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Always Measure Twice: City Failed to Provide Evidence for Statutory Defence

Beardwood v. Hamilton (City), 2023 ONCA 436

The appellant broke his leg having fallen off his motorcycle on a roadway in the City of Hamilton ("City"). The appellant filed an action against the City for damages, the trial judge at the Superior Court of Justice was satisfied that the two-prong *Fordham v. Dutton Dunwich (Municipality)*, 2014 ONCA 891 ("*Fordham*") test was satisfied. Despite this, the appellant's action was dismissed, as the trial judge found that the City had established a defence under s. 44(3)(c) of the *Municipal Act, 2001 ("Act")* finding the City not liable for failing to keep a highway in a reasonable state of repair as minimum maintenance standards ("MMS") established under the *Act* were met. The appellant appealed.

HELD: Appeal is granted, trial judge order is set aside.

DISCUSSION: The MMS provides a municipality a statutory defence if a surface discontinuity on a roadway is less than or equal to 5cm. The appellant's expert witness, who had not taken measurements but rather reviewed photographs from the scene which had a ruler placed against the uneven pavement was the only witness to testify to the discontinuity heights. The expert witness provided that the ruler in the photographs depicted height range between 3.8-5cm however, the expert opinion was that the height range was 3.5-5.5cm. The trial judge accepted this evidence, finding that even if the range provided by the photographs (3.8-5cm) or the expert witness' average of 4.5cm was accurate it was still below 5cm and therefore the City was not responsible for damages.

The Court of Appeal held that trial judge committed a palpable and overriding error and set the order aside. The approach of relying on the photographs or taking an average of the expert witness' range was deeply flawed, speculative and amounted to guesswork. The trial judge erred in accepting evidence as depicting accurate measurements in the absence of testimony of the individual who took the photograph. Furthermore, the City still had an obligation to prove the surface discontinuity was less than 5cm, the appellant's expert witness did not relieve the City of its onus. The City failed to provide evidence to establish the establish the height of the discontinuity that caused the appellant's accident. Thereby, the Court of Appeal held that the City failed to meet its onus of proving it was entitled to a statutory defence under s. 44(3) of the

Act. Appeal is granted, and the trial judge's order is set aside.

Responding Openly, Accurately and Completely to Freedom of Information Requests

City of Charlottetown (Charlottetown Police Services) (Re), 2023 CanLII 62781 (PE IPC)

An applicant filed a records request under the *Freedom of Information and Protection of Privacy Act,* R.S.P.E.I. 1988, Cap. F-15.01 ("*Act*") for correspondence from four employees at the City of Charlottetown Police Service. Three of the employees provided records to be disclosed to the applicant, but one employee ("Employee #1") indicated there were no records in his position to be provided to the applicant. The applicant requested a review as to whether an adequate search was completed by the police service.

HELD: The police service failed to complete an adequate search.

DISCUSSION: The police service, a public body, has a duty to respond to all record requests openly, accurately, and completely and bear's the onus to establish that such a reasonable search has been conducted. The applicant's argument was that Employee #1 should have at least one email, presenting the information and privacy commissioner ("commissioner") with evidence of an email that was forwarded to that employee. The commissioner requested information from the police service to demonstrate why it believed a reasonable search was conducted, or reference to internal policies that were followed for the search. The police service provided no response. The commissioner had no option but to find that the police service, a public body, did not meet their burden under the *Act* to establish it had conducted an adequate search. In addition to the establishment of a new internal policy for records management, the commissioner ordered the police service to search the records of all employees mentioned in the records request, including electronic and paper records, at no cost to the applicant and to be disclose to the applicant within 40 days.

City's Duty to Accommodate During Interviews: Physical and Mental Disabilities

Dorman v. City of Kamloops, 2023 BCHRT 62

The complainant applied for a promotion at the City of Kamloops ("City") that required computer testing prior to the interview. In response to the requirement, the complainant filed an application under the *Human Rights Code ("Code")* alleging that the City discriminated against him based on his physical and mental disability when it refused to accommodate him on the computer test. The City denies discrimination and sought to have the application dismissed.

HELD: Application dismissed.

DISCUSSION: Under s. 27(1)(b) and s. 27(1)(c) of the *Code* the onus is on the complainant to demonstrate that he has a characteristic protected from discrimination, that he has experienced an adverse impact with respect to an area protected by the *Code*, and the protected characteristic was a factor in the adverse impact. It is the City's position that the complainant had not alleged facts that if proven, would establish that he had a physical disability that adversely impacted his ability to take a computer test. The complainant failed to demonstrate any connection between a physical disability and the alleged adverse impact of not getting an interview. The Tribunal held that a physical disability without a connection between that disability and adverse impacts does not satisfy the test under s. 27(1)(b). Despite dismissing the application under this section, the Tribunal still proceeded to review s. 27(1)(c). Under this section the complainant had to demonstrate that his evidence takes the case out of the realm of conjecture.

The Tribunal considered the evidence before it and found there was a reasonable prospect the complainant would succeed at a hearing, *Workers' Compensation Appeal Tribunal v. Hill,* 2011 BCCA 49. The complainant successfully argued that the City failed to accommodate him by failing to allow him to forgo the computer test, or to take a course prior to the computer test.

While there is no freestanding duty to accommodate, the Tribunal noted that it is triggered once an employer knows or should have known that the employee is experiencing a disability-related impact. Prior to taking the computer test, the complainant advised Human Resources that the test was giving him "anxiety". The complainant produced medical evidence that referenced his anxiety and depression and the Tribunal found that this provided some evidence that his mental disability existed at the time of the job competition. The complainant then suffered adverse impacts of missing out on a promotion when the City removed him from the job competition for failing to take the computer testing, and it was his mental disability that impacted his ability to take the computer testing. The Tribunal was satisfied that this removed the application out of the realm of conjecture. However, the Tribunal dismissed the complaint of discrimination under s. 27(1)(b).

Stormwater Management System Included with Home Purchase

Channell v. Vaughan (City), 2023 ONSC 4045

The applicants purchased a home in the City of Vaughan ("City") without conducting a home inspection. Upon moving in, they were surprised to find a 54 square foot Ditch Inlet Manhole ("DIMH") in their backyard. The DIMH is an integral part of the City's storm water management system and is relied on by other properties in the neighbourhood for drainage. The applicant's sought a declaration that the DIMH is owned by the City, and an easement be registered on title to allow the City their right to access and maintain the DIMH. The City sought to dismiss the application.

HELD: Application dismissed.

DISCUSSION: It is the applicant's position that the DIMH is a City asset and a critical component of the City's storm water management system and is not something a private property owner is expected to maintain or be liable. The City disagreed. The City submitted that it bears no responsibility for the DIHM, relying on the Subdivision Agreement and a City By-law. The Subdivision Agreement explicitly provides that all sewer infrastructure on private property will not be assumed by the City and will become the private property of the lot owner on which it is located. Furthermore, the City passed a By-law that it will not assume responsibility for any storm drainage structures on private property regardless of whether the structure services multiple lots and or private or public drainage. The Court agreed with the City, finding that it should not be responsible for the applicant's negligence in purchasing the property without a home inspection. The Court is satisfied that the Subdivision Agreement contemplated drainage structures on private property, and that it would remain the responsibility of the owner of the property and that the City By-law explicitly provides that it would not assume any storm drainage structure that was on private property. While other cities may retain control over infrastructure such as DIHM, this Court had no jurisdiction to mandate the City to expropriate the structure and assume responsibility for it. The Court found the DIMH was on the applicant's private property, application dismissed.

Former CFO Wrongful Dismissal Claim Dismissed Against City

Mema v. Nanaimo (City), 2023 BCSC 1189

The Plaintiff, the former Chief Financial Officer at the City of Nanaimo ("City") was terminated in May 2018 for using his City credit card ("P-Card") for questionable purchased, including personal expenses as high as $14,000.00 and $1,300.00 while on vacation in Cancun, Mexico. The Plaintiff filed a notice of civic claim for unlawful termination, wrongful dismissal, and a breach of good faith. The City sought a summary judgement.

HELD: Plaintiff's claim is dismissed.

DISCUSSION: The City's position was that the claim should be dismissed on summary judgment because the notice of civic claim was out of time. Section 152 of the *Community Charter*, S.B.C. 2003, c. 26 which deals with the termination of officers, and section 735 of the *Local Government Act,* R.S.B.C. 2015, c. 1 ("*Act*") which deals with all actions against a municipality for unlawful

doings, permits a shortened six-month limitation period for claims against municipalities. The Plaintiff claimed that the City's P-Card Agreement and Policy did not absolutely preclude the use of the P-Card for personal expenses, submitted that no accounting staff (ie. his staff) followed up with him regarding his personal charges, and no one told him to stop. Furthermore, the Plaintiff submitted that the six-month limitation period would not apply to unlawful termination flowing from the alleged procedural failures of the City, *Gringmuth v. North Vancouver (District),* 2002, BCCA and *Pausche v. British Columbia Hydro & Power Authority and District of Maple Ridge*, 2002 BCCA 62.

Upon reviewing the evidence, the Court was satisfied that the City complied with the requirements of the Management By-law when it terminated the Plaintiff for cause. The Court found that the six-month limitation period provided under section 735 of the Act applies to the Plaintiff's unlawful termination claim, the allegation of non-compliance with the City's statutory procedural requirements for termination, as well as the wrongful dismissal claim, which is connected to the termination issue. The shortened limitation period applies, and the Court dismissed those portions of the Plaintiff's claim in their entirety. The Court noted that the limitation period does not apply to the allegations regarding breach of good faith, whether these allegations are true and if damages should be awarded is something a trial would decide.

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