
18. The Surrey RCMP gave the Mother and the father full information about the offences committed by the Sex Offender, and in doing so provided more information than the Petitioner had.
19. On 28 July 2014 the Police Complaint Commissioner ordered an external investigation into the matter.
20. An investigation was conducted under the Police Act. The results of the investigation were compiled in a Final Investigation Report and Supplemental Final Investigation Reports.
21. On 17 September 2015, following the conclusion of a discipline proceeding, Chief Constable David Jones issued a Police Act Form 3 in which he found that the Petitioner had violated s. 77(3)(i)(i) of the Police Act.
- [11] The AGBC says that the petition fails to plead the material facts necessary to support the claim for a declaration that the impugned provision is null and void and without effect, either based on an infringement of s. 7 of the Charter or otherwise.
- [12] With respect to the s. 7 claim, the AGBC says that the petitioner has failed to plead the material facts necessary to establish any of her s. 7 interests to life, liberty or security of the person.

- [13] The AGBC submits, citing *Carter v. Canada (Attorney General)*, 2015 SCC 5 (at para. 55) and *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 (at para. 47) that, in order to establish a breach of s. 7, the claimant must plead and prove the following facts: (a) the impugned law or government action interferes with or deprives the claimant of her life, liberty or security of the person; and (b) the impugned law or government action affects the s. 7 interest in a manner that is inconsistent with the principles of fundamental justice.
- [14] The AGBC says, in respect of the relief requested in para. 1 of the Orders sought, that the court does not have the power at common law to invalidate legislation on the basis that it is vague. On the other hand, where a law is found to be unconstitutional, the court has the power under s. 52(1) of the Constitution Act to declare that law of no force or effect.
- [15] The AGBC says further that the petition fails to set out the facts necessary to support an application for judicial review and also fails to set out the grounds for review. The AGBC submits (citing *Mayden v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2015 BCSC 692, in particular at paras. 69-72), that these omissions are fatal.
- [16] The AGBC says finally that the petition does not plead any material facts or legal grounds that would support the relief sought against Chief Constable Rich. Specifically, no material facts have been pleaded respecting any disciplinary measures against Ms. Wright.
- [17] Ms. Wright says that she has sufficiently pleaded the type of claim that may be brought by petition for judicial review and has sufficiently pleaded the material facts necessary to support the relief sought on the legal basis pleaded.
- [18] With respect to the AGBC's complaint about the absence of material facts to support the relief sought against Chief Constable Rich, Ms. Wright says that such relief would follow as a logical consequence of the granting of either of the declarations sought in paras. 1 and 2 of Part 1 of the petition, and the granting of the declaration in para. 3, which would also follow accordingly. Therefore, it is unnecessary to allege any further facts.
- [19] I pause at this point to note that it is implicit from this that, as far as Ms. Wright is concerned, all material facts necessary to justify the relief sought in paras. 1 and 2 of the petition have been pleaded. Given that her success is dependent on her establishing entitlement to relief under either para. 1 or para. 2, this highlights the importance of ensuring that all material facts to support the relief claimed in those paragraphs have been pleaded.
- [20] With respect to the AGBC's attack on the petition on the grounds that it fails to plead the facts necessary for an application for judicial review, Ms. Wright argues, citing *Sekela v. Police Complaint Commissioner*, 2001 BCCA 572 (where the grounds for judicial review included that the process appointing the adjudicator violated the principles of natural justice, in that it created a reasonable apprehension of bias), that it is unnecessary for her to plead that the finding made by Chief Constable Jones and reflected in the Form 3 is unreasonable. Rather, she argues (by analogy to *Sekela*) that her assertions that the

impugned provision is void and that she cannot be disciplined for an act or omission that is not clearly prohibited by law create an issue of fundamental justice (as described by Fish J. in *R. v. Levkovic*, 2013 SCC 25, at paras. 1-2), and the violation of the principle of fundamental justice creates grounds for judicial review. She argues that, if judicial review is designed to remedy a violation of natural justice (as was the case in *Sekela*), then it must also be available to remedy a violation of fundamental justice.

- [21] With respect to the AGBC's submissions concerning the failure to plead the material facts necessary to support a claim for relief under s. 7 of the Charter, Ms. Wright asserts that she does not need to plead any further facts. She says that, in order to pursue her application for judicial review, it is unnecessary to do so and it would be wrong, for example, for her to plead as a fact that she has suffered serious psychological harm or to plead facts concerning the cause of such harm, given the nature of her complaint and the likelihood of anguish and stress being a universal experience in relation to the circumstances she describes.
- [22] I have concluded that the petition must be struck, but the petitioner should have leave to amend.
- [23] In my opinion, the petition fails to plead the material facts necessary to state a claim for relief under s. 7 of the Charter. I reject Mr. Woodall's argument on behalf of Ms. Wright that it is unnecessary for her to plead such facts. In my opinion, that position is not supported by the authorities, and I agree with the AGBC's submissions on this point. Without such facts being pleaded, no proper claim has been stated and no relief in relation to s. 7 can be granted.
- [24] I also agree with the submission of the AGBC that the petition fails to set out the facts necessary to support an application for judicial review and it also fails to set out the grounds for review. I do not accept Mr. Woodall's submission that, in the context of this application and applications for judicial review generally, the terms "natural justice" and "fundamental justice" should be treated as synonymous. In the context of a judicial review, "natural justice" is about process, and (as *Sekela* demonstrates) judicial review can be brought on the grounds of a breach of natural justice, without necessarily attacking the merits of an adjudicator's decision. However, "fundamental justice" is quite different from natural justice. Depending on the circumstances, a complaint about a breach of a principle of fundamental justice might be the subject of a proper application for judicial review, but it might not.
- [25] It follows that I do not accept Mr. Woodall's argument that the petition sufficiently pleads an application for judicial review and adequately sets out the grounds. In my opinion it does not.
- [26] However, in my opinion, this is not a case where it would be impossible to plead the material facts to support a claim for judicial review in relation to the Form 3 and findings therein, or to plead recognizable grounds for judicial review. The material facts in relation to Ms. Wright's request for a declaration under s. 7 of the Charter could be pleaded, for example. Para. 28 of Ms. Wright's written submission suggests some facts that could be pleaded,

although I am not implying or suggesting that that would be all that would be required. The problem for Ms. Wright on this application is that material facts have not yet been pleaded.

- [27] Therefore, in my opinion, it is appropriate that Ms. Wright have leave to amend. It will be up to her and her counsel to decide whether she wishes to amend. However, I have concluded that the application for judicial review cannot go forward on the basis of the current petition.
- [28] I have considered whether only parts of the petition should be struck. For example, there is nothing fundamentally wrong with the facts currently alleged. However, on their own, in my view, they fail to state a proper claim for judicial review. In my view, therefore, the better course is to strike the entire petition, with leave to Ms. Wright to amend. Any amended petition must be filed within 30 days of this judgment.
- [29] In summary, I order that the petition filed be struck and that Ms. Wright have leave to file an amended petition within 30 days of this judgment.
- [30] Assuming that the petition is amended and the matter proceeds to a hearing, I am not seized.
- [31] That concludes my ruling, unless counsel have any submissions that they wish to make concerning costs.
- [32] MS. WEBBER: Yes, My Lady. Thank you. The AGBC has sought costs in his notice of application in the event that we have been successful in this application. It is my submission that costs should follow as a matter of course.
- [33] MR. WOODALL: It seems to me that success is mixed on this application. My friend had applied not only to strike the application, but that there not be leave to amend and therefore in my submission the better course is to allow the judge who ultimately hears the matter to decide all applications. There was an application two weeks ago, an adjournment application, which my friend did not succeed upon and in that case the judge said that that application should go over to the judge who is hearing the petition to decide who will bear the costs.
- [34] THE COURT: All right. I will say that, given the relief that was sought in the notice of application, it could certainly be said, as Mr. Woodall has submitted, that success was mixed. I think that the appropriate order in the circumstances is that costs of this application will be left to the judge who ultimately hears the petition.
- [35] And is there anything further?
- [36] MS. WEBBER: My Lady, simply by way of clarification, if the petition is not amended and does not proceed, would costs then follow?

[37] THE COURT: If the petition is - if the hearing of the petition does not proceed, then I think the appropriate order, in view of the mixed success, is that there would be no order with respect to costs.

"Adair J."

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