COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Gardezi v. Positive Living Society of British Columbia,* 2018 BCCA 84

Date: 20180223
Docket: CA44894

Between:

Shella Gardezi

Appellant
(Petitioner)

And

The Positive Living Society of British Columbia, Ross Harvey, Alexandra Regier, Canadian Union of Public Employees, Local 3495

Respondents
(Respondents)

Before: The Honourable Madam Justice Garson
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated October 20, 2017 (*Gardezi v. Positive Living Society of British Columbia*, 2017 BCSC 1883, Vancouver Registry S1510156).

Oral Reasons for Judgment

Appearing on her own behalf:	S. Gardezi
Counsel for the Respondent, Canadian Union of Public Employees, Local 3495	M. Shapiro
Place and Date of Hearing:	Vancouver, British Columbia February 21, 2018
Place and Date of Judgment:	Vancouver, British Columbia February 23, 2018

Summary:

The respondent labour union applies for security for costs of the appeal. The union says the appeal lacks merit. It also says it will struggle to recover costs if successful on appeal. Held: Application granted. The appellant's financial means are limited. She has failed to pay costs awarded against her in related proceedings. The union demonstrated that recovering costs of the appeal will be difficult if the union succeeds, raising a presumption in favour of costs. Although the appeal is not necessarily bound to fail, the appellant failed to rebut this presumption by showing the appeal has obvious merit.

Introduction

[1] **GARSON J.A.**: The Canadian Union of Public Employees, Local 3495 ("Union"), one of the respondents to the appeal, applies for an order pursuant to s. 24 of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77, requiring the appellant to post security for the costs of the appeal in the amount of $2,352. The Union says Ms. Gardezi's appeal has no merit. It also submits that recovering costs of the appeal will be difficult, particularly in light of Ms. Gardezi's failure to satisfy previous costs orders made against her.

[2] The underlying proceeding is an appeal of a judicial review of two orders of the British Columbia Human Rights Tribunal (the "Tribunal") dismissing Ms. Gardezi's human rights complaints as untimely. The Tribunal concluded in its first decision, found at 2015 BCHRT 143, that her complaint was late-filed and that it was not in the public interest to accept the complaint under s. 22(3) of the *Human Rights Code*, R.S.B.C. 1996, c. 210 [*Code*]. This decision was affirmed on Ms. Gardezi's application for reconsideration (2015 BCHRT 163). A Supreme Court judge dismissed her petition for judicial review of the Tribunal's decisions (2017 BCSC 1883).

[3] There is also a related proceeding arising from Ms. Gardezi's unsuccessful complaint to the British Columbia Labour Relations Board ("LRB") alleging that the Union had breached its duty of fair representation pursuant to s. 12 of the *Labour Relations Code*, R.S.B.C. 1996, c. 244. Ms. Gardezi was ordered to pay security for costs of the appeal of the order dismissing her petition for judicial review of the LRB order. She has not paid the security for costs and her appeal remains stayed.

Factual Background

[4] The underlying appeal as well as the related LRB judicial review proceeding arises out of the termination of Ms. Gardezi's employment by the respondent, the

Positive Living Society of British Columbia (“Employer”), in 2014.

[5] On March 19, 2014, Ms. Gardezi filed a bullying and harassment complaint against her Employer. The Employer retained an independent investigator to investigate her complaints. In a report dated June 13, 2014, the investigator concluded that Ms. Gardezi’s complaints were unsubstantiated, and the Employer terminated her employment on June 17, 2014.

[6] The Union grieved the termination. On September 26, 2014, the Union informed Ms. Gardezi that it had entered into a settlement agreement with the Employer on her behalf. The agreement did not include reinstatement of her employment. On October 29, 2014, the Union’s appeal committee upheld the settlement agreement and it was finalized on November 5, 2014.

The Labour Relations Board Proceedings

[7] On November 3, 2014, Ms. Gardezi filed a complaint with the LRB. She alleged that the Union had breached its duty of fair representation under s. 12 of the *Labour Relations Code*. The LRB dismissed the complaint on March 14, 2015. On June 18, 2015, Ms. Gardezi’s application for leave and reconsideration of the LRB’s decision was dismissed. The background circumstances underlying the LRB proceeding are the same as those that underlie the Human Rights Tribunal proceeding.

[8] Ms. Gardezi sought judicial review of the LRB’s reconsideration decision but was unsuccessful (see 2016 BCSC 421). Ms. Gardezi appealed the order dismissing her application for judicial review. On June 17, 2016, Justice Fenlon ordered Ms. Gardezi to post security for the costs of her appeal in the amount of $1,800 (“2016 Order”) (*Gardezi v. Canadian Union of Public Employees, Local 3495* (June 17, 2016), CA43571). A division of this Court dismissed Ms. Gardezi’s application for review of Fenlon J.A.’s order on November 14, 2016 (see 2016 BCCA 462). Ms. Gardezi sought leave to appeal the order affirming the 2016 Order of Fenlon J.A. to the Supreme Court of Canada. Leave was refused with costs to the respondents on April 13, 2017 ([2017] S.C.C.A. No. 16). Ms. Gardezi says she intends to appeal to an international forum.

[9] Ms. Gardezi has not paid the costs of the judicial review of the LRB proceedings, now taxed at $3,696. She has not paid the costs of the unsuccessful

appeal to the Supreme Court of Canada, which have been taxed at $1,047.

The Human Rights Tribunal Proceedings

[10] On April 22, 2015, almost six months after filing the LRB complaint, Ms. Gardezi filed a complaint with the Tribunal alleging discrimination on the basis of mental disability by the Employer, the Union, and two of the Employer's employees. She alleged that the Employer terminated her employment on the basis of her mental disability and that the Union failed to support her in her bullying complaint, suspension, and termination because of its perception that she has a mental disability.

[11] On September 11, 2015, the Tribunal dismissed Ms. Gardezi's complaints in reasons found at 2015 BCHRT 143 ("Original Decision"). The Tribunal concluded that Ms. Gardezi's allegations were late-filed and declined to exercise its jurisdiction to accept them.

[12] The Tribunal summarized Ms. Gardezi's complaint as follows:

> [23] A sets out her complaint in a 15-page chronology of events covering the time span September 5, 2013 to April 7, 2015. Some of the entries contain only contextual information. In summary, A alleges that the Society discriminated against her by discrediting her feelings and her bullying complaint based on the Society's perception that she had a mental illness. Further, the Society allowed other employees to treat her poorly, did not deal with her complaints and failed to recognize its duty to accommodate her. Her allegations against the individual Society employees are similar and further allege that they said that she impacted the safety and well-being of others which was stigmatizing for her. She specifically alleges that being suspended during the investigation of her complaint had an adverse impact on her.
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> [24] A's allegations against the Union are that she did not receive support from the Union to help her keep her job and therefore she lost her job. She alleges that the amount of gossiping by Union executives caused her to lose her sense of dignity. She alleges that Union members alleged that she was mentally ill, that she was physically violent without any evidence and that two female co-workers and Union members stated that A should be removed for the members' protection. A alleges that the Union socially isolated her on the grounds that she was intimidating. A co-worker and Union member told the employer that she could not support or represent A because of [the co-worker's] perception of A's "mental instability". The incidents referred-to in this portion of A's complaint concern the period of time related to the investigation and the termination. The actual dates of the allegations against the Union in A's chronology span the time period March 3, 2014 to September 28, 2014.

[13] Section 22 of the *Code* provides that complaints must be filed within six months of the alleged contravention or within six months of the last alleged instance of a continuing contravention. The Tribunal may accept all or part of a late-filed complaint if it determines that it would be in the public interest to do so and no substantial prejudice would result to anyone because of the delay: *Code*, s. 22(3).

[14] As I said, Ms. Gardezi filed her complaint on April 22, 2015. As a result, allegations of contraventions occurring before October 22, 2014, were late-filed unless they formed part of a continuing contravention that continued after October 22, 2014. The Tribunal concluded that there was no continuing contravention of the *Code*. It found that events referred to in the complaint that occurred after October 22, 2014, could not, if proved, constitute a contravention of the *Code.*

[15] The Tribunal held that it would not be in the public interest to accept Ms. Gardezi's late-filed complaint. Most of her complaints were at least four months late-filed, which the Tribunal considered to be a "lengthy" delay. The Tribunal rejected Ms. Gardezi's argument that her delay was justified because she was waiting for the LRB to issue its decision. The Tribunal noted that she had filed other complaints under the *Code* and could be "presumed to be knowledgeable about its time limitations": para. 40.

[16] Ms. Gardezi also argued that she did not receive evidence revealing the existence of a potential human rights complaint until after October 22, 2014. She said this late-acquired evidence justified her delay in filing a complaint with the Tribunal. The Tribunal noted that the discovery of new information does not restart the clock for the time limit for filing complaints, but rather is a factor in determining whether it would be in the public interest to accept a late-filed complaint under s. 22(3).

[17] The Tribunal said the late-acquired evidence in this case did not justify the acceptance of Ms. Gardezi's late-filed complaints. The Tribunal did not accept that Ms. Gardezi was unaware of grounds for a discrimination complaint prior to October 22, 2014. The Tribunal found at para. 42 that Ms. Gardezi:

> … was aware that she may have grounds for a complaint and, indeed, did file an internal complaint of bullying and harassment [on March 19, 2014] due to a perception of mental disability.

[18] On September 14, 2015, Ms. Gardezi requested reconsideration of the Tribunal's decision. The Tribunal issued its reconsideration decision, found at 2015 BCHRT 163, on October 27, 2015 ("Reconsideration Decision"). The Tribunal found that Ms. Gardezi had failed to show procedural unfairness justifying reconsideration of its Original Decision.

[19] On December 8, 2015, Ms. Gardezi filed a petition for judicial review seeking to set aside the Tribunal's Original Decision and Reconsideration Decision.

Reasons for Judgment on Judicial Review

[20] Ms. Gardezi appeals the order of Madam Justice Burke, pronounced October 20, 2017, dismissing her application for judicial review of the Tribunal's decisions. The chambers judge's reasons are found at 2017 BCSC 1883.

[21] The chambers judge's reasons noted that, under s. 32(q) of the *Code*, the applicable standard of review for the Tribunal's decisions is found in s. 59 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45.

[22] As the decision to accept a late-filed complaint under s. 22 of the *Code* is discretionary, the chambers judge concluded that the applicable standard of review under s. 59 of the *Administrative Tribunals Act* was patent unreasonableness. She also noted that the question of whether a continuing contravention of the *Code* exists is a question of fact or a matter involving a discretionary decision.

[23] On the application for judicial review, Ms. Gardezi maintained that information revealing the basis for her complaint did not come to light until October 23, 2014. She said her original bullying complaint, filed March 19, 2014, contained no reference to mental illness and could not be relied on as evidence of her awareness on that date of discrimination on the basis of mental disability. She also maintained that events occurring after October 22, 2014, amounted to instances of a continuing contravention. She argued that the Tribunal provided no reasons for rejecting her position in this regard.

[24] The chambers judge concluded that the Tribunal's decision was not patently unreasonable. She found that Ms. Gardezi was aware of possible grounds for a

complaint before she received additional disclosure on October 23, 2014. The chambers judge reiterated the Tribunal's finding that Ms. Gardezi had "filed an internal complaint of harassment due to a perception of mental disability" on March 19, 2014: para. 36. The chambers judge also relied on the following passage from Ms. Gardezi's complaint:

> In October I received a letter and three emails that revealed the extent to which mental illness played a role in the adverse treatment I received. Although I was aware of discrimination, I did not have enough evidence of grounds.
>
> [Emphasis added.]

[25] The chambers judge found that the Tribunal provided adequate reasons for rejecting the existence of a continuing contravention arising out of the forwarding of emails in March 2015. The Tribunal had explained that this allegation was unconnected to a protected ground or statement of adverse impact, making the forwarding of the emails incapable of amounting to a contravention of the *Code*. The chambers judge held that this conclusion was not patently unreasonable.

[26] The chambers judge also briefly addressed the Reconsideration Decision, noting that Ms. Gardezi had not identified anything improper in that decision.

[27] The chambers judge awarded costs to the respondents.

The Application for Security for Costs

[28] The jurisdiction to order security for the costs of an appeal is found in s. 24(1) of the *Court of Appeal Act*. Importantly, on such an application, it is the appellant who bears the burden of showing why security is not required: *Creative Salmon Company Ltd. v. Staniford*, 2007 BCCA 285 at para. 9 (Chambers).

[29] This Court generally considers five factors in determining whether to make an order for security for costs of the appeal. The first factor is the appellant's financial means. If ordering security for costs would prevent the appellant from pursuing a meritorious appeal, it may not be in the interests of justice to make the order: *Zen v. M.R.S. Trust Company* (1997), 88 B.C.A.C. 198 (Chambers). However, the Court may require the appellant to post security for costs of the appeal even if obtaining the funds would be difficult: *D. Bacon Holdings Ltd. v. Naramata Vines Inc.*, 2010 BCCA 427 at para. 21 (Chambers).

[30] The second factor is whether the costs of the appeal will be readily recoverable if the respondent succeeds. If the applicant shows there is a serious question that recovery may be difficult, a presumption in favour of granting security for costs arises, unless the appellant can demonstrate the appeal has obvious merit: *Edwards v. Moran*, 2003 BCCA 443 at para. 14 (Chambers); *Sangha v. Azevedo*, 2005 BCCA 125 at para. 6 (Chambers).

[31] The third factor is the timing of the application for security. Because the appeal is usually stayed until security is posted, injustice would result if the respondent applied for security for costs on the eve of the appeal: *M.(M.) v. F.(R.)* (1997), 43 B.C.L.R. (3d) 98 at 101 (C.A. in Chambers).

[32] The fourth factor is the merits of the appeal. If the appeal is "virtually hopeless" or "bound to fail", security for costs may be ordered even if the order prevents the appellant from pursuing the appeal: *Jenkins v. Swallow Frames & Cycles Ltd.* (1997), 97 B.C.A.C. 81 at paras. 5, 7 (Chambers); *Freshway Specialty Foods Inc. v. Map Produce LLC*, 2006 BCCA 592 at para. 14 (Chambers). On the other hand, the Court will not order security for costs if it would prevent the appellant from pursuing a meritorious appeal: *Creative Salmon Company Ltd.* at para. 12.

[33] The fifth and ultimate factor is whether the order for security for costs would be in the interests of justice: *Lu v. Mao*, 2006 BCCA 560 at para. 6 (Chambers).

Application

[34] Turning to Ms. Gardezi's financial means, she deposes that she has insufficient income or assets to post security for costs. In her submissions on this application she says she will not be able to pursue her appeal if she must post security.

[35] Ms. Gardezi has full-time employment earning net income (after taxes) of $2,600 per month. She has credit card debt totaling about $14,000. She also deposes that her rent is $896 per month. Her only asset is a car of minimal value.

[36] In reasons for the 2016 Order in the LRB proceeding, Fenlon J.A. observed that Ms. Gardezi had few financial means. Since that time, Ms. Gardezi's income and expenses appear to have changed little. I am satisfied, as was Fenlon J.A.,

that an order for security for costs may well preclude Ms. Gardezi from pursing her appeal.

[37] I am also satisfied, however, that the Union will have difficulty recovering its costs of this appeal if it is successful. In her reasons for the 2016 Order, Fenlon J.A. similarly concluded that the material supported a finding that recovery of costs would probably be difficult for the respondents. Ms. Gardezi's failure to pay previous costs awards supports such a conclusion in this application.

[38] This application has been made in a timely manner before any significant steps have been taken on the appeal.

[39] I come to the merits stage of the analysis. Ms. Gardezi's application materials suggest that she will raise two primary grounds of appeal: (a) the Tribunal erred in finding that she was aware of the existence of a complaint for discrimination on the grounds of mental disability prior to receiving disclosure of additional information on and after October 23, 2016; and (b) the Tribunal erred in finding that no continuing contravention took place after October 22, 2014. In my view, there is no obvious merit to this appeal, particularly given the deferential standard of review usually applicable to discretionary decisions like this one. I have set out the evidence in some detail, but nothing has been drawn to my attention that would seem to support the arguments made by Ms. Gardezi – at least not on this application.

[40] I conclude that the interests of justice weigh in favour of the respondents on this application. The Union has shown there is a serious question that recovering costs will be difficult, which raises a presumption in favour of ordering security for costs. Although I am not prepared to say the appeal is bound to fail, Ms. Gardezi has not rebutted the presumption by showing obvious merit in the appeal.

[41] The Union seeks security for costs in the amount of $2,352. I accept that this amount is significant to Ms. Gardezi. In an effort to balance Ms. Gardezi's interests in pursuing the appeal with the interests of the respondents, I would order that Ms. Gardezi post a lesser amount than that sought by the Union. I order that she post $1,500.

[42] In accordance with the usual practice in this Court, as described in *The Pitt Polder Preservation Society v. The District of Pitt Meadows*, 1999 BCCA 593 at

para. 5 (Chambers), I would stay the appeal until Ms. Gardezi has posted the requisite security.

“The Honourable Madam Justice Garson”