
COURT PERMITS PASTOR'S WRONGFUL DISMISSAL LAWSUIT TO PROCEED

*By Barry W. Kwasniewski**

A. INTRODUCTION

In July 2014, the British Columbia Supreme Court (“BC Supreme Court”) decided that it had jurisdiction to hear a pastor’s wrongful dismissal claim. In *Kong v Vancouver Chinese Baptist Church*, the Reverend Alfred Yiu Chuen Kong (“Rev. Kong”) claimed that he was wrongfully dismissed by the Vancouver Chinese Baptist Church (“VCBC”).¹ The VCBC sought by motion to have Rev. Kong’s claim dismissed, arguing that the removal of a spiritual leader was purely an ecclesiastical issue and therefore beyond the jurisdiction of the civil courts. The BC Supreme Court, in dismissing VCBC’s motion, concluded that assessing whether an individual is an “employee”, and therefore whether church procedures or the civil law should be applicable, is a fact-based analysis. This decision is important for religious organizations which may seek to apply ecclesiastical law or principles in dealing with their employees who perform religious or spiritual functions, to the exclusion of civil law. This *Church Law Bulletin* reviews and discusses this decision.

B. FACTS

In 2010, the VCBC Personnel Committee (“Committee”) recruited Rev. Kong to serve as the VCBC Senior Pastor. Rev. Kong was sent an Offer of Employment on November 15, 2010 that included the financial terms and benefits of the position. Rev. Kong accepted the offer and began in his new role as Senior Pastor at the VCBC on January 1, 2011.

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¹ *Kong v Vancouver Chinese Baptist Church*, 2014 BCSC 1424 (CanLII) [*Kong*].

Difficulties arose between Rev. Kong and the two associate pastors at the VCBC. The VCBC used its internal review process to address these difficulties.

In January 2013, the Committee formed a “small group”, consisting of two members of the Committee and two Deacons, which met with Rev. Kong and each of the two associate pastors. After the individual meetings, the small group recommended performance appraisals, a reconciliation meeting, and an ongoing monitoring system. Rev. Kong did not think that the performance appraisals should apply to him, nor did he support the monitoring process. He also questioned the authority of the Committee.

In May 2013, the two associate pastors resigned. In June, a “leaders group” met and decided that Rev. Kong should be removed as Senior Pastor. The group attempted to communicate this decision to Rev. Kong. However, before Rev. Kong responded to the group’s decision, he delivered a doctor’s note saying that he was unable to work for three weeks due to medical reasons. After three weeks, the VCBC tried to hold a second meeting to consider Rev. Kong’s position. Instead of attending this meeting, Rev. Kong submitted a new doctor’s note saying that he was unable to work for three months. The proposed meeting proceeded without Rev. Kong. At the meeting, the VCBC membership terminated Rev. Kong, approving the leaders group’s recommendation that he receive six months’ pay in lieu of notice.

After his sick leave expired, Rev. Kong first filed a complaint with the Human Rights Tribunal, citing discrimination based on age and mental disability. He then started a civil action seeking damages for wrongful dismissal.

C. PARTIES’ POSITIONS

The VCBC submitted that its decision to remove Rev. Kong was “intrinsically ecclesiastical in nature” and, therefore, that the court had no jurisdiction other than considering whether the process was fair, in that the VCBC followed its internal processes and that those processes met the requirements of natural justice.² It relied on the decision in *Hart v Roman Catholic Episcopal Corporation of the Diocese of Kingston, in Canada*, where Justice Laskin concluded that:

² *Ibid* at 32.

A person who voluntarily chooses to be a member of a self-governing organization and who has been aggrieved by a decision of that organization must seek redress in the internal procedures of that organization.³

Conversely, Rev. Kong submitted that his appointment was consistent with a standard employment relationship and was not directly tied to any church law. He relied on the following commentary:

Very little in the way of principle or policy prevents the courts from classifying “ministers” as employees when the existing common-law tests for employment are met, and affording these individuals the protection that employees enjoy in contemporary Canadian society.⁴

Rev. Kong submitted that the principal issue was whether his relationship with the VCBC met the common-law test for employment — the most important element being control.

D. REASONS OF THE BC SUPREME COURT

Justice Grauer focussed on the criteria for establishing whether VCBC was an employer, within the meaning of that term in civil law. He considered whether the purported employer had the power to select, control, and dismiss the employee.⁵ Using these factors, Justice Grauer concluded that Rev. Kong was subject to the control of the VCBC leaders. This meant that the facts in this case primarily and fundamentally were related to employment law, not church law, and therefore that the “mere fact that the plaintiff is a clergyman claiming against a church is ... not determinative” of the court’s jurisdiction.⁶

Justice Grauer emphasized that Rev. Kong and the VCBC did not agree to abide by internal church law and that VCBC did not have an internal dispute resolution process similar to the one used in *Hart*. Justice Grauer therefore held that “there is nothing ... that in my view should deprive Rev. Kong of the protection that other employees enjoy in contemporary Canadian society.”⁷

Justice Grauer did not make any determination about whether Rev. Kong’s wrongful dismissal claim would succeed on its merits. The court simply concluded that it had jurisdiction to hear the claim. The result is that the claim would continue in the BC civil courts until its conclusion.

³ *Hart v Roman Catholic Episcopal Corporation of the Diocese of Kingston, in Canada*, 2011 ONCA 728, 344 DLR (4th) 332 at 18).

⁴ Stacey R Ball, *Canadian Employment Law*, looseleaf (Toronto: Canada Law Book, 2013) at 3:10.1

⁵ *Kong*, *supra* note 1 at 46.

⁶ *Ibid* at 47.

⁷ *Ibid* at 50.

E. CONCLUSION

The *Kong* decision demonstrates the religious organizations may face difficulties in avoiding civil lawsuits by pastoral staff who consider that they have been unfairly removed from their positions. Courts are likely to consider such persons as “employees”, with the legal rights which accrue both under employment standards statutes and at common law. To avoid this result, religious organizations should have clear processes set out in their internal laws respecting church discipline, authority and removal of individuals who occupy positions of spiritual leadership. These processes should be fair, transparent and made known in writing at the time the person accepts the position. If such internal processes are lacking, deemed to be arbitrary, or are not followed, the chances of a successful civil wrongful dismissal lawsuit significantly increase. Further, any written documents appointing a person to a position of spiritual leadership should require that person to agree and abide by the organization’s internal procedures, to the exclusion of any other forums.

The text of this decision is available online at: <http://canlii.ca/t/g87wd> .