COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *British Columbia v. Taylor,*
2024 BCCA 44

Date: 20240206
Docket: CA49225

2024 BCCA 44 (CanLII)

Between:

His Majesty the King in Right of British Columbia

Appellant
(Defendant)

And

Wendy-Lou Taylor

Respondent
(Plaintiff)

Before: The Honourable Madam Justice Stromberg-Stein
The Honourable Mr. Justice Grauer
The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia, dated June 22, 2023 (*Taylor v. British Columbia*, Victoria Docket S192747).

Oral Reasons for Judgment

Counsel for the Appellant:	L.J. Zivot
Counsel for the Respondent:	J.M. Hutchison, K.C.
Place and Date of Hearing:	Victoria, British Columbia February 6, 2024
Place and Date of Judgment:	Victoria, British Columbia February 6, 2024

Summary:

This is an appeal from an order dismissing the appellant's application to strike pleadings. The respondent employee claimed, among other things, breach of the duty of good faith in the employment context. The appellant employer argued that such a duty exists only at the time of termination and sought to strike certain pleadings on the basis that they did not relate to her dismissal. This was denied. On appeal, the appellant argues that the chambers judge failed to adequately assess the pleadings and misapplied principles of good faith. Held: Appeal dismissed. Conduct predating termination can be relevant if it is a component of the manner of dismissal. It is inappropriate at this stage to determine which aspects of the parties' conduct are relevant to the manner in which the respondent was terminated. Moreover, the law on the duty of good faith in the employment context is still developing and the court should err on the side of permitting novel claims to proceed.

2024 BCCA 44 (CanLII)

GRAUER J.A.:

1. Overview

[1] This appeal arises out of a claim for wrongful dismissal. It concerns the viability of pleadings alleging bad faith on the part of the appellant employer, the Province of British Columbia.

[2] The Province employed the respondent (plaintiff), Ms. Taylor, from May 18, 1987 to June 29, 2017. Ms. Taylor's position at the time of her termination was Executive Director, Cross Government Compliance and Enforcement Secretariat.

[3] On June 24, 2019, Ms. Taylor filed a notice of civil claim seeking damages for, among other things, wrongful dismissal and "breach of the duty of good faith by BC in her employment and in the termination of her employment".

[4] In their response, the defendants conceded that Ms. Taylor was terminated without cause from her employment, maintaining that she was paid the maximum amount of severance pay under the *Employment Termination Standards*, B.C. Reg. 379/97.

[5] On January 27, 2020, the defendants filed a notice of application seeking orders that: 1) Ms. Taylor produce further particulars in relation to her claims; and

2) her claims against the defendant Kim Henderson be struck. Ms. Henderson was the Deputy Minister who allegedly terminated Ms. Taylor's employment.

[6] This application was granted on December 8, 2020, by Justice Steeves in reasons indexed at 2020 BCSC 1936. Ms. Henderson is thus no longer a party to this dispute; the Province is the sole defendant.

2024 BCCA 44 (CanLII)

[7] Once the particulars were provided, the Province filed a notice of application seeking an order striking out Ms. Taylor's claims related to allegations of bad faith as disclosing no reasonable cause of action, without leave to amend, pursuant to Rule 9-5(1)(a) of the *Supreme Court Civil Rules*.

[8] Justice Power dismissed the application on June 22, 2023 in unpublished oral reasons, from which order the Province now appeals.

[9] The Province alleges that the judge committed a number of errors in relation to her application of the law on good faith.

[10] For the reasons that follow, I would dismiss the appeal.

2. Background

2.1 The termination

[11] Ms. Taylor claims that throughout her tenure, she "received regular glowing assessments on annual performance reviews, and was singled out for unusual, high praise by her supervisor".

[12] She pleads that in June 2012, she was seconded to the Ministry of Health to help with an investigation into the alleged misuse of private healthcare data by government employees and contractors:

> 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.

[13] According to the claim, the Ministry of Health terminated the employment of certain civil servants and the contracts of several external parties upon the recommendation of individuals other than Ms. Taylor, yet created the impression that she was involved. Ms. Taylor pleads that she was not aware of these recommendations. According to her, the terminations occurred before the investigation team had completed their work and provided a final report:

> 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. <u>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</u>.
>
> 16. The plaintiff and the other members of the investigative team were <u>not aware of the advice or recommendations</u> 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 <u>completed the investigation nor provided a final report to government</u>. 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.
>
> [Emphasis added.]

[14] The terminations attracted considerable public attention. Ms. Taylor alleges that the Province, without providing her any notice or reasonable support, took the position that the investigation team was to blame for the Ministry of Health terminations, wrongly identifying her as the "lead investigator" in media reports and during public discussion of the events. This led to her being confronted by members

2024 BCCA 44 (CanLII)

of the public and fearful for her personal safety. She states that no steps were taken to alleviate or clarify the situation by the Province.

[15] The Ombudsperson of British Columbia was eventually called in to investigate the terminations. The Province directed Ms. Taylor to respond to the Ombudsperson's enquiries. The Ombudsperson issued a report on April 6, 2017 entitled "Misfire: The 2012 Ministry of Health Employment Terminations and Related Matters". Ms. Taylor alleges that she was given a draft of the report prior to its release. She pleads that she identified over 170 instances of error, misconceptions, and misunderstandings. This caused her to incur significant legal expenses.

[16] She also claims that she was required to respond to a personal investigation by the British Columbia Public Service Agency for which she had to obtain further legal advice.

[17] Ms. Taylor was terminated without notice on June 29, 2017 by Ms. Henderson, then Deputy Minister to the Premier, Cabinet Secretary and Head of the B.C. Public Service.

[18] She was notified of her termination approximately half an hour before the Province issued a press release indicating that it would make payments to people who were affected by the Ministry of Health terminations. She asserts that she was made a "scapegoat" for the Province with respect to the terminations:

> 58. Termination of the plaintiff was further wrongful in the manner of her termination, as it made the plaintiff a "scapegoat" for BC with respect to the public relations embarrassment which BC perceived to have received by reason of the public furor over the terminations and cancellation of contracts made during the investigation into the Ministry of Health.
>
> 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.
>
> [Emphasis added.]

[19] She alleges that she did not receive severance until September 17, 2018.

2024 BCCA 44 (CanLII)

[20] In her notice of civil claim, Ms. Taylor seeks the following remedies:

1. damages for wrongful dismissal;
2. aggravated damages for the manner of her dismissal;
3. damages for breach of the duty of good faith by BC in her employment and in the termination of her employment;
4. damages for breach of the obligation of BC to indemnify and hold safe the plaintiff from the legal expenses she incurred while acting in the course of her employment;
5. punitive damages; and
6. costs

2024 BCCA 44 (CanLII)

3. The judgment below

[21] Justice Power dismissed the Province's motion to strike.

[22] Relying on the Supreme Court of Canada's statement in *Bhasin v Hrynew*, 2014 SCC 71 at para 66 that "[t]he application of the organizing principle of good faith to particular situations should be developed where the existing law is found to be wanting", the judge held that it was inappropriate at this stage to analyze Ms. Taylor's allegations without a full record and within the limits of the cases provided by the Province.

[23] The judge noted that she was "entirely unpersuaded by the defendants' argument at this stage that the events at the earliest stage of these allegations commencing in 2012 are unrelated to the dismissal without cause in 2017": at para 16.

[24] She stated that the allegations advanced by Ms. Taylor were "unusual" and "extraordinary and perhaps even egregious" enough that a court might possibly be persuaded to "extend a good faith doctrine": at paras 16, 18.

4. The issues

[25] In its factum and in its submissions, the Province submits that the judge erred by:

1. failing to consider or assess how the bad faith pleadings could constitute bad faith in the manner of the termination of Ms. Taylor's employment;

2. improperly conflating two aspects of bad faith, arising out of two lines of cases in the Supreme Court, and consequently failing to analyze the impugned pleadings; and

3. failing to strike the bad faith pleadings on the basis that Ms. Taylor failed to plead dishonesty.

2024 BCCA 44 (CanLII)

5. Discussion

5.1 Standard of review and test for motion to strike

[26] As recently stated by this Court, decisions refusing to strike pleadings for disclosing no reasonable cause of action pursuant to R 9-5(1)(a) generally raise an extricable question of law for which no deference need be accorded: *Situmorang v Google, LLC*, 2024 BCCA 9 at paras 50–51; see also *FORCOMP Forestry Consulting Ltd. v British Columbia*, 2021 BCCA 465 at para 14 and *Kamoto Holdings Ltd. v Central Kootenay (Regional District)*, 2022 BCCA 282 at para 37.

[27] The test for striking a pleading under R 9-5(1)(a) is well settled. A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Levy v British Columbia (Crime Victim Assistance Program)*, 2018 BCCA 36 at paras 14, 32; *Atlantic Lottery Corp. Inc. v Babstock*, 2020 SCC 19 at para 14.

[28] The approach must be generous and err on the side of permitting novel but arguable claims to proceed to trial. Courts ought to be cautious in striking claims, particularly "novel ones that may not yet be embedded in existing legal rules, lest it stunt the growth of the law": *Levy* at para 32.

5.2 The pleadings under review

[29] The Province seeks to strike the following materials:

- Part 1 of Ms. Taylor's notice of claim paras 19–23, 36
    - Part 1 details the statement of facts.
    - Ms. Taylor asserts that "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."

      Ms. Taylor alleges that her reputation was ruined and that she was confronted by the public and made fearful for her personal safety.
- Part 3 of Ms. Taylor's notice of civil claim paras 1, 3, 5
    - Part 3 details the legal basis for relief.
    - Ms. Taylor asserts that as "an employee of BC, [she] was entitled to be treated in good faith by her employer" and that the Province was in breach of its duty of good faith by failing to support her over the course of the investigation.
- Response to Demand for Further Particulars Pursuant to the Order of Justice Steeves at paras 1–9, 12–13
    - Ms. Taylor identified 15 individuals who she claims acted in bad faith.
    - Among many other allegations, she claims that these individuals and/or the Province:
        - berated her and accused her of ruining the Ministry of Health;
        - failed to respond to her concerns with respect to the manner in which she was interviewed, and accused, during the Ombudsperson's interview process;
        - failed to correct errors in the media publication blaming the team and Ms. Taylor in particular for the decisions to terminate or suspend the Ministry of Health employees;
        - failed to provide assistance with respect to media inquiries;
        - dismissed her at the same time the Province announced settlement payments to previously suspended or fired Ministry of Health employees or contractors;
        - treated her without reasonable dignity and fairness.

2024 BCCA 44 (CanLII)

[30] The Province submits that most of these allegations relate to matters that occurred years before the termination and cannot relate to bad faith in the manner of the termination.

5.3 Issue #1: Relation to the "manner of termination"

[31] The Province's principal position is that much of Ms. Taylor's pleading concerning the Province's treatment of her over the course of her employment is unrelated to the manner in which the Province terminated Ms. Taylor. According to the Province, the duty to exercise good faith in the manner of termination, when applied to a case involving a termination without cause, requires an examination of the employer's actions *at the time of termination only*. As such, all of the particulars Ms. Taylor has provided, including but not limited to the names of individuals who she claims acted in bad faith and their purported acts in past years, must be struck.

[32] Ms. Taylor, in response, asserts that her pleadings disclose a consistent and continuing pattern of problematic behaviour that led to and culminated in her termination. She asserts that these acts are directly connected to her termination.

Analysis

[33] The Province's arguments must be assessed in the context of determining whether pleadings should be struck pre-trial as disclosing no reasonable cause of action—as being bound to fail. Whether the Province might ultimately succeed on a full record is not the issue.

[34] Courts have time and again confirmed that pre (and post) dismissal conduct may be considered in assessing bad faith at termination if it is a component of the manner of dismissal: *Matthews v Ocean Nutrition Canada Ltd.*, 2020 SCC 26 at paras 40, 81; *Doyle v Zochem Inc.*, 2017 ONCA 130 at para 13; *Lalonde v Sena Solid Waste Holdings Inc.*, 2017 ABQB 374 at para 80; *Deol v Dreyer Davison LLP*, 2020 BCSC 771 at paras 130–137.

2024 BCCA 44 (CanLII)

[35] The “manner of dismissal” is an issue of fact, and in some cases may span a period of years before, or years after, the moment of dismissal. The rationale for this is aptly stated in *Doyle* at para 39:

> … [W]hile some conduct during a dismissal meeting viewed in isolation would not constitute bad faith, the same conduct when part of a course of conduct on the part of an employer that inflicts mental distress on an employee may legitimately inform the result…

[36] A court must not “parse too narrowly what is and is not a component of the manner of dismissal”: *Doyle* at para 39*.* This is particularly so on a motion to strike, where a court is bound to accept a plaintiff’s pleadings as fact and assess them generously.

[37] In *Matthews*, the SCC upheld the trial judge’s assessment of a period of four years leading up to termination. In *Lalonde*, the court observed that the employer maintained wrongful accusations against the employee for almost five years (including a period of time post termination).

[38] The Province argues that a court can only assess such pre-termination conduct in cases involving a claim for *constructive dismissal*. The authorities do not support this contention. There are grounds for arguing that the same principles would apply in a case of without cause termination. *Doyle* was one.

[39] Ms. Taylor pleads that one of the circumstances that was contrary to normal procedure in her termination was that “public notice of her departure from government employment was announced, *coincidentally* with the public notice of payments being made to compensate suspended or dismissed Ministry of Health employees or contractors” (emphasis added).

[40] More specifically, Ms. Taylor alleges that she was notified of her termination “*approximately half an hour before* press releases [were] made by BC as to its intention to make payment of compensation…to the persons who had been terminated...” (emphasis added).

2024 BCCA 44 (CanLII)

2024 BCCA 44 (CanLII)

[41] As the chambers judge correctly found, public notice of Ms. Taylor's termination, along with public notice of the Province's intention to make settlement payments to those affected by the Ministry of Health terminations, if proven, may serve as the "evidentiary link[s]" that unite her termination with the purported bad faith acts that transpired well before her departure. The Province's treatment of her over the course of her employment in relation to the Ministry of Health investigation could thus become "a component of the manner of dismissal": *Matthews* at para 81, citing *Doyle* at para 13.

[42] The chambers judge was "entirely unpersuaded" that the events commencing in 2012, given their extraordinary nature, were unrelated to Ms. Taylor's dismissal without cause in 2017. At this early stage of the litigation, I share that view.

[43] Generally, employers in British Columbia are not required to provide an employee with a reason for the employee's termination if they provide reasonable notice or payment in lieu. The Province asserts that it did just that. However, the crux of Ms. Taylor's claim is that through her termination, she was made "a scapegoat for BC with respect to the [Ministry of Health] terminations". This is the core of her bad-faith claim. It would have been wrong for the judge, and wrong for this Court, to decide at this time what aspects of the parties' conduct preceding the termination will prove to be relevant at trial in this developing area of law. In my view, no more detailed analysis of the individual particulars was required of the judge.

5.4 Issue #2: Novel application of the organizing principle of good faith

[44] The Province alleges that the judge conflated the organizing principle of good faith emanating from *Bhasin* with the obligation of good faith in the manner of dismissal recognized by the SCC in a separate line cases (*Wallace v United Grain Growers Ltd*, [1997] 3 SCR 701, *Honda Canada Inc. v Keays*, 2008 SCC 39 and *Matthews*).

[45] According to the Province, in refusing to analyze the pleadings within the confines of *Wallace*, *Honda*, and *Matthews*, the judge improperly relied on the following statement by the Supreme Court in *Bhasin*:

> [66] This organizing principle of good faith manifests itself through the existing doctrines about the types of situations and relationships in which the law requires, in certain respects, honest, candid, forthright or reasonable contractual performance. Generally, claims of good faith will not succeed if they do not fall within these existing doctrines. <u>But we should also recognize that this list is not closed. The application of the organizing principle of good faith to particular situations should be developed where the existing law is found to be wanting</u> and where the development may occur incrementally in a way that is consistent with the structure of the common law of contract and gives due weight to the importance of private ordering and certainty in commercial affairs.
>
> [Emphasis added.]

[46] The Province argues that the organizing principle developed in *Bhasin* was “much broader and was directed at contractual performance”, whereas this case “as pleaded, is not one involving good faith contractual performance”.

Analysis

[47] I am not persuaded by this argument.

[48] First, I do not agree that it can be said at this stage that this is not a case involving good faith contractual performance. While Ms. Taylor pleaded that she was unfairly terminated by being made a scapegoat, she has also claimed “damages for breach of the duty of good faith by BC <u>in her employment</u>” (emphasis added).

[49] Second, whether the law should recognize a general duty of good faith that “bind[s] the employer based on a mutual obligation of loyalty in a non-fiduciary sense during the life of the employment contract, owed reciprocally by both the employer and employee … is a matter of fair debate”: *Matthews* at para 85. In leaving this open, the Court in *Matthews* relied on its statement in *Bhasin* at para 40 that the common law should develop in an incremental fashion: *Matthew* at para 86.

[50] It is trite that in motions to strike, the court should err on the side of permitting any potential novel claims to continue: *Nevsun Resources Ltd v Araya*, 2020 SCC 5

2024 BCCA 44 (CanLII)

at para 66. It is not determinative that the law has not yet recognized the particular claim. Pleadings should be read generously at this stage to allow for novel claims to be pursued. The Province argues that, to paraphrase *Bhasin* at para 66, the existing law is not found wanting so that no broader application of the organizing principle of good faith is required. That is something best determined at trial on a full record. At this stage, given the recognized potential for development of the law surrounding the duty of good faith in an employment context, I do not think that it can be said that Ms. Taylor's bad faith pleadings are bound to fail.

2024 BCCA 44 (CanLII)

5.5 Issue #3: Failure to plead dishonesty

[51] The Province asserts in its factum that the "gravamen of the [principle of good faith] is honesty" and that Ms. Taylor's pleadings of bad faith must be struck because there is no pleading of dishonesty on the part of the Province.

[52] According to the Province, if the judge had embarked on the necessary analysis, she would have realized that the pleadings could not constitute "dishonest or misleading or unduly insensitive (in the language of *Wallace*) conduct". The Province argues, therefore, that the bad faith claims are unsustainable.

Analysis

[53] I am unable to agree. The Province fails to point to any authority indicating that dishonesty must be pleaded in a particular manner when bringing a claim for breach under the organizing principle of good faith.

[54] The organizing principle is necessarily broad. The Court in *Bhasin* stated that "[the] organizing principle of good faith manifests itself through the existing doctrines about the types of situations and relationships in which the law requires, in certain respects, honest, candid, forthright or reasonable contractual performance": at para 66; emphasis added.

[55] The SCC in *Bhasin* recognized a duty of honest performance as a distinct duty applying to all contracts. It was in this context that much of the SCC's discussions on honesty took place. As Ms. Taylor points out, "while there is a clear

duty of honest performance, it is not the only duty arising from the general doctrine of good faith in contract law”. Ms. Taylor argues that the “decision to terminate [her] was entirely within the discretion of [the Province]” and that the Province’s “discretionary exercise … is in breach of the duty to do so in good faith”. In my view, Ms. Taylor is entitled to the opportunity to pursue this line of argument at trial. See, for instance, *Wastech Services Ltd. v Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7, which recognized “the duty to exercise discretion in good faith as a general doctrine of contract law”: at para 91.

2024 BCCA 44 (CanLII)

[56] Moreover, dishonesty should be construed broadly: see *C.M. Callow Inc. v Zollinger*, 2020 SCC 45 at paras 90, 91. In my respectful view, dishonesty—in the form of lies, omissions, and misleading conduct—is implicit in Ms. Taylor’s pleadings. She alleges, among many other things, that the Province and select individuals she identified in her particulars:

- misled the public and identified her as the “lead investigator”, leading to backlash against her;
- took the insupportable position that the investigation team was to blame for the Ministry of Health terminations;
- failed to correct errors in media publications blaming the investigative team of which she was a part;
- failed to advise her of information releases to the media in which she was identified.

[57] In these circumstances, I do not view the failure to plead specifically that the Province acted “dishonestly” to be fatal to Ms. Taylor’s bad faith claims.

6. Disposition

[58] For these reasons, I would dismiss the appeal.

[59] **STROMBERG-STEIN J.A.**: I agree.

[60] **HORSMAN J.A.**: I agree.

[61] **STROMBERG-STEIN J.A.**: The appeal is dismissed.

"The Honourable Mr. Justice Grauer"

2024 BCCA 44 (CanLII)