

SUPREME COURT OF NOVA SCOTIA

Citation: Dalhousie University v. Aylward, 2010 NSSC 65

Date: 20100223

Docket: Hfx No. 293141

Registry: Halifax

Between:

Dalhousie University

Plaintiff

v.

Professor Carol Aylward

Defendant

Judge:

The Honourable Chief Justice Joseph P. Kennedy

Heard:

October 22, 2009 in Halifax, Nova Scotia

Final Written

Submissions:

November 2, 2009

Written Decision:

February 23, 2010

Counsel:

Brian G. Johnston, Q.C. and Rebecca Saturley
for the Plaintiff/Applicant, Dalhousie
Craig M. Garson, Q.C. for the Defendant, Aylward

By the Court:

[1] This is an application brought by the plaintiff, Dalhousie University, seeking summary judgment against the defendant, Professor Carol Aylward.

[2] Dalhousie's action is based on breach of contract. Professor Aylward has counter-claimed alleging abuse of process.

BACKGROUND

[3] Professor Aylward has been employed at the Dalhousie Faculty of Law since 1991. She is black. She has twice complained to the Nova Scotia Human Rights Commission alleging that her employer, Dalhousie, has discriminated against her based on race, colour and gender.

[4] The first complaint (Complaint #1) was filed on March 18, 2004. That complaint was resolved prior to a hearing by a settlement agreement entered into between the parties in July of 2005. Professor Aylward also signed a "release" collateral to the agreement.

[5] This settlement agreement provided that Professor Aylward would be elevated to the rank of associate professor and would be paid a sum of money by way of general damages.

[6] It contained a "confidentiality clause" which prevented the parties from publishing or communicating any of the terms of the agreement.

[7] Eventually Professor Aylward sought to be promoted to the level of full professor. This did not happen. As a result, on August 23, 2007, Professor Aylward filed a second complaint (Complaint #2) with the Commission against Dalhousie and others, including Dean Phillip Saunders of the Law School. Again she alleged discrimination because of race and/or colour.

[8] Dalhousie and Dean Saunders filed Responses to Complaint #2 and Professor Aylward replied filing Rebuttals to those Responses. These Rebuttals are central to this action. They disclose terms of the July 2005 settlement agreement.

[9] On February 21, 2008, Dalhousie became aware that Professor Aylward had published the Rebuttals on her web page. Dalhousie asked Professor Aylward to remove the settlement agreement content from her Rebuttals and from the website. She refused to do so. Dalhousie commenced this action alleging breach of contract.

[10] Specifically, it claims a breach of the confidentiality term of the settlement agreement.

[11] Dalhousie wants this Court to declare that Professor Aylward has breached the settlement agreement and that the agreement remains valid.

[12] Further, Dalhousie has asked for a permanent injunction providing that Professor Aylward remove the impugned materials from the Rebuttals filed with the Commission and from the website.

[13] Finally, it seeks nominal damages of \$1.00.

[14] Professor Aylward has filed a Defence and Counterclaim. She does not deny putting terms of the settlement agreement into her Rebuttals and on her website, however, she claims to have been justified in so doing.

[15] She says that Dalhousie and Dean Saunders first breached the confidentiality clause by reviewing her file after the settlement agreement and then by misrepresenting the terms of the settlement agreement in their Responses to Complaint #2.

[16] Additionally, Professor Aylward claims that her Rebuttals became public documents once provided to the Commission and she therefore was entitled to publish.

[17] Finally, Professor Aylward also pleads absolute privilege and qualified privilege with respect to the disclosure of the settlement agreement terms.

[18] By the counterclaim Professor Aylward alleges that Dalhousie, by starting this action, has committed the tort of abuse of process in that the action is motivated by an ulterior or improper purpose (to dissuade her from proceeding with Complaint #2).

THE TEST FOR SUMMARY JUDGMENT

[19] This application is brought pursuant to *Nova Scotia Civil Procedure Rule 13.04* which reads:

13.04 Summary judgment on evidence

- (1) judge who is satisfied that evidence, or the lack of evidence, shows that a statement of claim or defence fails to raise a genuine issue for trial must grant summary judgment.
- (2) The judge may grant judgment for the plaintiff, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
- (3) On a motion for summary judgment on evidence, the pleadings serve only to indicate the laws and facts in issue, and the question of a genuine issue for trial depends on the evidence presented.
- (4) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.
- (5) A judge hearing a motion for summary judgment on evidence may determine a question of law, if the only genuine issue for trial is a question of law.
- (6) The motion may be made after pleadings close.

[20] The law in relation to summary judgment has been considered often in this province; the test is clear. In *MacNeil v. Bethune*, 2006 NSCA 21, Justice Roscoe, for the Nova Scotia Court of Appeal, set out the test:

[21] As stated in *Selig v. Cooks Oil Company Ltd.*, 2005 NSCA 36, it is a two part test:

[10] ... First the applicant, must show there is no genuine issue of fact to be determined at trial. If the applicant passes that hurdle, then the respondent must establish, on the facts that are not in dispute, that his claim has a real chance of success.

[21] Once the applicant for summary judgment is able to show there is no issue of material fact requiring trial, the respondent cannot simply raise allegations to resist summary judgment. Rather, the respondent must lead evidence which, if proven at trial, establishes that it has a real chance of success.

[22] The changes resulting from the implementation of the new *Nova Scotia Civil Procedure Rules* (2009) do not materially impact the previous jurisprudence in this province with respect to summary judgment, however, there are certain issues which have been clarified.

[23] First, the test that the applicant for summary judgment must satisfy has been changed to “no genuine issue for trial” rather than the previous “no arguable issue to be tried” test under old the *Nova Scotia Civil Procedure Rules*, (1972), however the standard remains the same. The “no genuine issue for trial” test is the same one articulated by the Ontario *Rule 20.04(2)(a)*.

[24] Secondly, summary judgment is no longer a discretionary remedy. Under *Rule 13.04(1)*, if the motions judge is satisfied that there is “no genuine issue for trial” summary judgment must be granted.

[25] Each side must put its “best-foot-forward” with respect to the existence or non-existence of material issues to be tried. *CPR 13.04(4)* requires that the respondent provide evidence in favour of that party’s claim. In the *Annotated Nova Scotia Civil Procedure Rules* by Professor Rollie Thompson, the author notes at p. 115:

An important new provision is *Rule 13.04(4)*, which requires the responding party to provide “evidence in favour of the party’s claim or defence” by various means. If this rule is read broadly, in practice it should produce the same effect as Ontario’s much more explicit “best-foot-forward” requirement in its *Rule 20.04(1)*: a responding party “may not rest on the mere allegations or denials of the party’s pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial”. In any event, the Supreme Court of Canada seems to have read this requirement into summary judgment generally, in a recent appeal from Alberta: *Canada (Attorney General) v. Lameman*, 2008 SCC 14.

[26] In this case, Dalhousie is asking not only that summary judgment be granted in its favour but that Professor Aylward’s counterclaim be dismissed.

[27] Under *CPR 13.02* a motion for summary judgment may be brought to dismiss a “counterclaim”, which is included for the purposes of *Rule 13* in the definition of “statement of claim”.

ARGUMENT

[28] Dalhousie says no material facts are in dispute. There is no “genuine issue of fact for trial”.

[29] Rather, the only factual dispute is the characterization, the proper meaning, of two words that are used in the Responses filed by Dalhousie and Dean Saunders in Complaint #2.

[30] The following facts are not disputed:

- (a) Complaint #1 was settled; it did not proceed to a Board of Inquiry for hearing and decision. The terms of that settlement are described in the settlement agreement.
- (b) The settlement agreement was executed by Professor Aylward on July 4, 2005, by Dalhousie and the other named respondent parties on August 9, 2005 and by the Nova Scotia Human Rights Commission on August 12, 2005.
- (c) The settlement agreement provided that the terms of the settlement were confidential.
- (d) Professor Aylward admits having put terms of the settlement agreement in her Rebuttals filed in Complaint #2 and then putting the Rebuttals online.

[31] Dalhousie submits that Professor Aylward’s defence of justification does not show any “real chance of success at trial”.

[32] It says there is no evidence of justification for Professor Aylward’s breach provided by Dalhousie’s or Dean Saunders’ Responses, rather Professor Aylward’s suggestion of justification is based on her having misinterpreted two words

(“coincidence” and “grant”) used in the Responses made by Dalhousie and Dean Saunders to Complaint #2.

[33] Professor Aylward counters that there is dispute as to material facts to the extent that various inferences may be drawn from the acknowledged facts.

[34] Professor Aylward’s position is this: yes she put terms of the settlement agreement in her Rebuttals and on the web as part of the publication of her Rebuttals, however, she was justified in so doing, therefore, a trier of fact might conclude that she did not breach the confidentiality clause and did not breach the contract.

[35] Professor Aylward claims that she does have a “real chance of success”. Her claim of “justification” is central to this argument.

[36] She submits that she has been the victim of discrimination and has a right (in fact an obligation) to put terms of the settlement agreement on the web.

[37] She says that Dalhousie, by misrepresenting the terms of the settlement agreement in its Responses to her second complaint, had first breached the terms of the settlement agreement and it is therefore open to her to disregard the confidentiality provisions of that agreement.

[38] Professor Aylward is specific about her claim of justification. She says that the following paragraph from the Response of Dalhousie misrepresented the settlement agreement (p. 7, para. 34):

In July 1999, the complainant was awarded tenure, and was promoted to Associate Professor, effective July, 2001, following a review of her file coincident with the settlement of a human rights complaint, described in paragraph 54 and following.

[emphasis added]

[39] Professor Aylward submits that this statement suggests, by the use of the word “coincident”, that it was a term of the settlement agreement that her file be reviewed subsequent to the agreement in assessing her suitability for promotion when, in fact, the agreement provided for an unconditional promotion.

[40] This, says Professor Aylward, is a misrepresentation of the terms of the agreement that justifies her disclosure of terms in her Rebuttals.

[41] Dalhousie submits that it did not either communicate or misrepresent the terms of the settlement agreement to either the Commission or to Professor Aylward when it used the term “coincident” in its Response dated October 15, 2007.

[42] It did not say that a review was required by, or resulted from, the settlement agreement, as alleged by Professor Aylward.

[43] It is acknowledged that the settlement agreement did not contemplate a review of Professor Aylward’s file and, in fact, Dalhousie says it did not conduct any such review following this settlement agreement.

[44] Professor Aylward was granted tenure “as a result of” the execution of the settlement agreement.

[45] As to its use of the word “coincident”, Dalhousie points out that for it to agree to the terms of the settlement agreement, that is to agree to settle Complaint #1, it had to satisfy itself as to the appropriateness of the terms.

[46] Because the settlement agreement required that she be promoted, Professor Aylward’s file was reviewed “coincident with the settlement of her human rights complaint” - Dalhousie’s President, Dr. Traves, took part in this file review prior to his approval of the settlement agreement.

[47] In order to assess whether this was a prudent bargain for Dalhousie to enter into in the circumstances, it conducted a review of Professor Aylward’s file coincident with the settlement of her human rights claim and not after the settlement agreement was executed by the parties, not as a result of the agreement.

[48] Dalhousie used the word “coincident” in its Responses to mean “at the same time as” or “contemporaneously”; thus, Dalhousie says the word “coincident” accurately described the actions taken by Dalhousie in relation to determining if it could be a party to the settlement agreement - its use does not disclose any term of that agreement.

[49] An excerpt from Professor Aylward's discovery examination illustrates that Professor Aylward's interpretation of the word "coincident" is that it means "subsequent to":

- Q. Okay. So what definition of the word "coincident" would allow you to say that the University had fabricated that statement?
- A. Oh, that implies that they did a review as a result of a term of the settlement agreement. I think any reasonable person reading that would come to that conclusion.
- Q. Do you think that maybe reasonable people reading that might have come to a conclusion a little different than as a result of ... namely, occupying the same area or space ... or happening at the same time?
- A. Well I guess if there are 20 definitions, then that word is capable of conforming to any one of those definitions.

(Traves' affidavit, Exhibit A, p. 82)

[50] Dalhousie submits, Professor Aylward's position, that "coincident" means "subsequent" or "after" is an untenable position and cannot be supported by any acceptable definition or usage of the word. It has provided the following definitions:

1. ***Coincident*** ... *Occupying the same place 1656; exactly contemporaneous 1598; in exact agreement, wholly consonant with 1563 ... (W. Little, C.T. Onions, The Shorter Oxford English Dictionary on Historical Principles, Vol. I "A-M" (Oxford: Clarendon Press, 1933) at p. 339)*
2. ***co•in•ci•dent*** ... *adj. 1. Occupying the same area in space or happening at the same time. 2. Being very similar to another, as in nature. 3. Matching point for point; coinciding (Canadian Dictionary of the English Language: An Encyclopedic Reference (ITP Nelson, 1998) at p. 271)*
3. ***co•in•ci•dent*** ... *adjective 1. occurring together in space or time. 2. (foll. by with) in agreement; harmonious ... (K. Barber, Ed., Canadian Oxford Dictionary, 2nd ed. (Oxford University Press, 2004) at p. 298)*

4. **coincident** ■ *adj.* 1. occurring together in space or time. 2. in agreement or harmony ... (C. Soanes & A. Stevenson, Eds., *Concise Oxford English Dictionary*, 11th ed. (Oxford University Press, 2004) at p. 279)
5. **coincide** ... *v.i.* to correspond in detail; to happen at the same time; to agree (in opinion) **-coin'cident** ... occupying the same space; agreeing; simultaneous ... (Collins Westminster Dictionary (London: Collins, 1960) at p. 103)
6. **co•in•ci•dent** ... *adj.* ... 1. occupying the same space or time < ~ events> 2. of similar nature : HARMONIOUS <a theory ~ with the facts> *syn see* CONTEMPORARY ... (Webster's New Collegiate Dictionary (G. & C. Merriam Co., 1977) at p. 218)
7. **coincident** *adj.* 1. occurring together in space or time. 2. (foll. by with) in agreement; harmonious. (A. Bisset, Ed., *The Canadian Oxford Paperback Dictionary* (Oxford University Press, 2000) at p. 181)
8. **co•in•ci•dent** ... *adj.* 1. coinciding; occurring at the same time. 2. taking up the same position in space at the same time. 3. in exact agreement; identical : as, a hobby coincident with one's vocation. (D. Guralnik, Ed., *The 100,000 Entry Edition Webster's New World Dictionary* (Toronto: Nelson, Foster & Scott Ltd., 1971) at p. 146)
9. **coincide** ... *v.* 1. to occur at the same time, his holidays don't coincide with hers. 2. to occupy the same portion of space. 3. to agree; our tastes coincide, are the same.
- ...
- coincident** ... *adj.* coinciding. (J. Hawkins, Ed., *The Oxford Paperback Dictionary*, 2nd ed. (Oxford University Press, 1984) at p. 119)
10. **co•in•ci•dent**
adjective
1. occurring at the same time
 2. taking up the same position in space at the same time
 3. in agreement; similar or identical where desire and need are coincident ...

*(Your Dictionary.com, online:
<<http://www.yourdictionary.com/coincident>>
(date accessed October 20, 2008))*

11. ***coincident*** ... adjective ...

1. : of similar nature ; HARMONIOUS <a theory coincident with the facts>

2. : occupying the same space or time <coincident events>

*(Merriam-Webster, Merriam-Webster Online Dictionary, online:
<<http://www.merriam-webster.com/dictionary/coincident>> (date
accessed: October 20, 2008))*

12. ***coincident*** ...

ADJECTIVE: 1. Occupying the same area in space or happening at the same time: a series of coincident events ... 2. Being very similar to another, as in nature: testimony that was coincident with the actual facts. 3. Matching point for point; coinciding: coincident circles.

(The American Heritage Dictionary of the English Language, 4th ed. (2000), online: <<http://www.bartleby.com/61/59/C0465900.html>> (date accessed: October 20, 2008))

[51] Thus, Dalhousie submits that Professor Aylward's "reasonable person" suggestion - that a reasonable person would consider "coincident" to mean "subsequent" is not reasonable at all. Simply put, the "subsequent to" definition of "coincident" is not correct.

[52] A sampling of dictionary definitions, "coincident" means:

Occurring together in space or time; in agreement with; harmonious -

[53] The word "coincident" is at issue here, however, Dalhousie submits that there is no accepted or known definition of the word "coincident" that encompasses the ideas of "after" or "subsequent to".

[54] There are no facts to suggest that Dalhousie reviewed Professor Aylward's file after the settlement agreement was executed.

[55] There are no facts to suggest that either Dalhousie or Dean Saunders misstated terms of the settlement agreement in the Responses.

[56] Dalhousie says it used the word in accordance with its plainly understood meaning.

[57] I am satisfied Professor Aylward's position that Dalhousie discussed terms of the agreement and misrepresented the terms in its Responses is not based on any facts shown. It is founded, rather, on her misunderstanding of the word "coincident".

[58] A trier of fact, using the correct definition of "coincident", would not find that Dalhousie's use of the word in its Responses was disclosure of, or misrepresentation of, the terms of the settlement agreement. The "justification" suggested by Professor Aylward based on her interpretation of the word "coincident" is not sustainable on the facts before me. Her claim of justification based on Dalhousie's use of that word would have no real chance of success at trial.

[59] Professor Aylward's second suggestion of justification based on misrepresentation of the terms of the settlement agreement in Dalhousie's and Dean Saunder's Responses to Complaint #2 relates to the use of the word "grant" or "granted".

[60] By way of example, in Dean Saunders' Response of October 2008: "Since grant of tenure in 1999 (with promotion in 2001)".

[61] Professor Aylward says that the term "grant" is a mis-statement of the terms of the settlement agreement. In para. 39 of her Rebuttal she states:

39. The Respondent Saunders states here that I was "granted" promotion in 2001 even though the Respondent Saunders knows for a fact that I was not "granted" promotion in 2001 by a Tenure and Promotion Committee but as a CONDITION of the Agreement in settlement of my previous human rights complaint. He knew

this because as incoming Dean he was responsible for signing off on the Settlement Agreement on behalf of the then Respondent Dalhousie Law School. What this means in practical terms is that the published book was not considered by any Tenure and Promotion Committee prior to the 2006 Committee which recommended that I be granted promotion to Full Professor.

[62] Professor Aylward suggests that the word “grant” necessarily indicates that promotion was as a result of review. Specifically, she asserts that Dean Saunders and Dalhousie, by using the term “grant”, are indicating that a review of her file was undertaken pursuant to s. 16 of the Collective Agreement, Dalhousie replies that Article 16 pertains to the promotion process as agreed between Dalhousie and the Dalhousie Faculty Association and applies to applications for promotion in the normal course.

[63] This process was not used in the promotion of Professor Aylward. The facts, which are not in dispute, make clear that Professor Aylward was not promoted pursuant to the application of Article 16 but, rather, was promoted as a result of the execution of the settlement agreement.

[64] Dalhousie says that even though her promotion did not go through the usual process of review by the Tenure Committee, she was still “granted” a promotion. The word “granted” does not suggest review subsequent to the settlement agreement. It does not suggest promotion pursuant to the process under the Collective Agreement.

[65] Again I agree that neither Dalhousie nor Dean Saunders disclosed or misrepresented the terms of the settlement agreement by the use of the word “grant”.

[66] The word “grant”, as used in the Responses, conveys that she was given a promotion. Nothing more can be properly inferred from the use of the word.

[67] Professor Aylward’s submission that the word “granted” suggests subsequent review is likewise a misinterpretation of a word and does not constitute contested material fact.

[68] This is not an inference that can properly be drawn from the use of the word in the Responses.

[69] I conclude that Professor Aylward's interpretation of the Responses of Dalhousie and Dean Saunders to be, again, untenable and her suggestion of justification to be again unsupportable by any evidence produced on this application.

[70] The separation agreement is a contract. It contains the requisite elements of offer acceptance and consideration. Its validity as such is not disputed.

[71] I am satisfied that the settlement agreement prohibited the publishing of its terms. The settlement agreement contains an express confidentiality provision. At para. 5 it states:

The Complainant, Respondents and the HRC agree and undertake that the terms of the settlement herein are strictly private and confidential matters between and among the Complainant and the Respondents and it is agreed and undertaken by them that neither the Complainant, Respondents, nor HRC, shall in any way publish or communicate, directly or indirectly, personally, or through any agent, the terms of the said settlement, except that HRC may report, other than via media publicity, the fact of the settlement, but not its terms, in its annual report, in its internal publications, and in its communications with other Human Rights agencies. (Traves' Affidavit, para. 12, Exhibit A, Release at p. 2)

[72] Similarly, the Release provided that Professor Aylward was prohibited from publishing or communicating the terms of settlement:

AND I HEREBY AGREE that I will keep strictly private and confidential and will not publish or communicate, directly or indirectly, personally, or through any agent, the terms of settlement. (Traves' Affidavit, para. 12, Exhibit A, Release at p. 2)

[73] I am satisfied that Professor Aylward, contrary to the confidentiality provision of the settlement agreement, did put certain of the terms of that agreement in her Rebuttals filed in Complaint #2 and then published those terms as contained in those Rebuttals online. She acknowledged that she did so.

[74] The terms of the separation agreement so published are:

- (a) Professor Aylward was promoted as a result of the execution agreement; and
- (b) that Professor Aylward received a monetary sum.

[75] I am satisfied that by referring to terms of the settlement agreement in her Rebuttals and then publishing those terms on her website, Professor Aylward breached the confidentiality clause in the agreement - she breached the contract.

[76] I agree with the applicant that there is no “genuine issue of fact” to be determined at trial.

[77] As to the defence having a “real chance of success”, I find that Professor Aylward’s claim of justification is grounded in a misunderstanding of the proper meaning of these two words.

[78] Nothing set out in the Responses by Dalhousie and Dean Saunders suggests a subsequent review of her file after the signing of the agreement but before the promotion. Dalhousie says no such subsequent review took place.

[79] The claim of justification is not based on any facts presented by Professor Aylward.

[80] Professor Aylward has not shown that there could be inferences in support of her defence that can be drawn from the facts before this Court.

[81] The defence of justification is not real.

[82] I find that based on the evidence put forward, Professor Aylward’s defence of justification has no “real chance of success at trial”.

PUBLIC DOCUMENTS

[83] Alternatively Professor Aylward argues that there was nothing to preclude her from placing the Rebuttals on her website because these documents have been filed before the Commission and were therefore in the public domain.

[84] At discovery (p. 88 of the transcript) she characterized her Rebuttals as:

... public documents because they are responses to a Human Rights complaint. They can be sought through **Freedom of Information**; they can be disclosed through requirements by law; they can be put on a website. Which is what I did. Because that's a public space.

[85] The settlement agreement did allow for the possibility of disclosure in the event of a successful FOIPOP (*Freedom of Information and Protection of Privacy Act*) application, but no such application has been made with respect to the settlement agreement.

[86] Any FOIPOP application would involve adherence to the request and disclosure procedures under the *Act*. Such an application could be made to either Dalhousie or to the Commission. Dalhousie would have opportunity to make a decision on such a request (if the application was made to Dalhousie) or respond (if the application was made to the Commission) on how any such application would affect its interests. The FOIPOP process is properly considered a restricted one, and a Rebuttal submitted to the Commission would not be a "public document" that any member of the public could access without process and decision.

[87] I find this claim of public document has no validity. It has no "real chance of success". It ignores the requirement of a successful FOIPOP application before these materials could be made public.

PRIVILEGE

[88] Professor Aylward has further pleaded the defence of absolute privilege. She claims that there is an absolute privilege with respect to materials filed with the Commission.

[89] Absolute privilege provides protection to communications made by certain individuals in certain limited circumstances. If absolute privilege attaches to the communications, the individual making them is protected from liability in civil proceedings. The main categories of absolute privilege are generally said to be:

- (1) statements made in the course of judicial or quasi-judicial proceedings or in any of the associated documents, such as pleadings and affidavits (also known as witness immunity);
- (2) statements made by one officer of state to another in the course of official duties;
- (3) parliamentary proceedings and official parliamentary reports; and
- (4) fair and accurate newspaper or broadcast reports of court proceedings.

[90] Professor Aylward appears to be claiming witness immunity. The core of witness immunity is well established. Essentially, an absolute privilege or immunity attaches to communications which take place during, incidental to, and in the processing and furtherance of, judicial or quasi-judicial proceedings.

[91] Even if Professor Aylward was able to claim absolute privilege she forfeited any such claim when she published the materials on the website.

[92] *G. (R.) v. Christison* (1996 CarswellSask 666 (Sask. Q.B.)) was a divorce/custody proceeding in which the father of the children and his second wife claimed that the mother and a child counsellor had wrongfully accused them of physical and sexual abuse and brought an action for libel and negligence.

[93] The child counsellor claimed absolute privilege as to her reports which were tendered in the Unified Family Court.

[94] The Court found that the counsellor would have been able to enjoy an absolute privilege with respect to these reports but continued (at para. 66):

... On the other hand, it is also absolutely arguable that this privilege was lost when Helene C. published them outside the boundaries of the court proceedings. This is true whether the Reports were to be considered those of an ordinary witness or an expert witness.

[95] The Court found that when the counsellor published her reports on unfounded allegations of alcoholism and physical abuse of children to social services, police and doctors, she forfeited her defence of absolute privilege.

[96] Absolute privilege is not a viable defence in this matter. Such claim has no “real chance of success”.

[97] As to qualified privilege, such is a defence that is available in actions for defamation and does not appear to me to have any application herein (*Hill v. Church of Scientology of Toronto* [1995] 2 S.C.R. 1130 (S.C.C.)).

[98] In any case, any privilege that may have attached to the Rebuttals was lost when they were published.

COUNTERCLAIM

[99] Professor Aylward submits that should I direct summary judgment on the Dalhousie breach of contract claim that her counterclaim alleging abuse of process should survive.

[100] In support of this position she cites *Toronto-Dominion Bank v. Lienaux* 1997 CanLII 9836 (NSSC) (upheld 1997 NSCA 80). The trial judge, Goodfellow, J. (in Chambers, citing *The Law of Torts by Fleming*) says at p. 9:

Unlike malicious prosecution, the gist of this tort lies not in the wrongful procurement of legal process or the wrongful launching of criminal proceedings, but in the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to serve. It involves the notion that the proceedings were ‘merely a stalking-horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the court is asked to adjudicate.’ It is therefore immaterial whether the suit thus commenced was founded on reasonable cause or even terminated in favour of the instigator: the improper purpose is the gravamen of liability.

[101] Professor Aylward sets out details of her claim of “improper purpose” in her Response to Dalhousie’s demand for particulars herein.

[102] The six particulars set out are as follows:

- (i) demanding in a letter to the Defendant dated February 25, 2008 that she withdraw the Rebuttal she filed with the Nova Scotia Human Rights

Commission to Complaint #2 with a threat to sue her if she did not comply;

- (ii) attempting to coerce the Plaintiff to accede to its demands that she withdraw the Rebuttal she filed to Complaint #2 at the Nova Scotia Human Rights Commission;
- (iii) retaliation against the Defendant for having filed a Human Rights Complaint (contrary to Section 11 of the *Nova Scotia Human Rights Act*);
- (iv) attempting to intimidate the Defendant and/or cause her financial duress as a result of her unwillingness to accede to the Plaintiff's demands;
- (v) attempting to prevent the Defendant from further criticizing the Plaintiff and/or raising public awareness of the systemic and/or adverse effects discrimination on the Defendant's website; and
- (vi) by misrepresenting the terms of the Settlement Agreement and thereafter threatening to the Defendant when she attempted to correct these misrepresentations.

[103] Professor Aylward submits that the trier of fact in this matter will have the opportunity at trial to hear all of the evidence detailing the relationship that she had with Dalhousie from the time of the filing of the first complaint through to the time of the commencement of this trial.

[104] She submits that it will be open to the jury to find that having regard to the manner in which she was treated by Dalhousie, that this lawsuit was initiated for a collateral or illicit purpose and, as a result, she has suffered some measure of special damages.

[105] Dalhousie responds that there is no evidence that its breach of contract action is anything more than a legitimate use of court process. There is no evidence of any improper or illicit advantage that Dalhousie has attempted to gain or will gain through this process.

[106] I conclude that Professor Aylward has, through the demand for particulars, simply made bald statements alleging coercion and intimidation.

[107] There are no facts before me which support the claim by Professor Aylward that this action is an abuse of process. This action was brought to address a specific concern. This process was justified by what is flagrant disregard for the confidentiality clause accomplished when Professor Aylward disclosed terms of that agreement in her Rebuttals and then published them online. There is no evidence before me to suggest that this action was brought to prevent Complaint #2. The counterclaim in this instances cannot survive. It is dismissed.

CONCLUSION

[108] Under *CPR 13.04*, a judge must grant summary judgment when he or she is satisfied that a statement of claim or defence “fails to raise a genuine issue for trial”.

[109] With respect to both the claim and the counterclaim, there are no genuine issues for trial and I find, applying the law of contract to the facts of this case, that the settlement agreement was breached and that there is no legal justification for Professor Aylward’s decision to post materials online.

[110] Further, there are no facts that support Professor Aylward’s claim that Dalhousie has committed an abuse of process by bringing this claim to enforce the settlement agreement.

[111] There are no genuine issues for trial.

[112] As was noted by Justice Roscoe in *Bethune*, “at the second step of the test, there is an evidential burden on the responding party to put its best foot forward or risk losing”.

[113] Professor Aylward has failed to show that she has a real chance of success at trial with respect to either her defence or counterclaim. I am granting this application for summary judgment as sought.

RELIEF

[114] Dalhousie seeks a declaration that Professor Aylward has breached the settlement agreement and that the settlement agreement remains valid. I so declare as to both.

[115] Dalhousie seeks a permanent injunction requiring that Professor Aylward remove the terms of the settlement agreement from her website.

[116] There is no issue with respect to injunctive relief forming the basis of a summary judgment claim. *Civil Procedure Rule 75.02(1)(a)* provides that a party who claims an injunction as a final remedy may make a motion for the injunction pursuant to *Civil Procedure Rule 13*.

[117] Since the fusion of the jurisdictions of equity and law, either or both of damages and equitable relief are available in the same action in appropriate circumstances.

[118] However, as Waddams (Waddams, *The Law of Contracts*, 5th ed. (Toronto: Ont., Canada Law Book) at p. 484, para. 665), notes:

The court has power to order contracts to be specifically performed and to grant injunctions restraining breaches of contract. In some systems of law specific enforcement is the primary remedy for breach of contract. In English law, however, and in the systems derived from it, these remedies have long been regarded as secondary. The primary remedy for breach of contract is said to be the award of monetary compensation, specific enforcement being available only when money compensation is inadequate.

[119] Dalhousie has not engaged in any behaviour, such as *laches* or lack of clean hands that would disentitle it from seeking equitable relief from the Court.

[120] Dalhousie is seeking an equitable remedy in the nature of specific performance because the substantial relief of damages is difficult to quantify and does nothing to protect Dalhousie's interest in enforcing the settlement agreement.

[121] I determine that injunctive relief is available and that it can be accomplished herein to the benefit of Dalhousie without significant prejudice to Professor Aylward. It is the manifestly practical remedy in this instance.

[122] I grant a permanent injunction requiring Professor Aylward to remove the terms of the settlement agreement from her Rebuttals filed in Complaint #2 and from her website.

DAMAGES

[123] I award Dalhousie \$1.00 in nominal damages.

[124] This Court grants the relief claimed, including costs and pre-judgment interest.

Joseph P. Kennedy
Chief Justice