

SUPREME COURT OF YUKON

Citation: *BC v KP*,
2025 YKSC 57

Date: 20250903
S.C. No. 22-A0158
Registry: Whitehorse

BETWEEN:

B.C.

PLAINTIFF

AND

K.P., J.T., R.G., and
SODEXO CANADA LTD.

DEFENDANTS

Before Justice K. Wenckebach

Counsel for the Plaintiff

Daniel S. Shier

Counsel for Defendant R.G.

Luke Faught

Counsel for Defendant Sodexo Canada Ltd.

No one appearing

REASONS FOR DECISION

OVERVIEW

[1] The plaintiff, B.C., has commenced an action against K.P., J.T., R.G., and Sodexo Canada Ltd., for alleged sexual assaults and harassment against her. B.C. states that, while she and the other individual defendants were working for Sodexo, K.P. harassed her racially and sexually, and then sexually assaulted her. B.C. also alleges she informed J.T. and R.G., who were supervisors at Sodexo, about the sexual assaults but they failed to assist her. B.C. was forced to quit because of the individuals' actions and asserts the defendants are liable to her for what occurred.

[2] R.G. has filed an application to strike B.C.'s action against him. He submits that, pursuant to Rule 20(26)(a) of the *Rules of Court* of the Supreme Court of Yukon, the statement of claim discloses no reasonable cause of action against him.

[3] For the reasons below, I grant R.G.'s application, in part.

INTRODUCTION

[4] The statement of claim alleges that K.P. committed assault and battery on B.C. by kissing her and otherwise sexually assaulting her. It also states that K.P. told B.C. he wanted to see what it was like "doing it" with a "native". The claim further states that K.P. is directly liable to her for the sexual assaults, and for sexual and racial discrimination.

[5] Regarding R.G., the statement of claim alleges: he denied B.C. time off to attend counselling following the sexual assaults; refused to cover the costs of counselling for the sexual assaults; failed to fulfill his statutory obligation arising from the *Workers' Safety and Compensation Act*, SY 2021, c 11 ("WSCA"); and failed to provide reasonable and appropriate assistance to B.C. The claim then states R.G.'s actions were discriminatory against B.C. on the basis of sex and constitute the intentional infliction of mental distress.

[6] The statement of claim also alleges the actions of the individual defendants made B.C.'s continued employment with Sodexo intolerable, thus constituting constructive dismissal.

[7] The statement of claim alleges Sodexo is also vicariously liable for R.G.'s actions.

[8] B.C. seeks various heads of damage, including general damages, aggravated damages, punitive damages, and human rights damages.

[9] R.G.'s position is that the Court does not have jurisdiction over B.C.'s claims; rather, the Yukon Worker's Safety and Compensation Board (the "WSCB") and the Yukon Human Rights Commission (the "Commission") have jurisdiction over them. At the hearing, I also raised the issue of whether the claim for constructive dismissal against R.G. was properly brought.

[10] The parties taking part in this application are R.G. and B.C. Default judgement has been issued against K.P. and J.T.; and Sodexo excused itself from appearing at the application.

ISSUES

- a. What is the nature of the claims alleged in the statement of claim?
- b. Does the WSCB have jurisdiction over the claims of constructive dismissal and intentional infliction of mental distress against R.G.?
- c. Can B.C. bring an action for human rights breaches against R.G.?
- d. Can B.C. bring an action for constructive dismissal against R.G.?
- e. If some of the claims against R.G. are struck, what must be struck from the statement of claim?

ANALYSIS

- a. What is the nature of the claims alleged in the statement of claim?

[11] The parties disagree about the nature of the claims alleged in the statement of claim. It is therefore necessary to determine what claims B.C. raises against R.G. before determining whether they can be brought against him.

[12] R.G. states that B.C. brings the following claims against him: constructive dismissal, breach of contract, breaches of B.C.'s human rights and intentional infliction of mental distress.

[13] B.C. submits that her claim against R.G., is, in essence, about the employment relationship and its breach and termination. B.C. further submits that she is not alleging human rights violations as a cause of action in itself, but to support other aspects of her claim.

[14] I conclude the claims raised against R.G. here are: a human rights claim; a claim of constructive dismissal; and a claim of intentional infliction of mental distress.

The Human Rights Claim

[15] B.C. submits that the references to violations of her human rights and discriminatory acts against her are included as an element for assessing the individual defendants' conduct and to support her claim for aggravated and punitive damages. I agree that the allegations of discrimination are pertinent to these issues. They are part of the factual basis for the claim of constructive dismissal. The statement of claim also explicitly states that B.C. is entitled to aggravated damages because of the alleged discrimination.

[16] I disagree with B.C., however, that the references to human rights breaches are made solely for these purposes. Instead, the allegations of human rights violations are included to establish the human rights breaches as a cause of action, as well. The statement of claim outlines K.P.'s actions which, it is alleged, are discriminatory. It then states that K.P. is directly liable to B.C. for the discriminatory conduct. In laying out the

claim in this manner, the statement of claim asserts that discrimination is a cause of action for which a defendant may be liable.

[17] The statement of claim then states that R.G.'s conduct was discriminatory to B.C. It does not state, as it does for K.P., that R.G. is directly liable for the discriminatory conduct. However, It asserts that B.C. suffered injuries because of the discriminatory conduct, and seeks damages, including general damages.¹ It furthermore states that R.G.'s discriminatory acts are actionable. Reading the statement of claim as a whole, the conclusion is that B.C. alleges a breach of her human rights as a cause of action against R.G. for which damages should be paid.

Constructive Dismissal

[18] There is no issue that there is a claim of constructive dismissal. Both parties agree B.C. makes a claim of constructive dismissal. The claim is also explicitly laid out in the statement of claim itself.

[19] The question is whether the statement of claim asserts that the claim is made against R.G. as well as against Sodexo. As I understood B.C.'s counsel, he argues that the claim for constructive dismissal is against both R.G. and Sodexo. As he sees it, R.G. is responsible for B.C.'s constructive dismissal; and Sodexo is vicariously liable for R.G.'s actions.

[20] This is how the statement of claim reads, as well. Paragraph 16 of the statement of claim states that because of R.G.'s actions (as well as those of K.P. and J.T.), B.C.'s continued employment at Sodexo was rendered intolerable, constituting a repudiation of

¹ B.C. also seeks human rights damages. I am not including this in this part of the analysis, however, as B.C. submits that she can seek human rights damages even though there is no cause of action for breaches of human rights. I will address this argument below.

the terms of B.C.'s employment and amounting to constructive dismissal. At paragraph 18, the statement of claim alleges Sodexo is vicariously liable for R.G.'s actions, including those actions related at paragraph 16. In this way, the statement of claim asserts that R.G. is liable for B.C.'s constructive dismissal and Sodexo is vicariously liable for R.G.'s actions.

Intentional Infliction of Mental Distress

[21] The statement of claim alleges that R.G.'s actions and the results to B.C. constitute the intentional infliction of mental distress. In written argument, B.C.'s counsel states the cause of action is wrongful dismissal. The allegation of intentional infliction of mental distress provides the facts for why B.C. was constructively dismissed. It also supports the claim for aggravated and punitive damages. In oral argument, as I understood him, B.C.'s counsel additionally argued that there is a claim for intentional infliction of mental distress against R.G. and, vicariously, against Sodexo. I agree that there is a claim against R.G. for intentional infliction of mental distress, as set out in subparagraph 17(e) of the statement of claim.

Breach of Contract

[22] The statement of claim alleges that breaching B.C.'s human rights was also a breach of contract. The statement of claim does not, however, claim this as a separate cause of action. As I read it, statements about the breach of contract are not included to assert a claim for breach of contract, but to support the allegations of constructive dismissal.

[23] Having determined that B.C. alleges R.G. is liable for human rights breaches, constructive dismissal and intentional infliction of mental distress, the next question is whether such claims are legally viable.

b. Does the WSCB have jurisdiction over the claims of constructive dismissal and intentional infliction of mental distress against R.G?

[24] R.G. submits that the claims are within the WSCB's jurisdiction. I do not agree. Rather, the claim of constructive dismissal is within the Court's jurisdiction. The claim of intentional infliction of mental distress may be within the WSCB's jurisdiction, but it is too early to reach such a conclusion.²

Parties' Submissions

[25] R.G. argues that the WSCA has jurisdiction over all claims for compensation arising from injuries in the workplace. Additionally, the WSCA provides special protection to workers from being sued civilly for their actions in the workplace that caused injuries to other workers (ss. 1(d)(iii)). The accusations against R.G. all arise out of his work as supervisor to B.C. R.G. therefore submits that the claims must be dealt with through the WSCB.

[26] In written argument, B.C. submitted that her claim is that of constructive dismissal. The WSCB does not have jurisdiction over constructive dismissal. The statement of claim can proceed against R.G. In oral argument, counsel for B.C. also stated that the claim of intentional infliction of mental distress should also proceed through a civil action.

² Although R.G.'s argument could apply to the claim for human rights breaches, it is better addressed when I consider whether the Supreme Court of Yukon or the Commission has jurisdiction over them.

Analysis

The WSCA

[27] The WSCA does not create blanket immunity to employees from harms they cause another employee if it occurs in the workplace, as R.G. seems to suggest.

[28] Workers' compensation schemes across Canada provide compensation for employees who suffer injuries in the workplace. Employees receive compensation for injuries regardless of fault and have security of payment. As a trade-off, the employee cannot sue the employer in court for their injuries (*Pasiechnyk v Saskatchewan (Workers' Compensation Board)*, [1997] 2 SCR 890 at paras. 24-27).

[29] The WSCA is structured similarly to other workers' compensation legislation in Canada. Its stated purpose is to collect funds to provide compensation to workers injured on the job. Workers who are physically or mentally injured at the workplace or who suffer occupational illnesses are paid no-fault compensation. In turn, they cannot sue the employer or a fellow employee who caused their injuries or illness (ss. 1(d)). As with the other legislative schemes, the WSCA covers torts causing work-place injuries. It does not provide compensation for all harms suffered by employees in the workplace, nor does it bar employees from bringing actions against employers for other harms suffered in the workplace. (*Morningstar v WSIAT*, 2021 ONSC 5576 at para. 49).

The WSCA does not apply to Constructive Dismissal

[30] Constructive dismissal is not a claim in tort but in contract. Courts have thus roundly concluded that constructive dismissal claims are not covered by workers' compensation legislation (at para. 49).

[31] R.G. attempts to distinguish those cases by noting that ss. 1(d)(iii) explicitly states that one of the *WSCA*'s purposes is to provide immunity to employees from civil suits. He states other legislation does not provide this explicit protection to employees. He submits that the legislation intends for employees to have broad immunity from civil liability in the workplace.

[32] However, ss. 1(d)(iii) provides immunity from civil suits to both workers and employers. If R.G.'s interpretation is correct, then a worker would be barred from bringing any action in which an injury on the job forms part of the factual basis of the claim, whether it is brought against an employer or fellow employee. This would be a significant change to the common law that is not reflected in the language of the legislation.

[33] Moreover, read within the context of ss. 1(d), which focuses exclusively on injuries, and taking into account that the legislation provides for compensation for work-related injuries, ss. 1(d)(iii) does nothing more than reiterate that the scheme is intended to protect both employers and employees from civil suits for tortious actions that cause work-place injuries. Thus, the claim of constructive dismissal is properly brought through a civil action in court.

The *WSCA* May Apply to the Claim of Intentional Infliction of Mental Distress

[34] The claim of intentional infliction of mental distress may fall under the *WSCB*'s jurisdiction because the injuries may, under the *WSCA*, qualify as workplace injuries. The injuries R.G. allegedly caused may be interconnected with those caused by K.P. K.P. allegedly sexually assaulted B.C.; and R.G. allegedly did not assist B.C. when she reported the assault. Rather than being separate incidents, the actions could form part

of a larger incident. In particular, if B.C. proves her case, it may be impossible to separate the injuries caused by K.P. from those caused by R.G. The statement of claim explicitly acknowledges this, as it states, at para. 23: “The injuries suffered by [B.C.] ... cannot be separated so that their damages may be assessed independently and as such constitute indivisible injuries ...”.

[35] Moreover, an element of the intentional infliction of mental distress is that the defendant’s conduct caused the plaintiff to suffer a visible and provable illness (*Prinzo v Baycrest Centre for Geriatric Care*, [2002] OJ No. 2712 at para. 43 (CA)). As this alleged injury was caused at work, it could be within the WSCB’s jurisdiction.

[36] There are, however, provisions in the *WSCA* that suggest that the alleged injuries caused by R.G.’s actions are not in the WSCB’s jurisdiction. The *WSCA* does not cover injuries resulting from mental stress (s. 77(1)). If B.C.’s injuries are caused by mental stress, therefore, the claim against R.G. would not fall under the *WSCA*. Additionally, injuries resulting from a decision by the employer related to the employee’s employment, such as their working conditions, are not covered by the *WSCA* (s. 77(1)). Some of R.G.’s actions, such as refusing time off to B.C., may be decisions related to B.C.’s employment. It is, at this point, an open question whether the WSCB or the court has jurisdiction over the claim of intentional infliction of mental distress.

[37] The threshold for striking claims is high; they are struck only in the clearest of cases (*McDiarmid v Yukon (Government of)*, 2014 YKSC 31 at para. 17). Here, as it is not clear whether the WSCB has jurisdiction over the claim of intentional infliction of mental distress, I will not strike this claim against R.G.

c. Can B.C. bring an action for human rights breaches against R.G.?

[38] B.C.'s counsel concedes that the Commission has sole jurisdiction over claims of human rights breaches. He submits, however, that even if B.C. cannot make a claim for human rights *breaches*, she can make a claim for human rights *damages*. Human rights damages, he argues, are a separate head of relief. Alternatively, B.C.'s counsel submits that simply because a claim is novel does not mean it should be dismissed.

[39] In my opinion, it is not possible to receive damages without asserting a breach because it is the breach that gives rise to damages. Thus, human rights damages cannot be awarded if there is no identified breach.

[40] Even setting this aside, however, I am not persuaded by counsel's arguments. The Supreme Court of Canada determined in *Seneca College v Bhadauria*, [1981] 2 SCR 181 at 194, that the Ontario *Human Rights Code*, RSO 1990, c H 19, is a complete code, providing jurisdiction to the Human Rights Commission over all aspects of human rights breaches. As a part of this analysis, the Supreme Court of Canada noted the full range of remedies that may be awarded to a complainant under the scheme. The principle of *Bhadauria* is that the Human Rights Commission has jurisdiction over human rights breaches in their entirety, including remedies.

[41] *Bhadauria* has since been accepted as applicable to other human rights legislation, including the Yukon *Human Rights Act* (*Ausiku v Yukon (Human Rights Commission)*, 2012 YKCA 5 at paras. 15-16). Like the Ontario *Human Rights Code*, under the Yukon *Human Rights Act*, RSY 2002, c 116 ("*HRA*") a complainant may receive different kinds of damages, including for financial loss, injury to dignity, feelings

and self-respect; and exemplary damages. The legislative intent is to give the Commission sole jurisdiction over human rights claims and damages.

[42] B.C. is not raising a novel claim: it was settled by *Bhadoria*. Other human rights legislation permits courts to award human rights damages (e.g. Ontario *Human Rights Code*, s. 46.1 (enacted after *Bhadoria* was decided)). The Yukon legislature, however, decided not to include a similar provision in the *HRA*. I conclude, therefore, that, as between the Commission and the courts, the legislature intended for the Commission to have full jurisdiction over all elements of a human rights claim.

d. Can B.C. bring a claim of constructive dismissal against R.G.?

[43] This issue was not raised by R.G. but by me during oral argument. As noted above, B.C.'s lawyer submits that R.G.'s actions (along with those of J.T.) made B.C.'s employment intolerable, leading her to quit. R.G. is thus liable to B.C. for constructive dismissal. Sodexo is then vicariously liable for R.G.'s actions.

[44] I conclude that B.C. cannot bring a claim of constructive dismissal against R.G.

Law

[45] Vicarious liability makes an employer or principal liable for the employee's or agent's tortious actions. The employer or principal is liable not because it is at fault but because it controls the business or organization that created or exacerbated the risk that the tortious act would occur (*Bazley v Curry*, [1999] 2 SCR 534 at paras. 32, 37). It is, therefore, indirectly liable.

[46] In contrast, an employer sued for constructive dismissal is not vicariously liable for the actions of others. As noted above, claims of constructive dismissal are claims in contract. Liability arises because, having voluntarily bound itself to the terms of the

employment contract, the employer is liable for breaching the contract. An employer is thus directly liable in claims of constructive dismissal.

[47] Additionally, individuals who have not bound themselves to the terms of the contract cannot be sued for breaching the contract. A third-party to the contract, therefore, cannot be sued for constructive dismissal.

Analysis

[48] The parties to B.C.'s employment contract were B.C. and Sodexo. B.C.'s claim of constructive dismissal is, therefore, against Sodexo. If successful, Sodexo would be directly liable to B.C. Vicarious liability does not apply. Moreover, R.G. is not a party to the contract. B.C. cannot sue him for constructive dismissal.

e. If some of the claims against R.G. are struck, what should be struck from the statement of claim?

[49] The portions of the statement of claim about R.G. that should be retained are those that describe his actions, how those actions support a claim for aggravated damages and his involvement in the claim for intentional infliction of mental distress. The portions asserting R.G. is liable for constructive dismissal and Sodexo is vicariously liable are to be struck. As well, any portions that specifically identify that R.G. is liable for human rights breaches should be struck. I will proceed chronologically through the statement of claim as it pertains to R.G.

[50] Subparagraphs 13(b),(c) to 15 describe R.G.'s actions. They provide the basis for the claim of intentional infliction of mental distress and for the constructive dismissal claim against Sodexo, as well as support for the claim for aggravated damages. They are retained.

[51] Paragraph 16 raises the claim for constructive dismissal. In doing so, it claims Sodexo is vicariously liable for R.G.'s actions. It is therefore struck.

[52] Subparagraphs 17(a)-(d) set out the claim for aggravated damages as it pertains to the claim for constructive dismissal. It is premised on the notion that the individual defendants are directly liable for the constructive dismissal and is therefore struck, with leave to amend. Subparagraph 17(e) addresses the claim for intentional infliction of mental distress. It is not problematic but is not complete without the rest of paragraph 17. Subparagraph 17(e) is therefore struck with leave to amend.

[53] Paragraphs 18-22 comes under the heading "Vicarious Liability of the Defendant Sodexo". Paragraph 18 states that Sodexo is vicariously liable for K.P.'s, J.T.'s and R.G.'s actions by stating it is vicariously liable for the actions described in paragraphs 8-17. It therefore incorporates paragraph 16, which states that Sodexo is vicariously liable for R.G. in the claim of constructive dismissal. However, paragraph 16 is already struck. The rest of the paragraph can be interpreted to relate to the claim of intentional infliction of mental distress. It will therefore remain without changes.

[54] Similarly, paragraphs 19-20 can be applied to the claim for intentional infliction of mental distress. They will remain.

[55] Paragraph 21 sets out that Sodexo is vicariously liable for different claims, including constructive dismissal. The phrase "constructive dismissal" is therefore struck from the paragraph.

[56] Paragraph 22 impliedly makes Sodexo vicariously liable for the contract breach. It, too, is struck.

[57] The next set of paragraphs that address R.G. specifically are paragraphs 29-30. Subparagraph 29(a) is not entirely clear. It appears that B.C. seeks aggravated damages for discrimination and intentional infliction of mental distress. I will strike the entirety of the subparagraph, as it is awkwardly phrased if only the portion about discrimination is struck. B.C. has leave to amend this paragraph.

[58] Subparagraph 29(b) claims aggravated damages for constructive dismissal, but does it in the context of alleging that Sodexo is vicariously liable for R.G. I will strike this subparagraph, with leave to amend so that it can be re-drafted in accordance with this decision.

[59] The rest of the statement of claim makes claims for human rights damages (at paragraph 31 and under relief sought). Because they do not specifically seek them from R.G., I will not strike them. However, the statement of claim should be read to exclude R.G.'s liability for the human rights claim and human rights damages.

[60] If necessary, B.C. has leave to amend the statement of claim on the issue of B.C.'s claim for constructive dismissal against Sodexo.

CONCLUSION

[61] The claims of human rights breaches and constructive dismissal as against R.G. are struck. The claim of intentional infliction of mental distress is not struck.

[62] Costs may be spoken to in case management if the parties are unable to agree.