

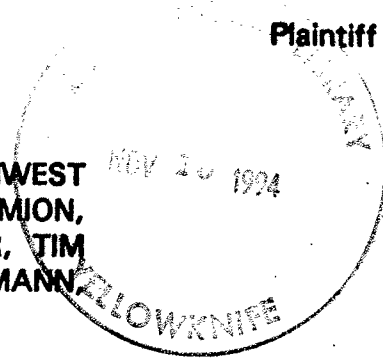
IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

ERNEST WILFRID KUICH

- and -

THE COMMISSIONER OF THE NORTHWEST TERRITORIES, ELLEN ALEXIE, HOLLIS DIMION, BRENDA DOHEY, SHARON GAIRDNER, TIM HOBSON, RUTH LAFFERTY, LORI SCHUMANN DOUG SOROFF and LINDA WALTON



Plaintiff

Defendants

Motion to strike out the statement of claim allowed in part in respect of the plaintiff's claims against the defendant Commissioner of the Northwest Territories but dismissed, as premature, in respect of the plaintiff's remaining claims.

Heard at Yellowknife on March 21st 1994

Judgment filed: May 7th 1994

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE M.M. de WEERDT

Counsel for the Plaintiff: Ms. Shirish Chotalia

Counsel for the Defendant Brenda Dohey: Ms. Karen Shaner

Counsel for the Defendants Commissioner of the Northwest Territories and the Individual Defendants: Cayley J. Thomas

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

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TERRITORIES, ELLEN ALEXIE, HOLLIS DIMION,
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HOBSON, RUTH LAFFERTY, LORI SCHUMANN,
DOUG SOROFF and LINDA WALTON

Defendants

REASONS FOR JUDGMENT

The defendants move the Court to grant an order striking out the plaintiff's statement of claim on grounds that it discloses no cause of action against them or, in the case of the defendant the Commissioner of the Northwest Territories, that the cause of action pleaded is barred by virtue of a collective agreement between the plaintiff's collective bargaining representative and the Commissioner; and on the further ground that the plaintiff's action is frivolous, vexatious or otherwise an abuse of the Court's process.

2 The defendants other than the Commissioner rely, in addition, on the ground that any statement made by any of them as alleged in the statement of claim is protected by privilege.

3 The plaintiff seeks damages under various heads in his prayer for relief in the statement of claim, together with declaratory relief and an order reinstating the

plaintiff to his former position in the public service under the **Public Service Act, R.S.N.W.T. 1988, c. P-16** (as amended). The damages claimed are for breach of his contract of employment under the Act, as well as for the torts of defamation, conspiracy and inducing breach of contract, including special and exemplary damages, in all totalling over \$420,000.

4 Rule 124A. (1) of the **Rules of Court**, on which the defendants rely, reads as follows:

124.A. (1) The court may at any stage of proceedings order to be struck out or amended any pleading in the action, on the ground that

- (a) it discloses no cause of action or defence, as the case may be, or
- (b) it is scandalous, frivolous or vexatious, or
- (c) it may prejudice, embarrass or delay the fair trial of the action, or
- (d) it is otherwise an abuse of the process of the court,

and may order the action stayed or dismissed or judgment to be entered accordingly.

5 The expression "cause of action", though not specifically defined by the **Rules of Court** or in the **Judicature Act, R.S.N.W.T. 1988, c. J-1**, has been held to mean the factual basis entitling one to judicial redress or relief at law or in equity: **Kiewit Management Ltd. v. Northwest Territories (Commissioner)**, [1992] N.W.T.R. 70 (S.C.) at p.71; and see **The Oxford Companion to Law** at p.193.

As in all such applications, it is necessary to examine the pleading under attack and to assume that the facts which are pleaded are, for purposes of the motion, true: *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441, 12 Admin. L.R. 16, 13 C.R.R. 287, 18 D.L.R. (4th) 481, 59 N.R. 1; *Hearn Stratton Construction Ltd. v. Northwest Territories (Commissioner)*, [1992] N.W.T.R. 107 (S.C.).

7

The allegations of fact made in the statement of claim are as follows:

1. The Plaintiff herein is a resident of the Town of Hay River, in the Northwest Territories as is each of the individual Defendants.
2. The First Defendant is the Commissioner of the Northwest Territories.
3. At all times material to this action, the individual defendants were employed by the first Defendant with the Department of Justice in the Corrections Division in the following positions:

the second defendant, Ellen Alexie, was employed as Childcare Worker III; the third defendant, Hollis Dimion was employed as a Childcare Worker II; the fourth defendant, Brenda Dohey, was employed as a Childcare Worker II, and thereafter she was a homemaker; the fifth defendant, Sharon Gairdner, was employed as a Childcare Worker III; the sixth defendant, Tim Hobson was employed as a Childcare Worker II; the seventh defendant, Ruth Lafferty, was employed as a Supervisor I; the eighth defendant, Lori Schumann was employed as a Supervisor I; the ninth defendant, Doug Soroff, was employed as a Manager of the Hay River Secure Centre; and the tenth defendant Linda Walton was employed as a childcare Worker III.

4. In or about November 1991, the Plaintiff was employed as a Child Care Supervisor in a permanent position with the said Department pursuant an employment contract with the First Defendant.
5. On or about September 8, 1993, the First Defendant constructively dismissed the Plaintiff by demoting him to a lower position without cause or notice.

6. At all times material to this action, the Defendants have breached, and have induced the breach, of the said employment contract.
7. Each of the individual Defendants wrongfully, unlawfully and maliciously conspired with one another to ruin the reputation of the Plaintiff at the Northwest Territories and to induce the First Defendant to breach the Plaintiff's contract of employment with it by dismissing him from or demoting him in his employ with it without cause or notice.
8. The individual Defendants together and in furtherance of their agreement sought out and exerted pressure on individuals employed with or previously employed with the First Defendant to make unjustified and untrue allegations about the conduct of the Plaintiff and pressured the First Defendant to dismiss the Plaintiff from its employ when they knew or ought to have known that such dismissal was not for cause and that injury would result. The predominant purpose of the said acts of the individual Defendants and the others named was to ruin the Plaintiff's reputation and to injure and damage the Plaintiff personally and in his employment particulars of which are provided herein.
9. As a result of the conspiracy of the Defendants in or about June and July, 1993, the First Defendant wrongfully demoted the Plaintiff without cause or notice and the Plaintiff has thereby suffered damages.
10. Under the terms of the Plaintiff's contract of employment with the First Defendant the Plaintiff received an annual income of \$52,176.00, a housing allowance, contributions to his pension plan, and other benefits particulars of which shall be proven at trial.
11. In or about July, 1993 and August 1993 the individual Defendants defamed the Plaintiff at his place of employment by insulting and abusing him, and more specifically falsely, maliciously, offensively, arbitrarily and expressly speaking and published of the Plaintiff, and of him, false and slanderous and libelous words particulars of which are set out in their statements to the First Defendant which are in the possession of the first Defendant.

The said slanderous and libelous words were published to Colin Gordon, Sylvia Haener, Ron McCagg, Bobbi Hamilton and Jim Kipling. They were further published by each of the individual defendants in the community of Hay River in or about July, 1993 to present.

12. That by the publication of such slanderous and libelous words, the individual Defendants intended to charge and to be understood as charging, and were by the receivers in fact understood as charging, among other things, that the Plaintiff was sexist, racist, perverted, incompetent and unfit to be employed by anyone.
13. The said accusations caused to be published are false and malicious.
14. At all times material to this action, the Defendants have intentionally inflicted the Plaintiff with mental suffering.
15. The acts of the Defendants, and each of them procured damage to the Plaintiff by his wrongful constructive dismissal of his employment, and by destroying the Plaintiff's future prospects of promotion. The Plaintiff suffered job demotion, loss of future prospects for promotion, emotional anxiety, loss of reputation, shame, and domestic unrest, and continues to suffer the same. The Plaintiff has suffered and continues to suffer from economic loss for reduction of wages, and pension, insurance and other employment benefits, insomnia, mental anguish, emotional trauma, injury to reputation, loss of employment and wages, marital trauma among other things. Particulars of the same will be provided at the trial of the action.
16. The First Defendant and its agents or employees have breached their duties of administrative fairness towards the Plaintiff and have acted in violation of the rules of natural justice in investigating allegations of sexual harassment against the Plaintiff, some particulars of which include:
 - a) They did not afford the Plaintiff a fair hearing to respond to the allegations;
 - b) Their decision to demote or dismiss the Plaintiff had been made prior to the date of the conclusion of the investigation;
 - c) They failed to maintain the confidentiality of the investigation;
 - d) They failed to give the Plaintiff adequate time to respond to the allegations;
 - e) They failed to conduct a fair investigation and failed to speak to relevant witnesses;

f) They failed to demote, discipline or dismiss employees who had clearly breached their duties towards the First Defendant.

17. Due to the arbitrary, unfair, malicious, and tortious practices of the Defendants the Plaintiff is entitled to a reasonable sum of about \$50,000.00 by way of exemplary or punitive damages.

8 A statement of claim will be struck out only in a clear case: *Inuit TapariSAT of Canada v. Canada (Attorney General)*, [1980] 2 S.C.R. 735, 115 D.L.R. (3d) 1, 33 N.R. 304. The remedy of striking out a pleading is exceptional and is to be granted sparingly: *Arctic Star Lodge (N.W.T.) Ltd. v. New Hampshire Insurance Company*, [1989] N.W.T.R. 131 (S.C.).

9 Paragraph 5 of the statement of claim alleges that the defendant Commissioner constructively dismissed the plaintiff on or about September 8th, 1993, by demoting the plaintiff to a lower position without cause or notice. The affidavit of Sylvia Haener sworn on March 3rd 1994 and filed on behalf of the defendant Commissioner, shows that the plaintiff has grieved the dismissal or demotion pursuant to Article 37 of the Collective Agreement which (I understand to be not in dispute) governs the terms of the plaintiff's employment in the public service by the defendant Commissioner pursuant to the **Public Service Act**. I take this to be a fact, though it is not pleaded in the statement of claim, since it is not contested on this motion and there is no affidavit material before the Court to show otherwise. It is to be noted that subrule 124A.(2) of the **Rules of Court**, excluding the use of affidavit material in applications based on clause 124A.(1)(a), does not make any mention of clauses 124A.(1)(b)(c) and (d) in that connection.

Article 37 of the Collective Agreement reads in part as follows:

ARTICLE 37

ADJUSTMENT OF DISPUTES

- 37.01 (1)** The Employer and the Union recognize that grievances may arise in each of the following circumstances: ...
- (b)** disciplinary action resulting in demotion, suspension or a financial penalty;
 - (c)** dismissal from the Public Service; and
 - (d)** letters of discipline placed on personnel file.
- 37.05** Except as otherwise provided in this Agreement a grievance shall be processed by recourse to the following steps:
- (a)** First Level (first level of management)
 - (b)** Second Level (second level of management)
 - (c)** Final Level (Minister of Personnel).
- 37.10** An employee may present a grievance at each succeeding level in the grievance procedure beyond the first level,
- (a)** where the decision or settlement is not satisfactory to him/her, within fourteen (14) calendar days after that decision or settlement has been conveyed in writing to him/her by the Employer; or
 - (b)** where the Employer has not conveyed a decision to him/her within the time prescribed in Article 37.10 within fourteen calendar days after the day the reply was due.

ARBITRATION

- 37.19** Where a difference arises between the parties relating to the interpretation, application or administration of this Agreement including any question as to whether a matter is arbitrable or where an allegation is made that a term or condition of this

Agreement has been violated, either of the parties may, after exhausting the grievance procedure in this Article, notify the other party in writing within twenty-one (21) days of the receipt of the reply at the Final Level, of his\her desire to submit the difference or allegation to arbitration under Section 43 of the Public Service Act.

37.21

- (1) The arbitrator has all of the powers granted to arbitrators under Section 12 of the Arbitration Act in addition to any powers which are contained in this Agreement. An arbitrator in a discipline case has the power to rescind, alter or amend the disciplinary decision including the ability to reinstate the grievor with full or partial compensation for lost wages, or the ability to award compensation in discipline or other alleged violations of the Collective Agreement. (emphasis in original)
- (2) The arbitrator shall hear and determine the difference or allegation and shall issue a decision and the decision is final and binding upon the parties and upon every employee affected by it.

37.25 Where an employee files a grievance against his/her dismissal from the Public Service, the provisions of Clause 37.19 apply.

37.26 In addition to the powers granted to arbitrators under Section 12 of the Arbitration Act the arbitrator may determine that the employee has been dismissed for other than proper cause and he/she may:

- (a) direct the Employer to reinstate the employee and pay to the employee a sum equal to his/her wages lost by reason of his/her dismissal, or such less sum as in the opinion of the arbitrator is fair and reasonable; or
- (b) make such order as he/she considers fair and reasonable having regard to the terms of this Agreement.

11

Section 12 of the Arbitration Act, R.S.N.W.T. 1988, c. A-5, states:

12. (1) Unless a submission expresses a contrary intention, an arbitrator or umpire acting under the submission may

- (a) administer oaths to the parties and witnesses;
- (b) state an award as to the whole or any part of the award in the form of a special case for the opinion of a judge; and
- (c) correct in an award any clerical error or error made accidentally or arising from an omission.

(2) An arbitrator or umpire may at any stage of the proceedings and shall, if so directed by a judge, state in the form of a special case for the opinion of a judge any question of law arising in the course of the reference.

12 It may be noted, in addition, that sections 3 and 26 of the **Arbitration Act** provide:

3. This Act applies to every arbitration under any Act whenever enacted as if the arbitration were pursuant to a submission, except insofar as this Act is inconsistent with the Act regulating the arbitration or with rules or procedure authorized or recognized by that Act.

26. Subject to sections 27 and 28, an award made by an arbitrator or by a majority of arbitrators or by an umpire is final and binding on all the parties to the reference and the persons claiming under them.

13 Furthermore, subsection 41(6) and section 43 of the **Public Service Act** remove any remaining doubt as to the effect in law of the Collective Agreement governing the plaintiff's employment. These provisions read as follows:

41. (6) A collective agreement made between the Minister and an employees' association is binding on the Government of the Northwest Territories, the employees' association and the members of the employees' association.

43. Where a collective agreement fails to provide for the determination of disputes arising out of the collective agreement during the term of the agreement without stoppage of work, those disputes shall be determined by means of arbitration pursuant to the **Arbitration Act**.

14 Although the legislation which applies in the present instance is not identical

to that which was held to govern in **Hodgson v. CBC**, [1990] N.W.T.R. 364 (S.C.), it is equally clear here that the appropriate legislative body has, by statute, ousted the jurisdiction of this Court to adjudicate the plaintiff's claim for damages for his alleged dismissal or demotion as held in **St. Anne Nackawic Pulp & Paper Co. v. C.P.U. Loc. 219**, [1986] 1 S.C.R. 704, 28 D.L.R. (4th) 1, 86 C.L.L.C. 14, 307, 73 N.B.R. (2d) 236, 184 A.P.R. 236, 68 N.R. 112 and **Oliva v. Strathcona Steel Mfg. Inc.**, [1987] 1 W.W.R. 730, 48 Alta. L.R. (2d) 193, 33 D.L.R. (4th) 499, 74 A.R. 46 (C.A.). **Hodgson v. CBC** was recently approved by the Ontario Divisional Court in **Ontario (Attorney General) v. Bowle**, [1993] O.J. No. 3138, in which a number of other judicial decisions in that province are cited.

15 The legislative ouster extends also to the plaintiff's claims that the defendant Commissioner joined in inducing the breach of contract which resulted in the plaintiff's dismissal or demotion and furthermore that he breached a duty of administrative fairness to the plaintiff in violation of the rules of natural justice in the investigation of allegations of sexual harassment made against the plaintiff. The latter claim is in any event subject to disposition under Article 50 of the Collective Agreement, which reads as follows:

ARTICLE 50

SEXUAL HARASSMENT

50.01 The Government of the Northwest Territories is committed to promoting a work environment which is *free* from sexual harassment. Every employee has the right to freedom from harassment in the workplace because of sex by his/her employer or agent of the employer or by another employee.

50.02 Sexual harassment is defined as any conduct, gesture or contact of a sexual nature that:

- (a) is likely to cause offence or humiliation; or
- (b) that might on reasonable grounds, be perceived by an employee as placing a condition of a sexual nature on employment or on any opportunity for training or promotion.

50.03 A grievance under this Article may be initiated at any step of the grievance procedure. Grievances under this Article will be handled with all possible confidentiality and dispatch.

16 The only claim made by the plaintiff in his statement of claim with respect to the defendant Commissioner which is not affected by the legislative ouster above mentioned is the claim of conspiracy. That claim is, quite clearly, not subject to the grievance procedure created by the Collective Agreement and is, accordingly, beyond the jurisdiction of any arbitration contemplated by that agreement or by the **Arbitration Act** and the **Public Service Act**.

17 With this last mentioned exception, the plaintiff's claims against the defendant Commissioner, as incorporated in the prayer for relief in the statement of claim, are struck out so as to leave only the claim for damages for conspiracy in paragraph 18(e). The claims thus struck out are an abuse of the process of this Court, having regard to the legislative ouster above mentioned, as contemplated by clauses 124A.(1)(a), (b), (c) and (d) of the **Rules of Court**.

18 The related allegations of fact in reference to the defendant Commissioner, as set out in the statement of claim, are however not struck out since they appear to underpin the claim made against that defendant, among the others, in respect of the

alleged conspiracy.

19 In response to demands made by the defendants for particulars of the statement of claim, the plaintiff has filed two statements in reply, the first of which merely alleges that the particulars sought by the defendants are within their knowledge and the second of which consists of a number of statutory declarations which do not take the form of pleadings and so cannot be regarded as particulars of the facts alleged in the statement of claim, being merely of a very general nature and thus failing completely to particularize those allegations for purposes of pleading the alleged facts as required by the Rules of Court. In consequence, these statements made in reply to the defendants' demands for particulars are of no assistance to the plaintiff in reference to the present motion.

0 It is apparent that the statement of claim in its present form lacks particularity as to the alleged conspiracy. However, that is a defect which is curable in the usual way in the course of the litigation. It does not need to result in the striking out now of those portions of the statement of claim which deal with that subject matter. I hold that the motion to strike is premature in the same fashion as was held to be the case in *Westfair Foods Ltd. v. Lippens Inc. et al.* (1987), 44 D.L.R. (4th) 145 at 157-8; [1987] 6 W.W.R. 629 at 642-3 (Man. Q.B.). Furthermore, there is merit in the position taken by Master Marriott in *Foundry Services Inc. v. Foundry Services (Canada) Limited* (1953) O.W.N. 1 (H.Ct.), to the effect that particulars are not to be ordered before discovery in a case where the plaintiff has filed affidavit material (as is the situation here, even if in the form of a supplementary reply to demands for particulars) to the effect that the plaintiff is not

at present in a position to furnish further or any particulars, these being in any event within the knowledge of the defendants. And see **Dixon v. Trust and Guarantee Co.** (1914), 5 O.W.N. 645.

21 The plaintiff's allegations of fact in support of his claim for damages for defamation are likewise defective in form. However, Rule 518 provides:

518. No pleading or other proceedings shall be defeated on the ground of an alleged defect of form.

22 The defendants other than the Commissioner nevertheless contend that the statement of claim is defective not only in form but also in substance with reference to the defamation claims and allegations of fact made by the plaintiff. And these defendants therefore move that all reference to those claims and allegations in the statement of claim be struck out pursuant to Rule 124A.(1) of the **Rules of Court**. Moreover, they urge that they are entitled to claim privilege in respect of any statements made by them to the defendant Commissioner in respect of alleged sexual harassment on the part of the plaintiff, having regard to Article 50 of the Collective Agreement. On that basis they urge the Court to strike out those portions of the statement of claim in accordance with the decision of this Court in **Poland v. Maitland**, unreported, January 24th 1994 (Court file CV 04899).

23 To these contentions the plaintiff retorts that he is alleging malice on the part of the defendants other than the Commissioner, with the result that the claim of privilege must yield if malice is shown. Furthermore, he says that he is in the same position, as

to particulars before discovery, on the defamation branch of his action as he is on the conspiracy branch.

24

Poland v. Maitland was a defamation action in which a member of the Royal Canadian Mounted Police was claiming damages against a person who had lodged a complaint against him under the **Royal Canadian Mounted Police Act, R.S.C. 1985, c. R-10**, the complaint having been determined, after official investigation, to be unfounded. The defendant claimed absolute privilege. In striking out the statement of claim, Richard J. of this Court cited the case of **Boyachyk v. Dukes (1982), 37 A.R. 199 (Q.B.)** at p.205, where absolute privilege in a similar case under Alberta legislation was recognized.

25


In the present instance it appears that one or more of the defendants other than the Commissioner may have made a statement or statements alleging sexual harassment or other conduct in breach of the Collective Agreement, as a result of which action was taken on behalf of the Commissioner to demote the plaintiff from his then position in the public service under the **Public Service Act**. It is too early to say, on the material before the Court, that the alleged statements would have been made necessarily on an occasion of absolute privilege, as was held in **Poland v. Maitland**. It is, at this stage in the litigation, not yet clear if that was the case here or if the occasion in question was one merely of qualified privilege, so that malice (if shown) may render the privilege nugatory.

26

The motion is therefore dismissed as being premature with reference to the plaintiff's claims based on alleged inducement of breach of contract, conspiracy and defamation. However, it succeeds in respect of all other claims against the

Commissioner, including the claims to declaratory relief and an order of reinstatement of the plaintiff to his former position in the public service.

In view of the result, the costs of this motion are reserved until the trial, if there is one. If not, the parties are at liberty to apply.



M.M. de Weerd
J.S.C.

Yellowknife, Northwest Territories
May 6th, 1994

Counsel for the Plaintiff: Ms. Shirish Chotalia

Counsel for the Defendant
Brenda Dohey: Ms. Karen Shaner

Counsel for the Defendants
Commissioner of the
Northwest Territories and
the Individual Defendants: Cayley J. Thomas

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