

SUPREME COURT OF YUKON

Citation: *Kushner v First Nation of Nacho Nyak Dun*,
2026 YKSC 46

Date: 20260617
S.C. No.: 24-A0121
Registry: Whitehorse

BETWEEN:

ROBERT-SHAKA KUSHNER

PLAINTIFF

AND

FIRST NATION OF NACHO NYAK DUN, KAREN CLARK-MARLOW, ROBERT
GILLIAN, TERESA SAMSON, ADRIENNE HILL, EILEEN PETER, RONALDA
MOSES, MCGARRY SELBEE, GERI-LEE BUYCK, PETER IDOKO, JOELLA HOGAN

DEFENDANT

Corrected Decision: The text of the decision, at paragraph 35, was corrected and changes were made on June 17, 2026.

Before Justice K. Wenckebach

Appearing on his own behalf

Robert-Shaka Kushner

Counsel for the Defendants

Paul McLean

REASONS FOR DECISION

Introduction

[1] The plaintiff, Robert-Shaka Kushner, worked for the defendant, First Nation of Na-Cho Nyäk Dun, as Communications Officer. He was hired by FNNND on August 8, 2023, and was terminated on November 21, 2023. As a result of his termination, Mr. Kushner filed a Statement of Claim (which was later amended) against FNNND and the individual defendants. In the Amended Statement of Claim Mr. Kushner alleges

employees and supervisors at FNNND harassed, assaulted, defamed him and discriminated against him. He also alleges that employees interfered with his work, such that he was unable to perform his duties. The Amended Statement of Claim asserts claims of wrongful dismissal, constructive dismissal, negligent misrepresentation, unconscionability and assault and battery. He also seeks aggravated and punitive damages.

[2] FNNND has brought an application to strike parts of Mr. Kushner's claim. It submits that Mr. Kushner's claim is really of wrongful dismissal in which he seeks aggravated and punitive damages. Additionally, it does not seek that the claim for defamation be struck. Implicitly, then FNNND accepts that there is a valid claim for defamation. FNNND submits that many of the paragraphs in the Amended Statement of Claim are vexatious, meaning that they do not go to establishing Mr. Kushner's claim of wrongful dismissal or are evidence and should therefore be struck. FNNND also seeks security for costs in the amount of \$20,000.

[3] Mr. Kushner opposes FNNND's application. He submits that his claim is more than simply one of wrongful dismissal with aggravated and punitive damages.

Mr. Kushner also states that the Amended Statement of Claim contains valid claims for all the causes of action asserted. Mr. Kushner furthermore opposes the application for security for costs.

Issues

[4] The issues are:

- A. Does Mr. Kushner have a claim in constructive dismissal and wrongful dismissal?

- B. Should portions of the claim be struck because they do not support the claim of wrongful dismissal?
- C. Should the claim of negligent misrepresentation be struck?
- D. Should the claim of unconscionability be struck?
- E. Should the claim of assault and battery be struck?
- F. Should Mr. Kushner pay security for costs?

Short Answer

[5] I conclude that Mr. Kushner has a claim for wrongful dismissal, but not constructive dismissal. I also conclude that some, but not all, of the paragraphs FNNND seeks to strike should be struck. Some of the paragraphs making allegations about specific employees or misfeasance in FNNND should not be struck; the claim for negligent misrepresentation should be struck, although Mr. Kushner should have leave to amend parts of this claim; the claim of unconscionability should be struck; but the claim of assault and battery should not be struck. I also decline, at this point, to order that Mr. Kushner pay security for costs.

Preliminary Issue

[6] As part of its application, FNNND seeks that I declare the Supreme Court of Yukon does not have jurisdiction over claims of discrimination or workplace injuries. While I agree with FNNND that the Supreme Court of Yukon does not have jurisdiction over claims of discrimination or workplace injuries (*BC v KP*, 2025 YKSC 57 at para. 29, and 42) I do not believe it is necessary to make declarations in this instance.

The Amended Statement of Claim does not make human rights claims nor claims for

injuries suffered at the workplace. Mr. Kushner also confirmed at the hearing that he was not seeking these as separate claims. Declarations are, therefore, unnecessary.

Law

[7] The court may strike a claim, in whole or in part, if it “discloses no reasonable claim” or if it is vexatious (R. 20(26)(a), (b) of the Supreme Court of Yukon *Rules of Court* (the “*Rules*”). On an application to strike, the court must accept the allegations in the pleadings as true. The court will read pleadings generously and give allowance for deficiencies in drafting (*Grove v Yukon (Government of)*, 2021 YKSC 34 at para. 22). It will also only strike a claim where the action is certain to fail (*Beaugie v Yukon Medical Council*, 2012 YKSC 96 at para. 16). One circumstance in which a court may strike a pleading is where the claim does not contain all material facts to support every element of the cause of action. Vexatious pleadings include allegations that do not support the plaintiff’s claim (*Sidhu v Canada (The Attorney General)*, 2015 YKSC 53 at para. 8, citing *Citizens for Foreign Aid Reform Inc. v Canadian Jewish Congress*, [1999] BCJ No 2160 (SC) at para. 47).

Analysis

- A. Does Mr. Kushner have a claim in wrongful dismissal and constructive dismissal?

[8] Mr. Kushner alleges that he was both wrongfully dismissed and constructively dismissed by FNNND. FNNND submits that Mr. Kushner’s claim is not of constructive dismissal, but of wrongful dismissal, in which he is additionally seeking aggravated and punitive damages. I conclude that Mr. Kushner’s claim is for wrongful dismissal, not constructive dismissal.

Legal Principles

[9] Wrongful dismissal and constructive dismissal are two different concepts. Wrongful dismissal occurs when an employer terminates an employee, and the only question to determine with regard to liability is whether the employer had just cause to terminate the employee (*Reber v Lloyds Bank International Canada*, [1985] 61 BCLR 361 (CA) at 2, Esson J). Constructive dismissal occurs when an employer's conduct shows that they intend to no longer be bound by the employment contract with the employee. Constructive dismissal can arise, for instance, if the "... employer's treatment of the employee made continued employment intolerable" (*Potter v New Brunswick Legal Aid Services Commission*, 2015 SCC 10 at para. 33). In circumstances of constructive dismissal, the employer does not take the formal step of terminating the employee; rather, often, the employee quits.

Analysis

[10] In this case, constructive dismissal does not apply. The Amended Statement of Claim states: "FNNND unjustly terminated [Mr. Kushner's] employment in November 2023 on the grounds of breaches of the employment agreement, alleging poor work quality, conflict of interest and failure to be a role model pursuant to the agreement between the parties" (at para. 68). The Amended Statement of Claim does not allege that Mr. Kushner quit or that there was ambiguity about his continued status as an employee. The situation, as set out by Mr. Kushner, was that FNNND fired him. Mr. Kushner is, therefore, claiming that FNNND wrongfully dismissed him.

- B. Should portions of the claim be struck because they do not support the claim for wrongful dismissal?

[11] FNNND argues that some of the allegations in the Amended Statement of Claim that allege employees and supervisors mistreated Mr. Kushner may be relevant to a claim of constructive dismissal but are not relevant to a claim of wrongful dismissal. It furthermore submits that some of the allegations do not support any cause of action.

[12] I agree with FNNND that some of the allegations do not support Mr. Kushner's claim. I also conclude, however, that some of the claims of mistreatment may go to the question of aggravated and punitive damages.

Legal Principles

[13] The differences between wrongful dismissal and constructive dismissal means that allegations of an employer's bad behaviour towards an employee are treated differently whether the matter is one of constructive dismissal or wrongful dismissal. In cases of constructive dismissal, an employer's bad behaviour is relevant to the question of whether its treatment of the employee made continued employment intolerable.

[14] In cases of wrongful dismissal, an employer's bad behaviour does not generally play a role in determining if it had cause to terminate the employee. Exceptions do arise. For instance, an employer may undermine or sabotage the employee's work, thus putting into doubt the employer's assertion it had cause to dismiss the employee.

[15] While an employer's behaviour is not, by and large, relevant to the question of whether an employee was wrongfully dismissed, it is relevant when the employee seeks aggravated and punitive damages. Aggravated and punitive damages are available where, during the course of dismissal, the employer engages in conduct that is "unfair

or is in bad faith by being, for example, untruthful, misleading or unduly sensitive” (*Wallace v United Grain Growers Ltd. (cob Public Press)*, [1997] 3 SCR 701 at para. 98). In those cases, an employee may be entitled to increased damages because of the manner of their dismissal.

Analysis

[16] FNNND argues that many of Mr. Kushner’s allegations of mistreatment are not relevant because they are not about the manner of Mr. Kushner’s dismissal. They are, rather, about alleged bad conduct during the course of Mr. Kushner’s employment. It also states that other allegations are not relevant to his dismissal at all.

[17] I disagree with FNNND that some of the allegations of mistreatment are not about Mr. Kushner’s manner of dismissal. In analysing an employer’s manner of dismissal of an employee, the court is not restricted to examining only what the employer did at the moment of termination; rather, the manner of dismissal can encompass the employer’s conduct both pre- and post-termination (*Matthews v Ocean Nutrition Canada Ltd.*, 2020 SCC 26 at para. 40; *British Columbia v Taylor*, 2024 BCCA 44 at para. 34 (“*Taylor*)). The court is not to “parse too narrowly what is and is not a component of the manner of dismissal” (*Taylor* at para. 36, citing *Doyle v Zochem Inc.*, 2017 ONCA 130 at para. 39). This is especially true in a motion to strike, when a court is required to read the claims generously (*Taylor* at para. 36).

[18] Mr. Kushner worked for FNNND for a matter of months, during which he alleges he was persistently mistreated. Mr. Kushner also alleges that FNNND failed to act even when those in power knew he was mistreated. The allegations of mistreatment may,

therefore, support his claim for aggravated and punitive damages. The paragraphs that FNNND seeks to strike, and which I have concluded should be retained are:

- 15: this paragraph alleges that employees interfered with Mr. Kushner's work. This may be relevant to FNNND's decision to terminate Mr. Kushner, whether it was done in good faith or, and as claimed in the termination letter, it had cause;
- 23: this paragraph alleges that employees accosted Mr. Kushner and insulted him. This may be relevant to the manner of dismissal, as well as the defamation case;
- 25: this paragraph alleges harassment by a non-employee. Because the allegation is that a non-employee harassed Mr. Kushner, it in itself would not support Mr. Kushner's claim. Mr. Kushner goes on to state at paragraph 26, however, that he complained to his employer about the harassment but FNNND did nothing in response. The allegation may, therefore, be relevant to the manner of dismissal;
- 54-56 and 60: these paragraphs allege poor treatment post-dismissal;
- 73: this paragraph largely encapsulates Mr. Kushner's position that FNNND's bad treatment was part of the manner of dismissal. There is one phrase, however, that should be struck, which is "fraud and other criminal activities".

[19] At the same time, I also conclude that some of the Amended Statement of Claim should be struck because it is not relevant to the manner of dismissal. These paragraphs are:

- 12-13: these paragraphs allege that some employees have criminal records. It is not relevant to how Mr. Kushner was treated;
- 16: this paragraph is largely about someone else and includes evidence. This should be struck, except subparagraph 16(c), because it alleges that Mr. Kushner was harassed;
- 22: this paragraph contains allegations about another employee's misfeasance and are irrelevant;
- 38-39: these paragraphs are about an employee's criminal record and are irrelevant;
- 40: this paragraph contains evidence, bald statements and is irrelevant;
- 41-42: these paragraphs are about the character of other employees and is irrelevant;
- 45: this paragraph contains irrelevant, bald statements;
- 53: this paragraph alleges that the results of the formal investigation should have been disclosed. There is no indication that FNNND stated it would disclose the results to Mr. Kushner. It is therefore irrelevant.

C. Should the claim of negligent misrepresentation be struck?

[20] Mr. Kushner states the Amended Statement of Claim provides two bases for negligent misrepresentation. First, FNNND represented that Mr. Kushner's employment would be long-term; and the position, conditions, work relationships and environment would be pleasant (at paras. 5-6). Second, FNNND made representations that there would be transportation between Mayo and Whitehorse, there would be car dealerships and rentals in Mayo, that there would be medical transportation between Mayo and

Whitehorse, about the cost of utilities in Mayo, and that FNNND would provide a rental unit to Mr. Kushner. The Amended Statement of Claim furthermore implies that these representations were not true.

[21] FNNND submits that the claims of negligent misrepresentation must fail because the contract Mr. Kushner signed contains an entire agreement clause. FNNND could not, therefore, be liable for representations made before the contract was signed.

[22] I conclude that the claim for negligent misrepresentation should be struck, although not for the reasons advanced by FNNND. Mr. Kushner should, however, have leave to amend his Amended Statement of Claim on one aspect of his negligent misrepresentation claim.

Legal Principles

[23] The elements of negligent misrepresentation are: (1) there must be a “special relationship” between the representor and representee, from which a duty of care arises; (2) the representation made must be untrue, inaccurate or misleading; (3) the representor, in making the representation, must have acted negligently; (4) the representee must have reasonably relied on the negligent misrepresentation; and (5) the representee must have detrimentally relied on the representation, meaning damages must have resulted (*Queen v Cognos*, [1993] 1 SCR 87 at 88-89).

[24] The representation must be made before the contract is signed. If a representation is incorporated into the contract, negligent misrepresentation no longer applies. The issue is, rather, whether there was breach of contract. Furthermore, an entire agreement clause in a contract may defeat a claim of negligent misrepresentation.

Analysis

[25] I conclude that Mr. Kushner's claim that FNNND's representations that employment would be long-term and that the work environment and colleagues would be pleasant should be struck because those representations were then included in Mr. Kushner's contract. The Amended Statement of Claim provides details of the contract, stating that the offer expressed or implied that "employment would be long term" and "the position, condition and work relationships and environment would be cooperative and pleasant" (at para. 7). As laid out in the Amended Statement of Claim, the representations were not simply made during discussion before the contract was signed, they were incorporated into the contract. The proper allegation, therefore, is that FNNND breached the terms of the contract, not that they made negligent misrepresentations. Paragraphs 5-6, 71 and 77 of the Amended Statement of Claim, which set out the claim of negligent misrepresentation on these grounds, are therefore struck. Paragraph 75, which seems to combine claims of negligent misrepresentation and breach of contract, is also struck.

[26] I also conclude that Mr. Kushner's claim that FNNND misrepresented what living conditions in Mayo would be like should be struck. However, I give him leave to amend most of this claim. The reason the claim should be struck is that the Amended Statement of Claim does not contain material facts to support every element necessary to establish negligent misrepresentation. Specifically, there is nothing in the Amended Statement of Claim that suggests Mr. Kushner relied on the representations to his detriment. Moreover, it is not clear whether these representations were made before or

after the employment contract was signed. As laid out, the claim does not meet the requirements of negligent misrepresentation.

[27] I reject FNNND's argument that the entire agreement clause precludes this claim of negligent misrepresentation. The entire agreement clause is about the terms of the employment contract. For the most part, these alleged representations are about the living conditions in Mayo; they do not form part of the employment contract. It is at least arguable that the entire agreement clause does not apply to these representations.

[28] I therefore strike para. 47, which raises this claim of negligent misrepresentation, with leave to amend. I will also provide some additional guidance. Paragraph 47(IV) states that an employee of FNNND promised Mr. Kushner that it would provide him a rental unit. I believe Mr. Kushner implies that FNNND did not follow through. According to the Amended Statement of Claim, however, the contract stated that FNNND would provide Mr. Kushner with a rental unit. As the promise was incorporated into the contract, the claim is of breach of contract. Should Mr. Kushner want to pursue the alleged failure to provide a rental unit as a claim, it must be properly framed.

D. Should the claim of unconscionability be struck?

[29] The Amended Statement of Claim alleges, at para. 74, that the employment contract was unconscionable. Unconscionability has two elements: (1) inequality in bargaining power based on the claimant's weakness or vulnerability; and (2) an improvident transaction. To establish unconscionability, then, the plaintiff must show that the contract is in itself unreasonable, and the unreasonableness arises from the inequality of bargaining power (*Uber Technologies v Heller*, 2020 SCC 16 at paras. 62-63).

[30] In this case, unconscionability does not apply because the Amended Statement of Claim is not alleging that the contract itself was unreasonable. Paragraph 74 is therefore struck.

E. Should claims of assault and battery be struck?

[31] Reading the Amended Statement of Claim as a whole, one of Mr. Kushner's claims is of assault and battery. FNNND seeks to strike paragraph 57, which relates to the claim of assault and battery. Paragraph 57 includes a specific allegation of assault against Mr. Kushner, so it will not be struck completely. It includes, however, names of people who are not parties, irrelevant details and evidence. Those parts will be struck.

F. Should Mr. Kushner pay security for costs?

[32] FNNND seeks security for costs because Mr. Kushner is not a resident of the Yukon (Rule 60(44)(a) of the *Rules*). FNNND also states its position is supported by the fact that the Amended Statement of Claim presents a number of frivolous and vexatious claims.

[33] I do not have a sufficient basis to make an order of security for costs. There is no case law on R. 60(44)(a) from the Yukon. The Supreme Court of Ontario *Rules of Court* contains a similar rule. Case law from that jurisdiction provides that a defendant does not have a *prima facie* right to security for costs when the plaintiff resides in another jurisdiction. The Court must still weigh different factors in determining whether to grant security for costs. The plaintiff also has a burden, and may, for instance have to demonstrate that their case has merit or that they are impecunious and security for costs would prevent them from pursuing their case (*Zeitoun v Economical Insurance Group* (2008), 292 DLR (4th) 313, aff'd, 2009 ONCA 415).

[34] Whether these principles or others should apply here was not discussed. In the circumstances, I am not prepared to make an order of security for costs. Should the defendant wish to renew its application, it may do so. In that case, a Case Management Conference should also be scheduled so the plaintiff can be fairly advised of the case he has to meet.

Conclusion

[35] The following paragraphs shall be struck: 5-6, 12-13, 22, 38, 39, 40, 41,42, 45, 53, 71, 74, 75 and 77.

[36] The following paragraphs. shall be partially struck: the entirety of paragraph 16, except 16(c), shall be struck; in paragraph 57, the phrases that are retained are: “The Plaintiff was also criminally harassed, accosted and assaulted at the December 2023 [Firemen’s Ball] community event in Mayo, Yukon by Teresa Samson, Joella Hogan, and Ronalda Moses.... Samson ... accosted, shoved and manhandled the Plaintiff...”; the rest of the paragraph shall be struck; in paragraph 73 the phrase: “fraud and other criminal activities” shall be struck.

[37] Paragraph 47 shall also be struck. Mr. Kushner has 30 days from the date of this decision to amend this aspect of his claim.

WENCKEBACH J.