CITATION: Williams v. Vac Developments Limited, 2023 ONSC 4679
COURT FILE NO.: CV-21-2609-00
DATE: 2023 09 21

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
Agin Williams	)	M. Mustafa, for Agin Williams
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	)	
	)	
- and -	)	
	)	
	)	
Vac Developments Limited	)	T. McRae, for Vac Developments Limited
	)	
	)	
	)	**HEARD:** June 26, 2023 via Zoom videoconference

REASONS FOR DECISION

MCGEE J.

Overview

[1] Mr. Agin Williams ("Williams") is a qualified Aerospace Sheet Metal Mechanic. From January 2018 to June 2021, he was employed by Vac Developments Limited ("the company") in Oakville, Ontario. The company is an Ontario Corporation that specializes in built-to-print sheet metal and machining products, primarily for the aerospace and defence industries.

[2] On June 16, 2021, the company laid off Williams for reasons that are contested within this Statement of Claim. On June 21, 2022, he was advised that his layoff was permanent. He has never received a settlement, nor any statutory benefits arising from the end of his employment.

[3] The company states that Williams was one of many skilled workers laid off as a result of a COVID-19 related business slowdown. Williams states that he was laid off because he demanded that the police be called to respond to a series of escalating, racially motivated threats against his life.

[4] Williams contacted CTV News in the week following his layoff. He expressed his views and concerns with the company's failure to keep him safe or to appropriately respond to workplace racism. CTV News wrote and published an article that specifically named the company and quoted Williams.

[5] Two months later, Williams issued this Statement of Claim for his statutory entitlements, $24,024: being six months pay in lieu of notice, and $140,000 in damages resulting from a wrongful termination of his employment. He also sought a further Order that the company retain an external workplace investigator to examine the incidents of anti-Black racism.

[6] On November 10, 2021, the company issued a Statement of Defence and a Counterclaim for $1,500,000 in damages arising from injury to their reputation, loss of customers and business, defamation, injurious falsehood, and unlawful interference with its economic interests.

[7] This is Williams' Motion for an Order dismissing the Defendant's Counterclaim pursuant to section 137.1(3) of the *Courts of Justice Act,* R.S.O. 1990. c. C. 43. *("the Act")*.

[8] Motions brought under section 137.1 of the *Act* are known as anti-SLAPP[1] motions. They are designed to discourage the use of strategic litigation that has the effect of unduly limiting expression on matters of public interest.

[9] Justice Huscroft, writing for the Court of Appeal in *Mondal v. Kirkconnell*, 2023 ONCA 523, concisely captures the essence of Section 137.1 in the first paragraph: "an ostensibly straightforward procedural motion designed to weed out strategic and abusive proceedings – "Gag Proceedings" – at an early stage in order to better protect freedom of expression on matters of public interest."

[10] There are three stages to the analysis of a section 137.1 motion to dismiss a proceeding: the threshold expression hurdle, the merits hurdle, and the public

[1] SLAPP is an acronym for Strategic Lawsuits Against Public Participation.

interest hurdle. The party advancing the proceeding need not intend a proceeding to be a strategic and abusive counterpunch. The crux of the analysis is not a party's intentions, but a broader assessment gained by stepping back and asking, "what is really going on?"

[11] Here, the parties agree that the threshold expression hurdle is met, so in the reasons set out below I focus on the merits hurdle and public interest hurdle. I find that the company has not established that they are likely to have suffered substantial damages as a result of Williams' expression; and I find that the public interest in allowing the counterclaim to continue does not outweigh the public interest in protecting Williams' expression.

[12] The company's counterclaim is dismissed.

Background Facts

[13] Williams was laid off from his job as an Aerospace Sheet Metal Mechanic at the company on June 16, 2021. It is disputed whether Williams was the only person laid off from the company in June of 2021.

[14] At the time of his layoff, Williams was earning about $924 a week and had been working at the company for three and a half years.

[15] Williams describes racist workplace comments, death threats, the sabotaging of machines on which he worked, and disturbing anti-Black graffiti in the months leading up to the June 16, 2021 layoff.

[16] The company asserts that there were only two incidents, which they refer to as the March 11, 2021 incident and the May 12, 2021 incident. They state that no similar incidents have ever occurred at the company and that they remain isolated events. The company agrees at paragraph 6 of their Factum that the incidents were “reprehensible and unacceptable.”

[17] I will briefly set out the incidents as acknowledged by the company.

[18] On March 11, 2021 Williams discovered a drawing on his company locker that appeared to be a noose. He took a picture of it and immediately brought it to the attention of the Human Resources Manager (“the Manager”). The Manager instructed another employee to remove the drawing.

[19] On May 12, 2021 an employee of the company reported to the Human Resources Department that offensive and racist comments had been written on a bathroom wall. The Manager and others viewed the comments, and cleaning staff were instructed to remove the comments. The company refers to the comments as “graffiti.” Williams was not advised of the incident, and it is not disputed that the company informed its employees not to tell Williams.

[20] Nonetheless, Williams was aware that something had happened given the whispers and looks that he received. Later that day, an employee did tell him what had happened and conveyed to Williams that he had been specifically told not to say anything to him about it. He showed Williams a photograph of what had been written on the bathroom wall: “Kill William the Ape. Fuck BLM[2].”

[21] The company asserts that they took immediate steps to address each incident. On both occasions their management team met to discuss the matter. On both occasions, a note was placed on employees’ paystubs asking for anyone with information to come forward. No one came forward. Group meetings were called, and supervisors were instructed to advise their employees that racism is not tolerated in the company.

[22] Williams was not satisfied by the steps taken by the company. He could not understand why the police had not been called immediately, or at least, within the next two days. He could not understand why the writing had been quietly removed without any opportunity for the police to investigate.

[23] Williams felt unsafe. He deposes that he met with three company representatives, including the Manager on May 12, 2021. He asked for a formal investigation and that the police be called. The management team told him that

[2] Black Lives Matter.

they were trying to reach the owner before taking any steps. Williams sent an email to the Manager during the evening of Friday May 14, 2021 expressing his continuing distress, and fear. He asked again whether there had been an investigation, whether the police had been called, and if extra safety measures had been put into place. A copy of that email is in evidence. It closes with this paragraph:

> Please do let me know how I can help to get this matter resolved. I would very much like for things to get back to normal and for me to feel safe at work once again sometime in the near future. Thank you for your time and attention.

[24] Williams and the Manager had another exchange on Monday May 17, 2021. The police were called that day and they attended the workplace. Another officer attended on Tuesday the 18th. No charges have ever been laid.

[25] On May 20, 2021, the company placed an update on the employee's paystubs informing them about the police investigation and asking them to respect Williams' privacy.

[26] The company vigorously disputes any assertion that they did not take Williams' concerns seriously or that they did not act with dispatch. They state that they implemented recommended suggestions and accommodated Williams "in any

way possible.” Their counsel assures the Court that his corporate client is committed to ensuring that the whole of its diverse workforce, including Williams, labours in a safe and just environment. They emphasis that no other employees of the company have come forward with similar incidents to those alleged by Williams.

[27] Williams does not share their views. To the contrary, he held no confidence in their willingness or ability to confront workplace racism. He deposes that in the weeks following the incidents he grew increasingly concerned with the safety of the remaining Black employees of the company.

[28] On June 16, 2021 Williams was laid off.

[29] The company states that he was one of ten employees from various departments who was laid off. Williams believed that he was the only employee laid off. He stated in response to the dismissal that “I thought you people were smarter than that, I will see you in court.”

[30] Williams asserts that his concerns over racism at the company escalated in the week following his dismissal. He grew to believe that his experience was relevant to the broader issue of anti-Black racism in Canadian workplaces. His concerns were fueled by information learned from co-workers who continued to

check-in with him. He was advised that his position had been filled by someone with lesser qualifications. On June 24, 2021 he called CTV News.

[31] Williams was interviewed by a CTV News reporter. The company was called for comment, and they declined CTV News' request to respond.

[32] On July 9, 2021, CTV ran a news article that specifically named the company, summarized Williams' information about what had happened to him and quoted his statement that his bosses' failure to protect him from racist death threats was "unacceptable behavior within the work environment."

[33] The article goes on to relate Williams' view that his layoff from the company was in retaliation for insisting that the police become involved. He is quoted in the article that "he will not return to the company because he feels his former bosses aren't interested in protecting him" and that he "remains concerned for the remaining employees of colour there."

[34] He is quoted as stating that he "never felt that anti-Black racist threats were taken seriously by his bosses at VAC Developments Ltd." because "despite repeatedly asking his managers to call the police, they did so nearly a week after the graffiti had been removed" and with respect to being laid off, he believed that "the move was at least partially related to him getting the police involved."

[35] The article goes on to reference a Health Science Association study and two different surveys which point to employees' fears of reprisal stopping them from reporting racism at work. It concludes with a quotation from Williams that "[i]f it's not called out now, these acts will forever be perpetuated right through the younger generation coming up."

[36] The company does not view the CTV article as an expression of concern with anti-Black racism in Canadian workplaces, published in the context of heightened awareness of anti-Black racism following the aftermath of George Floyd's murder in May 2020. They argue that Williams' statements against the company are wholly unfounded, and that they misrepresent what they consider to be two isolated incidents. They point to Williams' failure to advise CTV of the steps taken by the company to address the incidents.

[37] Williams issued this Statement of Claim on September 17, 2021. He seeks the following:

a. A declaration that his employment was wrongfully terminated.
b. Payment of his statutory entitlements under the *Employment Standards Act.* 2000. S.O. 2000. c. 41 equivalent to three (3) weeks of pay in lieu of notice.
c. $24,024 representing six (6) months of pay in lieu of reasonable notice.
d. $100,000 as general damages for VAC's breach of the Human Rights Code, R. S.O. 1990, c. H. 19, and breach of the Occupational Health and Safety Act, R.S.O 1990, c. O.1.
e. Bad faith or moral damages in the amount of $20,000.
f. Punitive damages in the amount of $20,000.

g. An order mandating that VAC retain an external workplace investigator to conduct a fulsome investigation into the incidents of anti-Black racism and threats of racial violence set out herein.
h. Special damages in an amount to be determined at trial.
i. Prejudgement and post judgement interest.
j. Costs.

[38] On November 10, 2021, four months after the CTV article was published, the company issued its Statement of Defence and Counterclaim. The company denies all of Williams' allegations. Although they took no steps at the time the CTV article was published, they assert in their Counterclaim that the article was a defamatory, false publication that was deliberately calculated to disparage, injure, and cause pecuniary damage to the company.

[39] The Counterclaim seeks the following:

a. General damages for injury to reputation, loss of customers and business, in the amount of $1,000,000.
b. Special damages estimated to be in the amount of $150,000.
c. Punitive, aggravated, and exemplary damages in the amount of $350,000.
d. An interim, interlocutory, and permanent injunction restraining Williams from publishing or republishing any of the defamatory publications set out herein or any publications defaming or disparaging VAC.
e. Its costs of and incidental to this action on a substantial indemnity basis, together with all and any Goods and Services Tax exigible thereon pursuant to Division II of the Excise Tax Act. R.S. 1985. c. E-25, as amended.
f. Prejudgement and post-judgment interest.

[40] The company pleads that it experienced a significant reduction in business from June 2020 to June 2021 as a result of the effects of COVID-19 on the

aerospace industry. They describe how they were required to reduce their overall workforce by half, with a 67% decrease within their sheet metal department. At paragraphs 42 and 43 of their Statement of Defence they plead:

> 42. At all material times, VAC's intention was to recall the Plaintiff to work as soon as its operations allowed for it. However, the Defendant's intention to recall the Plaintiff was rescinded when the Plaintiff approached the media, specifically CTV News and made false allegations regarding the Defendant and its employees to the general public, which are not admitted but expressly denied.
>
> 43. In the alternative, in the event that the Defendant is found to have wrongfully terminated or constructively dismissed the Plaintiff's employment, which is denied, the Defendant pleads that such termination resulted from unforeseeable and unpreventable circumstances which caused the Plaintiff's employment contract to be frustrated. Therefore, the Plaintiff is not entitled to notice, or severance pay whether by statute or common law.

[41] The Counterclaim paints Williams' actions as reckless and vindictive, not in keeping with their good faith efforts to address what they consider isolated incidents.

[42] They therefore claim at paragraphs 56 to 60 that Williams is liable to them for defamation, injurious falsehood, and unlawful interference with its economic interests, and that they should be entitled to punitive, aggravated, and exemplary damages.

[43] The Counterclaim does not end there. It goes on to claim under the subtitle of “Economic Relations” at paragraph 61 that Williams “engaged in other unlawful, intimidating and commercially unreasonable actions with malicious intent to interfere with, undermine and destroy VAC's lawful economic and contractual relationships with its stakeholders.

[44] Specifically, it claims at paragraph 62 that William’s manner of dealing with the company, combined with the following, also entitles it to damages for defamation, injurious falsehood and unlawful interference with its economic interests stemming from the defamatory publications:

> a. Unlawfully defaming VAC and thereby misleading and demoralizing its stakeholders and turning them against VAC.
> b. Knowingly and unlawfully advising and attempting to convince VAC's stakeholders not to work with VAC by alleging among other representations that VAC is racist and not a safe environment at which to work.
> c. Maliciously intending harm to VAC by creating dissension and conflict between VAC and its stakeholders and inducing directly and/or indirectly the termination of the economic and contractual relationships by unfair or unlawful means.
> d. Discouraging anyone to work with or work for VAC has intentionally caused harm to VAC. including, inter alia, loss of the benefit of the economic and for contractual relationships between VAC, its current and previous employees, partners, and general public.

[45] The company has never initiated an action against CTV or the reporter who wrote the article.

[46] On June 21, 2022 Williams was advised that his layoff was indefinite.

Analysis

[47] As explored in *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, [2020] 2 S.C.R. 587, the legislative intent of section 137.1 is to ensure that abusive claims do not proceed, and that legitimate claims do proceed. The purposes of the section are set out at section 137.1(1) of the *Act*:

a. To encourage individuals to express themselves on matters of public interest;
b. To promote broad participation in debates on matters of public interest;
c. To discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and
d. To reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action.

[48] There are three stages to the analysis of whether a proceeding should be dismissed:

a. First, pursuant to section 137.1(3) of the *Act*, the moving party bears the onus to satisfy the motions judge that the proceeding initiated against him arises from an expression relating to a matter of public interest. See paragraphs 21 to 31 of *Pointes Protection.*

   If he cannot, the Motion to dismiss the Counterclaim is dismissed. If the threshold test is met, the inquiry moves into the second stage.

b. Second, pursuant to section 137.1(4)(a) of the *Act*, the defending party bears the onus to demonstrate that the proceeding has substantial merit, and that the moving party has no valid defence in the proceeding.

> "Substantial merit" does not require a prima facie case, but it does require that the claim have a real prospect of success. A possible, or arguable case is insufficient. See paragraphs 44 to 60 of *Pointes Protection.*
>
> "No valid defence" in s. 137.1(4)(a) is not a determinative adjudication of the merits of the underlying claim, or a conclusive determination of the existence of a defence. Instead, the motion judge need only consider whether there are grounds to believe that there is no valid defence, see paragraph 37 of *Pointes Protection.* The standard of proof at this stage is "a standard less than the balance of probabilities." See paragraph 56 of *Mondal v. Kirkconnell*, 2023 ONCA 523.

c. Third, pursuant to section 137.1(4) (b) of the *Act*, even if the counterclaim has substantial merit, and there are grounds to believe there is no valid defence, the court must go on to determine whether the harm likely to be or that has been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the counterclaim to continue outweighs the public interest in protecting the expression. See paragraphs 61 to 82 of *Pointes Protection.*

[49] The company concedes that Williams meets the threshold burden under section 137.1(3) of the *Act.* The company's counterclaim clearly arises from his statements to the CTV reporter, and his statements are expressions relating to a matter of public interest: anti-Black racism and workplace harassment.

[50] My analysis thus moves into section 137.1(4)(a) of the *Act*: whether the company has satisfied the Court that there are grounds to believe that the counterclaim has substantial merit, and that Williams has no valid defence in the proceeding.

Section 137.1(4)(a)(i): the Merits Based Hurdle

[51] In the first part of this test, the company is required to satisfy the court that its counterclaim has substantial merits by providing evidence that is reasonably capable of belief. Substantial merit as set out by the Supreme Court of Canada is a “real prospect of success, in other words, a prospect of success that, while not amounting to a demonstrated likelihood of success, tends to weigh more in favour of the plaintiff,” see *Pointes* at para. 49.

[52] I have reviewed the evidence and the elements of a defamation claim as articulated in *Bent v. Platnick* 2020 SCC 23, [2020] 2 S.C.R. 645. The elements are that the words complained of were published, meaning that they were communicated to at least one person other than the company, the words complained of referred to the company, and the impugned words were defamatory, in the sense that they would tend to lower the company’s reputation in the eyes of a reasonable person.

[53] I accept that the first two elements of the test are made out. There is a clear nexus between the Counterclaim and the statements made by Williams to the journalist. The third aspect requires a closer look: would the impugned words tend to lower the company’s reputation in the eyes of a reasonable person?

[54] A plain reading of the CTV Article shows it to be an investigative report on the issue of underreported anti-Black racism in the Canadian workplace using

Williams' recent experiences to ground the Article as a personal interest story. The Article highlights Williams' personal statements and conclusions that he was not protected by the company, that they did not act appropriately, and that he was let go because he demanded that the police become involved.

[55] If the reader were to accept that unreported anti-Black racism is ubiquitous within Canadian workplaces, the company's reputation would only falter with respect to whether in these circumstances, it had acted appropriately upon its discovery. Here, the company's failure to comment becomes relevant to the mitigation of any potential for reputational damage. I suspect there would have been minimal impact had the company offered a quick two-liner: it does not tolerate racism in any form, and the matter was under police investigation. The company could have even gone a step further, acknowledging at the time what was later placed into evidence in this proceeding, that the incidents were reprehensible and unacceptable.

[56] Did the company suffer any losses as a result of Williams' statement to CTV?

[57] Mr. Zach Vujnovic was cross exanimated on behalf of the company. He testified that the company was making a full pandemic recovery, that all employees

had been called back to work, and that they were looking into adding resources into the sheet metal department.

[58] Mr. Vujnovic was not aware of any clients having cancelled a contract as a result of Williams' interview with CTV. He could offer no evidence whatsoever that the company had lost any money as a result of the Article.

[59] On that point, the company concedes that they have provided no itemization, explanation of loss suffered, or any other underpinning for the amount of damages that they claim. Instead, they argue that evidence of actual reputational damage at this stage of the proceeding is unnecessary. They argue that *Grant v. Torstar Corp.,* 2009 SCC 61, [2009] 3 S.C.R. 640 imposes strict liability should the court find that the statement, in its full context, would reduce a reasonable person's opinion of the plaintiff.

[60] The company is a corporation. As explained by Justice Nordheimer in *Levant v. DeMelle,* 2022 ONCA 79, whether a plaintiff seeking damages is a corporation or an individual is a significant distinction in the law of defamation. Quoting Justice Blair in *Barrick Gold Corp. v. Lopehandia* (2004), 71 O.R. (3d) 416 (C.A.), he states at para. 49:

> Limited companies, and other corporations, may also be awarded general damages for libel or slander, without adducing evidence of specific loss. However, it is submitted that in practice, in the absence of proof of special

> damage, or at least of a general loss of business, a limited company is unlikely to be entitled to a really substantial award of damages.

[61] To pass the second hurdle, the company must establish some grounds to believe that its counterclaim has substantial merit. They need not prove harm or causation, but they must present more than a possible or arguable case. *Grant* involved an individual plaintiff in circumstances in which he had little to no ability to protect himself, and the reputational harm could be presumed.

[62] In this case, I am unable to draw inferences of likelihood of harm, its magnitude, and the relevant causal links. This is a counterclaim issued by a corporation whose management team chose not to respond to a story that it knew was about to be published, and in the succeeding two years has not suffered any loss of business. I am not satisfied that there are grounds to believe that the counterclaim has substantial merit.

[63] The analysis could end here, but in the event that I am wrong, I will continue to 137.1 (4)(a)ii: whether there are grounds to believe that Williams has no valid defence to the counterclaim.

Section 137.1(4)(a)ii: No Valid Defence

[64] A motion judge is not required to determine whether a defence will succeed, or to conduct the equivalent of a summary judgment motion. The Court

need only consider whether there are grounds to believe that there is no valid defence, see *Pointes Protection*, at para. 37. However, this is not a high bar. From *Mondal v. Kirkconnell* at para. 56:

> The appellant was required to establish only, on a standard less than the balance of probabilities, grounds to believe the respondents had no valid defence. In other words, "a basis in the record and the law – taking into account the stage of litigation at which a s. 137.1 motion is brought – for finding that … there is no valid defence": *Pointes*, at paras. 39-40. He was not required to establish that the respondents' fair comment defence would inevitably fail.

[65] Williams has raised a number of defences to the counterclaim: that his statements are entirely true, that he had no intention to defame or embarrass the company and that he only desired to bring attention to the harms of workplace discrimination and an employer who did not appropriately respond. These can be identified as the defences of "truth," "qualified privilege," "fair comment," and "responsible communication on matters of public interest."

[66] Upon putting these defences into play, the burden shifts to the company to demonstrate that no valid defence exists. As set out in para. 58 of *Pointes Protection,* "[t]he word *no* is absolute, and the corollary is that if there is any

defence that is valid, then the plaintiff has not met its burden and the underlying claim should be dismissed".

[67] The company argues each of the defences at some length. They point to the errors in Williams' statements, or omissions to the journalist, such as whether Williams knew how many Black employees were employed at the company at the time that he purported to be concerned for their well being. They also question whether Williams exercised reasonable due diligence before speaking to CTV, and whether Williams told the journalist that at the time, he had thanked the company for their responses to the incidents.

[68] For purpose of this analysis, I will only address the primary defence raised by Williams: the defence of fair comment.

[69] As set out in *Mondal* at paragraph 48*,* fair comment is a defence to a defamation claim that is available if the words complained of are expressions of opinion rather than fact. The test for fair comment was articulated by the Supreme Court in *WIC Radio Ltd. v Simpson,* 2008 SCC 40, [2008] 2 S.C.R. 420, at para 28. The four-part test is as follows:

1) The comment must be on a matter of public interest;
2) The comment must be based on fact;

3) The comment can include inferences of fact, but must be recognizable as comment; and

4) The comment must satisfy the objective test: could any person honestly express the opinion on the proved facts?

[70] Even if satisfied, the fair comment defence can be defeated if the defendant was subjectively motivated by express malice. The company asserts that Williams was motivated to cause harm to the company because he had been laid off. They point to his assertion that, '"I thought you people were smarter than that, I will see you in court." The company argues that at a minimum, Williams acted recklessly in talking to CTV and as a result, there are grounds to believe that he can not rely on the fair comment defence.

[71] The "I will see you in court" comment is not denied by Williams, but his counsel highlights that Williams did not actually take any court action on his layoff for another two months. Williams argues that the comment is unrelated to his decision to seek out the media. That decision, he asserts, was solely motivated by his belief that the company had laid him off to silence him, and that he owed a duty to others to call out the situation. He denies any malice and argues that malice cannot be inferred from his comments to the reporter.

[72] The merits-based hurdle is not a high burden on the company. The company need only establish that there are grounds to believe that Williams defence of fair comment will not succeed. In my view, they have done so.

[73] A fair comment defence can be defeated by malice if Williams is found at trial to have acted "out of revenge in order to obtain satisfaction for some personal resentment or grudge" *Zoutman v Graham*, 2019 ONSC 2834 at para 101, aff'd 2020 ONCA 767. The timing of Williams' interview with the CTV reporter, and the fact that he actively sought out media coverage within a week of being laid off, in my view, does raise grounds to believe that the defence of fair comment may not succeed.

[74] That said, it is a delicate finding. The CTV Article was a singular event. Williams has no prior or subsequent history of calling out the company and has since moved on in his career. Nothing that he stated to CTV about his time at the company was unconnected to the facts or outside an honest expression of opinion.

Section 137.1(4)(b): the Public Interest Hurdle

[75] The third and final test is the weighing of the public interest hurdle. I emphasize "outweighs" because the Supreme Court in *Pointes Protection* does so at paragraph 82:

> In conclusion, under s.137.1(40(b), the burden is on the plaintiff – i.e. the responding party – to show on a balance of probabilities that it likely has suffered or will suffer harm, that such harm is *a result* of the expression established under section 137.1(3), and that the corresponding public interest in allowing the underlying proceeding to continue *outweighs* the deleterious effects on expression and public participation. This weighing exercise is the crux or core of the section 137.1 analysis, as it captures the overarching concern of the legislature, as evidenced by the legislative history. It accordingly should be given due importance by the motion judge in assessing a section 137.1 motion.

[76] In the third hurdle, Section 137.1(4)(b) requires me to assess the public interest in allowing the company's counterclaim to proceed, and to separately assess the public interest in protecting Williams' expression. I must then weigh them against the other. Paragraph 67 in *Pointes Protection* provides clear direction to motion judges that "the statute requires that one consideration outweigh the other, and not simply that the considerations be balanced against one another…"

[77] As explained by Justice Cote at para. 61 of *Points Protection*, the weighing is "the crux of the analysis":

> No judge shall dismiss a proceeding under subsection (3) if the responding party satisfies the judge that, … (b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

[78] When I consider the crux of this litigation, I find that the public interest weighing exercise overwhelmingly favours the protection of Williams' expression. This is a former employee's action for a modest amount of statutory benefits and severance pay arising from a 3 1/5-year period of employment.

[79] Included in his action are damages claims for breaches of the *Human Rights Code*, and the *Occupational Health and Safety Act*; a "bad faith or moral" damages claim and punitive damages; as well as a claim for an investigation. All of the damages claims and the request for an investigation may result in significant costs awards payable to the company should they be unsuccessfully pursued.

[80] In contrast, the company's counterclaim for $1.5 million in damages is disproportionate and fraught. As stated by Justice Benotto in *Boyer v. Callidus Capital Corporation*, 2023 ONCA 233 at para. 51, in relation to a section 137.1 claim to dismiss a counterclaim alleging a breach of fiduciary duty, "while failure to suffer a loss is not necessarily a bar to a breach of fiduciary duty claim, the failure to itemize or explain how the millions in damages were calculated weighs against the public interest in permitting the proceeding to continue."

[81] Here, the failure of the company to itemize or explain any basis for their damages claim of $1.5 million, and the weak to modest grounds to believe that

Williams' statements to CTV are not protected by a fair comment defence, give the company's counterclaim little weight in the weighing exercise.

[82] Unidentified damages for assumed reputation harm to a corporation that has not suffered any actual financial loss two years out from the incident cannot outweigh the harm that would arise from interfering with an expression of public interest as significant as anti-Black racism in the workplace. There are few expressions more essential to a productive pluralistic society than the elimination of workplace racism.

Decision

[83] Given the purposes of section 137.1 of the *Act*: to encourage individuals to express themselves on matters of public interest, to promote broad participation in debates on matters of public interest, to discourage the use of litigation as a means of unduly limiting expression on matters of public interest, and to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action; it is just, and in accordance with the objectives of section 137.1 of the *Act* to dismiss the company's counterclaim.

[84] The Counterclaim issued November 10, 2021 is dismissed.

Costs

[85] I encourage the parties to attempt to resolve the issue of costs, particularly in light of reasons of the Ontario Court of Appeal in *Levant* and *Park Lawn Corporation v. Kahu Capital Partners* 2023 ONCA 129.

[86] If costs cannot be resolved, I will receive Williams' written costs submission by September 1, 2023, responding submissions will be due by September 15, 2023, and reply is due by September 25, 2023. Caselaw referenced in the costs submissions are to be hyperlinked. Submissions are limited to three pages exclusive of a Costs Outline and any Offers to Settle. Reply is limited to two pages. Submissions are to be forwarded to my assistant at Cindy.Martins@ontario.ca as well as filed and uploaded to CaseLines.

McGee J.

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B E T W E E N:

Agin Williams

- and -

Vac Developments Limited

REASONS FOR DECISION

McGee J.

Released: September 21, 2023