IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Belanger v. Tsetsaut Ventures Ltd.,*
2019 BCSC 560

Date: 20190415
Docket: S20222
Registry: Terrace

Between:

Mike Belanger, Brad Berarducci, Tony Brinson, Ty Calcutt, Darryl Carlson, Graham Huntley, Travis James, Moses Johnson, Brick Karrer, Clayton Karrer, Adam Kotowsky, John MacDougall, Gary Olson, Wayne Olson, Aaron Ranahan, James Skidmore, Justin Toews, Chris Turner, Levi Turner, James Van de Pol, Eric Venus, Zephyr Willson, John Barden, Joel Bonneville, Lawrence Commodore, Elliott Cote, Orey Forsythe, Walter Blane Forsyth, Rob Green, Konrad Howard, Tyler Kranz, Stefan Schultz, Robert L. Starr, Morgen Trombley, Ceejay Turner, Jared Vandermeulen, Grant Wilson, Tyrone Wilson, John Doe and Richard Roe

Plaintiffs

And

Tsetsaut Ventures Ltd.

Defendant

Before: The Honourable Madam Justice Norell

Reasons for Judgment

Counsel for the Plaintiffs:	W. MacGregor
Counsel for the Defendants:	K. Darling
Place and Date of Hearing:	Terrace, B.C. March 6, 2019
Place and Date of Judgment:	Terrace, B.C. April 15, 2019

Introduction

[1] The defendant Tsetsaut Ventures Ltd. ("Tsetsaut") applies pursuant to Rule 9-7 (the summary trial procedure) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, for dismissal of the plaintiffs' action.

[2] The plaintiffs were employees of Tsetsaut (the "Employees").

[3] The Employees make a claim for:

a) severance pay owing to them under the *Employment Standards Act*, R.S.B.C. 1996, c. 113 [*ESA*];

b) damages for breach of s. 83 of the *ESA* arising from a threat to terminate employment; and

c) damages for the tort of intimidation, arising from the same threat.

[4] Tsetsaut denies the claims and any amount owing, and says these claims should be dismissed as a matter of law.

Background

[5] Tsetsaut provides mining support services in Hazelton, BC, and in the surrounding area. Its services require employees to travel to and work in remote locations in British Columbia.

[6] The Employees worked at the Brucejack Mine located in northwestern BC. Most employees live at least 300 kilometres from the mine.

[7] A typical schedule of work was a 28-day cycle of a four to six hour day of travel from a collection point to a worksite, followed by 12-hour shifts for fourteen days straight, a travel day to return to the collection point, followed by twelve days off work. Thus, in four weeks the employees worked 168 hours plus travel time, which varied depending on the collection point and worksite.

[8] Prior to October 1, 2017, the Employees worked for Tsetsaut under contracts of employment pursuant to which they were paid a daily rate and some percentage of the daily rate for each travel day. The Employees allege that under these contracts they were not paid overtime, statutory holiday pay, and vacation pay in accordance with the *ESA*. Tsetsaut denies this.

[9] In the summer of 2017, Tsetsaut obtained the agreement of 84% of its approximately 200 employees to apply to the Director of Employment Standards pursuant to s. 72 of the *ESA* to seek a statutory variance so that certain provisions of the *ESA* would not apply. The statutory variance, if granted, would affect how entitlement to overtime would be determined for the Employees.

[10] On September 22, 2017, the Director approved a statutory variance (the "Variance"), effective October 1, 2017.

[11] The Employees allege that in the spring of 2018, Tsetsaut's contract to provide services to Brucejack Mine expired, and Pretium Resources Inc., which owned the mine, decided to bring the work in-house. The Employees were advised that Tsetsaut had no more work for them, but they could apply to Pretium to do the same work. Some Employees were issued lay off notices and Records of Employment and paid severance. Other Employees accepted the notice and applied to and were hired by Pretium. Those Employees were not paid severance.

[12] The Employees have never made a complaint to the Employment Standards Branch regarding Tsetsaut concerning the events of this lawsuit.

[13] On June 18, 2018, the Employees commenced this action.

Allegations

The Employees

[14] The Employees allege that in the summer of 2017, at the time Tsetsaut sought their agreement for the application for the Variance, they became aware of their rights granted by the *ESA* for overtime pay (s. 40), statutory holiday pay (ss.

45-46), and vacation pay (s. 58) (together the "Lost Wages"). They allege Tsetsaut found it necessary to explain those rights in the process of explaining why the Variance was being sought. The Employees also allege that in March 2018, when there were lay offs, severance pay (s. 63), as required under the *ESA* was not paid to some of them.

[15] In the original notice of civil claim, the Employees alleged breach of contract and debt for failure to pay Lost Wages prior to October 1, 2017, and severance pay arising out of the March 2018 lay offs.

[16] In the amended notice of civil claim, the Employees deleted the claim for the Lost Wages based on the statutory rights under the *ESA*. Instead, they now allege that in the summer of 2017 at the time of the application for the Variance, Tsetsaut "informed the plaintiffs that if the plaintiffs sought to collect the amounts they were owed due to the defendant's failure, up to that point, to comply with the Act [the *ESA*], such plaintiffs would be fired." The Employees now allege breach of s. 83 of the *ESA*, and the tort of intimidation.

[17] The Employees allege that the measure of damages for the breach of s. 83, and the tort of intimidation, is the amount of the Lost Wages which the Employees were allegedly owed prior to the Variance, and which they were effectively prevented from claiming because of the threat. The Employees have also continued their claim for breach of s. 63 (the severance pay provision) of the *ESA*. The relief sought in the amended notice of civil claim now states:

> 1. Damages for intimidation and breach of s. 83 of the Employment Standards Act, specifically the amounts provided for by sections 40, 45 and 46, and 58 of the *Employment Standards Act* for each plaintiff for the duration of his or her employment with the defendant up to 30 September 2017.
> 2. Severance pay pursuant to s. 63 of the Act for those plaintiffs to whom paragraphs 14 and 15 of part 1 of this Notice of Civil claim apply.

[18] The Employees argue that nothing in the *ESA* prevents them from advancing a claim for the tort of intimidation, and that the *ESA* does not specify a remedy for violation of s. 83 so they are entitled to seek a remedy from this Court.

Tsetsaut

[19] Tsetsaut denies the Lost Wages are, or severance pay is, owing. Further, Tsetsaut argues that the *ESA* provides a statutory scheme by which employees can pursue claims against an employer for statutory entitlements. This includes the Lost Wages and the severance pay. The proper route is a complaint made to the Director of Employment Standards, and in this case, the Employees failed to do so. Tsetsaut argues the Employees cannot make those claims in this Court, as the Court has no jurisdiction. Tsetsaut argues that this action is an attempt by the Employees to circumvent a six-month limitation period for making a complaint under the *ESA*.

[20] Tsetsaut denies it made any threat. It denies it breached s. 83 of the *ESA* or committed the tort of intimidation. In the alternative, if it did breach s. 83, the *ESA* is a complete codification of both the tort of intimidation and a mechanism to address allegations of threats to commit an act or use unlawful means, as between employers and employees. As such, the statutory remedy for such alleged conduct is a complaint to the Director of Employment Standards and this Court has no jurisdiction. In the further alternative, the claim for damages for the tort of intimidation should be dismissed as being based on a threatened breach of contract, which is not actionable.

Analysis

Appropriateness of summary trial application

[21] The Employees say there is a contested issue of fact: whether the Employees were told they would be fired if they made a complaint for the Lost Wages at the time they were asked to sign the application for the Variance. As such, they argue this Court cannot find the facts necessary to decide the summary trial application.

[22] Tsetsaut agrees there is conflicting evidence as to whether there were threats, but argues that this application can still be decided on a summary trial basis

because even if the Employees' allegations are accepted as true, this action, as a matter of law, cannot succeed.

[23] Rule 9-7(15) states:

> (15) On the hearing of a summary trial application, the court may
>
> (a) grant judgment in favour of any party, either on an issue or generally, unless
>
> (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
>
> (ii) the court is of the opinion that it would be unjust to decide the issues on the application,
>
> (b) impose terms respecting enforcement of the judgment, including a stay of execution, and
>
> (c) award costs.

[24] I conclude that this application raises issues that can be decided as a matter of law, and that it is suitable for a summary trial application. It is not necessary to make findings of contested facts to decide the issues, and it would not be unjust to decide the issues on the application. For the purposes of this application, I proceed on the assumption that the allegations of fact in the Employees' amended notice of civil claim are true, specifically that Tsetsaut threatened the employees that they would be fired if they made a complaint for the Lost Wages. I have also assumed the Lost Wages were owing (for a period prior to October 1, 2017) and severance pay was owing (from the March 2018 lay off).

ESA

[25] The *ESA* requires employers to pay overtime pay, statutory holiday pay, vacation pay, and severance pay, in accordance with the *Act*.

[26] The ESA also prohibits an employer from threatening to terminate an employee for making a complaint under the *Act*. Section 83 provides:

> 83 (1) An employer must not
>
> (a) refuse to employ or refuse to continue to employ a person,
>
> (b) threaten to dismiss or otherwise threaten a person,

> (c) discriminate against or threaten to discriminate against a person with respect to employment or a condition of employment, or
>
> (d) intimidate or coerce or impose a monetary or other penalty on a person,
>
> because a complaint or investigation may be or has been made under this Act or because an appeal or other action may be or has been taken or information may be or has been supplied under this Act.

[27] The *ESA* provides a mechanism through which employees may pursue claims for overtime, statutory holiday pay, vacation pay, and severance pay. That mechanism is a complaint to the Director of Employment Standards as provided by s. 74 of the *ESA*. A complaint relating to an employee who was terminated must be delivered within six months of the termination (s. 74(3)). Any award for wages that should have been paid is limited, in the case of a complaint, to those owing six months before the earlier of the date of the complaint or the termination of employment (s. 80(1)(a)).

[28] Section 79 of the *ESA* provides for remedies that may be ordered by the Director:

> 79 (1) If satisfied that a person has contravened a requirement of this Act or the regulations, the director may require the person to do one or more of the following:
>
> (a) comply with the requirement;
>
> (b) remedy or cease doing an act;
>
> (c) post notice, in a form and location specified by the director, respecting
>
> (i) a determination, or
>
> (ii) a requirement of, or information about, this Act or the regulations;
>
> (d) pay all wages to an employee by deposit to the credit of the employee's account in a savings institution;
>
> (e) employ, at the employer's expense, a payroll service for the payment of wages to an employee;
>
> (f) pay any costs incurred by the director in connection with inspections under section 85 related to investigation of the contravention.

> (2) In addition to subsection (1), if satisfied that an employer has contravened a requirement of section 8 or 83 or Part 6, the director may require the employer to do one or more of the following:
>
> (a) hire a person and pay the person any wages lost because of the contravention;
>
> (b) reinstate a person in employment and pay the person any wages lost because of the contravention;
>
> (c) pay a person compensation instead of reinstating the person in employment;
>
> (d) pay an employee or other person reasonable and actual out of pocket expenses incurred by him or her because of the contravention.
>
> [Emphasis added.]

ESA case law

[29] In *Macaraeg v. E Care Contact Centers Ltd.*, 2008 BCCA 182, leave to appeal ref'd [2008] S.C.C.A. No. 293, the Court considered whether the employee plaintiff was entitled to enforce her statutory right for overtime under the *ESA* through a civil action. The Court at para. 77 rejected "the broad proposition that rights granted by employment standards legislation are implied terms of employment contracts".

[30] The Court analyzed the statutory enforcement scheme within the *ESA* and concluded:

> [101] The proper analysis begins with *Orpen* [*v. Roberts*, [1925] S.C.R. 364]: did the legislators intend that conferred rights could be enforced by civil action? The answer to the question requires consideration of the legislation as a whole. If it affords effective enforcement of the rights, the general proposition, that statutorily-conferred rights are to be enforced not by court action, but by a statutory mechanism, applies. If the legislation does not afford effective enforcement, the exception to the general rule applies and the rights can be enforced in a civil action. The civil action will be based on recognized causes of action. In the case of rights conferred on employees through employment standards legislation, the rights will be implied terms of the employment contract and enforced through an action for breach of contract.
>
> [102] When a statute provides an adequate administrative scheme for conferring and enforcing rights, in the absence of providing for a right of enforcement through civil action expressly or as necessarily incidental to the legislation, there is a presumption that enforcement is through the statutory regime and no civil action is available.

> [103] In this case, the *ESA* provides a complete and effective administrative structure for granting and enforcing rights to employees. There is no intention that such rights could be enforced in a civil action.
>
> [Emphasis added.]

[31] In *Giza v. Sechelt School Bus Service Ltd. and Gould*, 2011 BCSC 669, (rev'd on other grounds, 2012 BCCA 18), the plaintiff brought a civil action for holiday pay under the *ESA*. Following *Macareag*, the Court stated:

> [71] The Court of Appeal addressed the rights of employees to recover sums payable under the *ESA* in the case of *Macaraeg v. E Care Contact Centers Ltd.*, 2008 BCCA 182. In that case, the court was considering a claim for unpaid overtime, rather than unpaid statutory holiday pay.
>
> [72] The court held, as set out in para. 104, that the former employee was not entitled to enforce her statutory right to overtime pay in a civil action, and that the exclusive jurisdiction to determine such claims lies with the Director of Employment Standards, subject to an appeal to the Tribunal, all pursuant to the provisions of the *ESA*.
>
> [73] The Court of Appeal considered the terms of the *ESA*, and they are the same terms which apply at present. The Court of Appeal concluded that the *ESA* provides an adequate administrative scheme for conferring and enforcing rights, and the legislation did not intend that such rights could be enforced in a civil lawsuit.
>
> [74] Both the overtime pay provisions and the statutory holiday pay provisions of the *ESA* are subject to the same administrative scheme.
>
> [75] Mr. Giza argued that his claim for statutory holiday pay was different from a claim for overtime, and that the Macaraeg case was not applicable. However, the reasoning of the Court of Appeal applies to claims for statutory holiday pay just as it does for overtime pay. The Court of Appeal concluded that the rights in the *ESA* can be enforced only through that *Act*, and not through a civil claim. The remedy available under that *Act* is limited to the period six months before the end of the employment, and in fact, Mr. Giza's claim for that period has been fully satisfied.

[32] This conclusion was upheld by the Court of Appeal:

> [52] I agree with the judge that this Court's decision in *Macaraeg* is a complete answer to the appellant's claim for statutory holiday pay. In *Macaraeg*, this Court concluded that the *Employment Standards Act* contained a complete procedure for enforcing rights granted by that legislation. In the context of this case, holiday pay is such a right.

Severance pay

[33] In my view, *Macaraeg* and *Giza* are a complete answer to the Employees' claim for severance pay. Severance pay is subject to the same administrative scheme as overtime and holiday pay. The same reasoning applies to prevent the Employees from advancing a claim for statutory severance pay under the *ESA* in a civil action. The exclusive jurisdiction to determine that claim is through the complaint process pursuant to the provisions of the *ESA*. The claim for severance pay is dismissed.

Claim for breach of s. 83

[34] The Employees' allegation of a threat, specifically that they were told they would be fired if they sought to enforce their rights to the Lost Wages accrued prior to the Variance, fall squarely within s. 83.

[35] Following *Macaraeg*, the inquiry is whether the legislature intended the rights in s. 83 to be enforced in a civil action rather than through the enforcement mechanism provided under the *ESA*. This requires a consideration of whether the *ESA* provides an effective remedy and enforcement mechanism for a breach of this right.

[36] The statutory scheme for enforcement of a breach of s. 83 is the same as that provided for breach of other rights such as overtime. Further, s. 79(2) provides additional remedies for breach of s. 83.

[37] The nature of the remedies available under s. 79 was discussed in *Re Tricom Services Inc.* (27 October 1998), BC EST #D485/98, a decision of the BC Employment Standards Tribunal. The tribunal noted at para. 11 that:

> The section gives the Director the means to put an employee as close as possible to the position she would have been in if the contravention had not taken place.

[38] In *Re Krausz* (23 October 2017), BC EST # RD112/17, the Tribunal referred at para. 38 to s. 79 of the *ESA* as the "make whole" remedy the purpose of which is to:

> …as far as is reasonably possible, return the employee – at least in an economic sense – to the position the employee would have been in had the contravention not occurred….

[39] The Employees argue that the *ESA* does not provide a remedy for breach of s. 83 and that therefore they are entitled to bring an action in this Court. I do not agree. Section 79 specifically provides remedies for breach of s. 83.

[40] The Employees also argue that s. 83 is "only effective when the threat doesn't work". In this case the threat worked, the Employees did not make a complaint within six months, and therefore the court should assume jurisdiction because there is no effective remedy under the ESA. I do not accede to this argument. As discussed above, there is an effective remedy and enforcement mechanism under the *ESA*. The purpose of s. 83 is to protect employees who are vulnerable. There is another safeguard within the *ESA* to protect employees who want to make a complaint; there is some ability to safeguard the name of a complainant (s. 79).

[41] The acceptance of the Employees' argument could result in an unequal and unpredictable application of s. 83 and the jurisdiction of this Court – those who were silenced by the threat would argue s. 83 does not apply and the court has jurisdiction; and those who were not silenced would fall within s. 83 along with the argument that the Director has exclusive jurisdiction to determine the complaint. The court's jurisdiction cannot be determined by whether a threat is effective.

[42] The reasoning in *Macaraeg* applies to allegations of breach of s. 83. I find the *ESA* provides a complete and effective administrative structure for enforcing rights under s. 83, and that an alleged breach of these rights cannot be enforced in a civil action. The claim for breach of s. 83 is dismissed.

Tort of intimidation

[43] The Employees assert an independent tort, the tort of intimidation, which is separate from breach of s. 83 of the *ESA*. This is a different situation from *Macaraeg* where the plaintiff was seeking to enforce a statutorily-conferred right in a civil action. The Employees argue that s. 118 of the *ESA* permits them to assert this independent common law claim. That section states:

> Subject to section 82, nothing in this Act or the regulations affects a person's right to commence and maintain an action that, but for this Act, the person would have had the right to commence and maintain.

[44] The Court in *Macaraeg* said this of s. 118:

> [97] In my view, this section addresses actions to enforce rights that exist apart from the provisions of the *ESA*; that is, rights a party could enforce regardless of the *ESA*. The section does not open the door to civil actions to enforce rights conferred by the statute.

[45] The Employees argue that the Director cannot award damages for the tort of intimidation, although the measure of damages they are seeking is the Lost Wages.

[46] Tsetsaut submits that the tort of intimidation in the employment context has been fully codified in s. 83 of the *ESA*. Alternatively, Tsetsaut argues that even if not codified in s. 83, the tort of intimidation does not arise on the facts pled. It argues that even if it is assumed that the Employees' allegations are true – that is, that they were threatened they would be fired if they made a complaint – the tort of intimidation is not established as it does not apply to a threat to breach a contract.

[47] In *Tran v. University of Western Ontario*, 2015 ONCA 295 at para. 23, the Court summarized the tort of intimidation:

> [23] The tort of intimidation requires: a threat by the defendant to commit an unlawful act; an intention by the defendant that injury will result to the plaintiff; submission to the threat by the plaintiff; and actual damage suffered by the plaintiff: *Kisin v. Netron*, 2000 CarswellOnt 1149, at para. 23 (S.C.), see also *Roehl v. Houlahan* (1990), 75 O.R. (2d) 482, leave to appeal to S.C.C. refused, [1990] S.C.C.A. No. 518 and *Central Canada Potash Co. v. Saskatchewan*, [1979] 1 S.C.R. 42. ….

[48] In *Central Canada Potash Co. Ltd. v. Saskatchewan*, [1979] 1 S.C.R. 42, the Court held that an independent tort of intimidation is not established when a party to a contract asserts what it reasonably considers is its contractual right.

[49] At 87-88, the Court stated:

> …Here the appellant is a party to the contract which it says was threatened to be breached, *i.e.* the lease, and would have been entitled to pursue its contractual remedies had that contract been illegally breached.
>
> On this point, I am in agreement with the view expressed by the author of *Winfield and Jolowicz* on *Tort* (10th ed.) p. 458, as follows:
>
> > It is submitted, therefore, that the two-party situation is properly distinguishable from the three-party situation and that it does not necessarily follow from *Rookes v. Barnard* that whenever A threatens B with an unlawful act, including a breach of his contract with B, he thereby commits the tort of intimidation. In fact the balance of advantage seems to lie in holding that where A threatens B with a breach of his contract with B, B should be restricted to his contractual remedies. The law should not encourage B to yield to the threat but should seek to persuade him to resist it. If he suffers damage in consequence he will be adequately compensated by his remedy in damages for breach of contract, as his damage can scarcely be other than financial. Where, however, what is threatened is a tort, and especially if the threat is of violence, it is both unrealistic to insist that proceedings for a *quia timet* injunction afford him adequate protection against the consequences of resistance and unreasonable to insist that if violence is actually inflicted upon him he is adequately compensated by an award of damages thereafter. The view is preferred, therefore, that although A commits the tort of intimidation against B where he threatens B with violence or perhaps with any other tort, no independent tort is committed when all that is threatened is a breach of contract.
>
> In my opinion the tort of intimidation is not committed if a party to a contract asserts what he reasonably considers to be his contractual right and the other party, rather than electing to contest that right, follows a course of conduct on the assumption that the assertion of right can be maintained.
>
> I am also of the view that if the course of conduct which the person making the threat seeks to induce is that which the person threatened is obligated to follow, the tort of intimidation does not arise….
>
> [Emphasis added.]

[50] Counsel advised they were unable to locate any relevant case law where the tort of intimidation was alleged in an employment situation such as this. Counsel for the Employees argues that *Central Canada Potash* is distinguishable as it involved a

government and a large corporation, whereas this involves an employment situation where there is unequal bargaining power.

[51] Tsetsaut's alleged threat engages both contractual and statutory rights.

[52] At common law, an employer can generally terminate an employment contract without cause. An employee who is dismissed without cause is generally entitled to notice or pay in lieu of notice. The employee may enforce that right through a civil action for breach of contract for wrongful dismissal. If Tsetsaut had carried out the threat and terminated the employment contracts, and did not give adequate notice or pay in lieu, the Employees could have sought a remedy through a civil action.

[53] The *ESA* provides a statutory right not to be terminated for pursuing statutory entitlements (s. 83). As discussed above, I find it provides an adequate remedy and enforcement mechanism for such a breach.

[54] While *Central Canada Potash* addressed a contractual relationship, and this case involves both a contractual relationship and statutory rights arising from that contractual relationship, in my view the same reasoning applies. There is no compelling reason to extend the tort of intimidation to a threatened breach of an employment contract where both a civil action for breach of contract for wrongful dismissal and the statutory remedies conferred by the *ESA*, afford the Employees an adequate remedy. I find that the tort of intimidation is not established in this situation and that the circumstances of this case fall within the exception in *Central Canada Potash*.

[55] The Employees' claim for the tort of intimidation is dismissed.

Disposition

[56] The Employees' action is dismissed. The statutory claims for severance pay and breach of s. 83 cannot be enforced by civil action. The *ESA* provides a complete and effective code for enforcement, and the exclusive jurisdiction to hear

those claims is through the complaint process pursuant to the *ESA*. The claim for the independent tort of intimidation is dismissed. Assuming without deciding that the threat pled is true, the tort of intimidation is not established as there are already effective remedies for such a threat.

[57] If necessary, the parties may make submissions on costs in writing through the registry within the next 30 days.

"Norell J."