# SUPREME COURT OF YUKON

Citation: *Wood v. Yukon (Occupational Health and Safety Branch)* , 2018 YKSC 24

Date: 20180503
S.C. No. 17-AP015
Registry: Whitehorse

**BETWEEN**

**JUANITA WOOD**

**PETITIONER**

**AND**

**DIRECTOR, OCCUPATIONAL HEALTH AND SAFETY BRANCH**
**YUKON WORKERS' COMPENSATION HEALTH AND SAFETY BOARD**

**RESPONDENT**

Before .Madam Justice M. Bielby

Appearances:
Juanita Wood — Appearing on her own behalf
Sacha R. Paul — Counsel for the Respondent

**REASONS FOR JUDGMENT**

**Overview**

[1] The Respondent seeks an order dismissing a petition pursuant to the provisions of Rule 20(26) of the Yukon *Rules of Court*, YOIC 2009/65. It maintains that the petition discloses no reasonable claim, is vexatious and is an abuse of process of the court. It also seeks an order of costs against the petitioner, Ms. Wood.

**Statement of Facts**

[2] The amended petition arises out of a complaint made by Ms. Wood subsequent to her termination of employment by the Respondent. In it she alleges that her employment was terminated because she questioned the handling of two safety concerns, i.e. an incident causing damage to a Caterpillar and the conduct of a certain

safety meeting. That complaint was made pursuant to s 18 of the *Occupational Health and Safety Act*, RSY 2002, c 159 ("*OHSA*"), which reads:

> 18(1) No employer or trade union or person acting on behalf of an employer or trade union shall
>
> (a) dismiss or threaten to dismiss a worker;
>
> . . .
>
> because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has in good faith sought enforcement of this Act or the regulations
>
> (2) If an employer or trade union or person acting on behalf of an employer or trade union is convicted of a contravention of subsection (1), the convicting court may order
>
> (a) the employer. . . to reinstate the worker to their former employment under the same terms and conditions which they were formerly employed;
>
> . . .

[3] Upon receipt of the complaint, the Respondent Director directed an investigation to be conducted by its safety supervisor who subsequently reported the results of same to Ms. Wood by letter of November 13, 2015. In that letter he concluded that her employment was in fact terminated for the three reasons given by her employer in her letter of termination: speeding while driving a government vehicle; leaving the worksite without approval; and demonstrating a confrontational attitude toward branch personnel and a lack of respect towards supervisors and management. The safety supervisor concluded that her employment was not terminated because she had sought compliance with the *Act* or in good faith sought enforcement of the *Act* or its regulations. He observed that while evidence of her confrontational attitude was demonstrated, in

part, by her means of questioning the Caterpillar and safety meeting incidents, the fact that she questioned them at all was not a reason for her dismissal.

[4] As a result, the Director declined to initiate a prosecution against the Respondent for breach of s 18(1). The *OHSA* provides that only the Director may prosecute. It states:

> s. 46(2) No proceeding in respect of any offence under this act or the regulations shall be commenced except by the director.

[5] Ms. Wood unsuccessfully appealed the Director's decision not to prosecute to the Yukon Workers' Compensation Health and Safety Board ("YWCHSB"). She also unsuccessfully sought relief from the Yukon Human Rights Commission. She then sued the Government of Yukon, Highways and Public Works by statement of claim issued on May 27, 2016, alleging the same breach of s 18 of the *OHSA* that she raises in this action. Judge Gower struck that action as disclosing no reasonable claim or cause of action, and as being vexatious and constituting an abuse of process in lengthy written reasons issued December 7, 2016: *Wood v Yukon (Highways and Public Works)*, 2016 YKSC 68. On May 25, 2017, the Yukon Court of Appeal quashed Ms. Wood's appeal from Judge Gower's decision on the basis that it was "devoid of merit and bound to fail": *Wood v Yukon (Highways and Public Works)*, 2017 YKCA 4, at para 24.

[6] On April 27, 2017, Ms. Wood filed a separate petition seeking judicial review of the decision to terminate her employment. Argument is set on that application for next month. She has also sought to have the YWCHSB reconsider its decision to dismiss her appeal, but has then withdrawn that request. She further commenced and then withdrew a private information alleging a breach of s 18(1) of the *OHSA*, all within the

last year. This petition was then filed January 22, 2018, and has been amended by her several times up to and including April 23, 2018. While that last amendment was filed after Respondent's counsel had filed his materials in relation to this application, that counsel did not seek an adjournment to allow him to respond to any changes in this final amended petition.

**ISSUES**

1. Should the petition be struck as a collateral attack on a previous order?

2. Should the petition otherwise be struck out pursuant to the provisions of Rule 20(26) of the Yukon Rules of Court?

**ANALYSIS**

**Issue 1: Should the petition be struck as a collateral attack on a previous order?**

[7] A litigant cannot make a collateral attack on a previous order binding the parties: *Quebec (Attorney General) v Laroche*, 2002 SCC 72, [2002] 3 SCR 708. An improper attempt to relitigate is an abuse of process. As the Supreme Court of Canada stated in *Toronto (City) v CUPE, Local 79*, 2003 SCC 63, at paras 35, 37, [2003] 3 SCR 77 *("CUPE")*:

> Judges have an inherent and residual discretion to prevent an issue of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice". . .
>
> . . .
>
> . . . [In] *Canam Enterprises Inc. v. Coles* (2000), 2000 Can LII 8514 (Ont. CA), 51 O.R. (3d) 481 (C.A.), at para. 5[6], *per* Goudge, J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63 (CanLII). . .:

> One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined.

[8] At para 38 of *CUPE*, the Court cited DJ Lange's *The Doctrine of Res Judicata in Canada* (Markham, Ont: Butterworths, 2000) at pp 624-25:

> The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitgation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

[9] In his decision in *Wood v Yukon*, Judge Gower struck Ms. Wood's statement of claim asking for, essentially, the same relief as she seeks in this action. In so doing, he found at para 48:

> I conclude that Ms. Wood's amended statement of claim, filed October 6, 2016, discloses no reasonable claim or cause of action. This is because it is based entirely on s. 18 of the *OHSA*, which does not create a civil cause of action. Rather, it creates the possibility of a summary conviction prosecution against an employer for an offence. In the case at bar, that offence would be for dismissing a worker because the worker has, in good faith, sought enforcement of the *OHSA*. Ms. Wood is simply mistaken when she states in her written outline that s. 18 "creates a civil cause of action for a prohibited reprisal".

[10] He went onto conclude that the statement of claim was also vexatious at para 49 of his reasons for decision:

> I further conclude that the amended statement of claim is unnecessary and vexatious. This is because it purports to be an appeal from Ms. Wood's dismissal on probation when, as a member of the Public Service Alliance of Canada, she has already exhausted the appeal process for that decision

> through the application of the *Public Service Labour Relations Act,* and the Collective Agreement. There is simply no right of appeal from the decision of the Deputy Minister of HPW of March 5, 2015. It is therefore obvious that Ms. Wood's action cannot succeed.

[11] Judge Gower also held that the statement of claim should be struck out as it was an abuse of process, stating at paras 50-51:

> Finally, I conclude that the amended statement of claim constitutes an abuse of process. As Ms. Wood herself acknowledged at the hearing, the "same facts" underlie her appeal to the Deputy Minister, her proceedings before the YWCHS Board, her proceedings before the Yukon Human Rights Commission, and now her action in this Court. Her focus in each forum was slightly different, but the factual matrix in each case turns on her perception that she has been wrongfully dismissed. . . [T]his is the fourth forum that Ms. Wood has accessed to relitigate her dismissal on probation.
>
> Furthermore, Ms. Wood chose not to pursue her right of appeal from the Appeal Tribunal to the YWCHS Board. Rather, on the very day she withdrew her appeal, she commenced the within court action. That constitutes a collateral attack on the Appeal Tribunal['s decision] and is an additional basis for concluding that this court action is an abuse of process.

[12] While Ms. Wood has again chosen a different procedural vehicle to advance her claim in the current action, and has chosen a different branch of the Government of Yukon as a Respondent, the basis for her claim is identical to the one Judge Gower has previously decided discloses no cause of action, is vexatious and is an abuse of process. Ms. Wood is bound by the substantive results of Judge Gower's decision. She is not entitled to reargue her claim simply by choosing another procedural vehicle, this time a petition, whereas the action before Judge Gower was advanced by way of statement of claim.

[13] She has therefore advanced a collateral attack on Judge Gower's decision. Her petition is struck as a result as being an abuse of process of the court.

**Issue 2: Should the petition otherwise be struck out pursuant to the provisions of Rule 20(26) of the Yukon Rules of Court?**

[14] While it is not necessary to address the issue further, I observe that even had Judge Gower not made his decision in 2016 YKSC 68, I would have struck Ms. Wood's petition as disclosing no reasonable claim, as being vexatious and as being an abuse of the process of the court.

[15] Rule 20(26) of the Yukon *Rules of Court* gives me the authority to do so. It provides:

> **Scandalous, frivolous or vexatious matters**
>
> (26) At any stage of a proceeding the court may order to be struck out… any…petition… on the ground that:
>
> (a) it discloses no reasonable claim or defence as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> . . .
>
> (d) it is otherwise an abuse of the process of the court
>
> and the court may grant judgment or order the proceeding to be …dismissed and may order the costs of the application to be paid as special costs.

**Rule 20(26)(a) – No Reasonable Claim**

[16] First, I conclude Ms. Woods' claim is not reasonable because she has no chance of success in obtaining reinstatement of her employment through this petition. She has argued that s 18 of the *OHSA* can be interpreted to provide her with the right to

commence a civil action for reinstatement, but the only recourse created by that section is by way of prosecution and the only person who may initiate a prosecution is the Respondent Director pursuant to the express provisions of s 46(2) of the same legislation. Ms. Woods is therefore, not entitled to start her own litigation against the Respondent, or anyone, to enforce s 18.

[17] That is because s 18(2) expressly provides the right to reinstatement only upon conviction of the employer. It reads "if an employer…is convicted of a contravention of subsection (1), the convicting court may order (a) the employer. . . to reinstate the worker into their former employment. . . ". This section is not ambiguous. It does not mean that a dismissed worker may sue civilly in any format for reinstatement upon alleging that one or more of the reasons for her termination arose from her good faith attempts to enforce the *Act*.

[18] Ms. Wood complains that the Director had an investigation of the substance of her claim conducted and decided not to prosecute her employer based on the results of that investigation. She says that because the *OHSA* does not expressly direct such an investigation, the Director had no right to conduct it and no right to decline to prosecute. She argues that the legislation should be interpreted to mean that once a complaint is filed, the Director is obliged to launch a prosecution of the employer who is the subject matter of the complaint, without more.

[19] However, the legislation does not contain an express provision precluding investigation and I conclude it should be interpreted to permit the approach used by the Director in this case. Absent investigation, the Director is unlikely to obtain sufficient evidence upon which to sustain a conviction. A parallel to Ms. Wood's argument is that

the police should be obliged to lay a charge whenever they receive a complaint, without any attempt to gather evidence to substantiate that charge. That would lead to many unsuccessful prosecutions, with attendant wasted resources.

[20] While the *OHSA* creates an express obligation to conduct an investigation in certain circumstances, I do not conclude the absence of such a provision in regard to s 18 complaints means no investigation should occur for this reason. By way of example, while s 16 of the *OHSA* expressly creates an obligation to investigate when an employee refuses to work because of safety concerns, and s 17 creates an express right of appeal of the resulting report, the absence of such provisions in s 18 cannot be interpreted to mean the Legislature intended to preclude investigation to determine whether a conviction was likely should a s 18 prosecution be undertaken or to limit the Respondent's discretion not to prosecute in such a situation.

[21] While Ms. Woods is deeply suspicious that the Director always chooses not to prosecute s. 18 complaints, and of his apparent practice of requesting the party laying a complaint to submit to an interview by a safety officer wherein that officer attempts to resolve the complaint other than by prosecution, there is no evidence to suggest that s. 18 prosecutions never take place, or that employers are being permitted to terminate workers who advance safety concerns without recourse. Her belief that other workers in the Yukon would be assisted by removal of the Director's discretion, does not translate into a right on her part to advance a claim on their behalf.

[22] More particularly, the directions contained in Rule 8(3) or elsewhere in the Yukon *Rules of Court* which may relate to statement of claim do not create a special means by way Ms. Wood can obtain reinstatement for breach of s 18 of the *OHSA*. This provision

addresses the mechanism by which a lawsuit is commenced; it does not create a right to sue.

**Rule 20(26)(b) – Vexatious Litigation**

[23] Second, Ms. Wood's petition should be struck because it is vexatious. In addition to attempting to advance a claim which has already been determined, she is attempting to use a vehicle created to punish employers for breach of a statutory duty to create a right to reinstatement for herself.

[24] As set out in *McDiarmid v Yukon (Government of)*, 2014 YKSC 31 at para 15, the test for ruling an action is vexatious requires the respondent to demonstrate "that the [petition] is groundless or manifestly futile, or that it is not in an intelligible form, or that it was instituted without any reasonable grounds whatsoever for an ulterior purpose": see also *Ramirez v Mooney*, 2017 YKSC 22 at para 40. A non-exhaustive list of factors set out in ***Dawson v Dawson***, 2014 BCCA 44 at para 16 citing *Re Lang Michener and Fabian*, 1987 CanLII 172 (ONSC) at para 19, 37 DLR (4th) 685, in assessing an application to declare a litigant vexatious is also of assistance, and includes:

> (a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction constitutes a vexatious proceeding;
>
> (b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious;
>
> (c) vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;
>
> (d) it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into

> subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;
>
> . . .

[25] The petition pursued by Ms. Woods and the history of her persistent litigation of this issue meets many, if not all of these factors.

**Rule 20(26)(d) – Abuse of Process**

[26] Third, most obviously, Ms. Wood's petition is an abuse of process because it was commenced well after the expiry of the one year limitation period found in s 46(1) of the *OHSA* which reads:

> A prosecution under this Act shall not be commenced after the expiration of one year after the commission of the alleged offence.

[27] Therefore, even if Ms. Wood had convinced me that she had been dismissed for attempting to enforce provisions of the *OHSA*, and her evidence falls far short of that, she has no remedy available to her under that legislation. It is now more than 3 years since the termination of her employment and more time than that since the conduct which she alleges led to her termination of employment. And, s 18 does not create a parallel civil process to the prosecution to which the one year limitation period has no application. To allow Ms. Wood to continue with this petition in the face of that circumstance would be to permit her to continue an abuse of process.

**Costs**

[28] The Respondent has sought, and is entitled to receive, costs from Ms. Wood in light of its success in this application. Its counsel may write me no later than May 15th, copied to Ms. Wood by email and regular mail, proposing a dollar amount of costs to be

awarded to it, and supporting that specific request with reasons. Ms. Wood may reply by May 31, 2018 should she so choose, after which time I will issue a separate costs decision.

**Conclusion**

[29] The petition is struck. The Respondent is entitled to costs paid by the Petitioner in an amount to be set.

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BIELBY J.