Federal Court  Cour fédérale

Date: 20161114

Docket: T-1390-16

Citation: 2016 FC 1269

Vancouver, British Columbia, November 14, 2016

PRESENT: Prothonotary Roger R. Lafrenière

BETWEEN:

DARREN OMAN

Plaintiff

and

HUDSON BAY PORT COMPANY
DBA PORT OF CHURCHILL

Defendant

ORDER AND REASONS

[1] On August 18, 2016, the Plaintiff, Darren Oman, commenced an action in damages against the Defendant, Hudson Bay Port Company, alleging wrongful or constructive dismissal. The salient facts as alleged in the Statement of Claim may be summarized as follows.

I. Allegations in the Statement of Claim

[2] The Plaintiff was employed since 2008 as a stevedore by the Defendant, a federally incorporated company which operates the transportation business for the Port of Churchill,

Manitoba. As an employee, he was also a member of the Public Service Alliance of Canada, UCYE Local 50503 Union (PSAC), which had entered into a collective agreement governing the relationship between the parties (Collective Agreement).

[3] On December 3, 2013, the Plaintiff's employment was terminated by the Defendant for disciplinary reasons. The Plaintiff grieved the disciplinary action and the matter proceeded to arbitration pursuant to the terms of the Collective Agreement. On December 15, 2015, an arbitrator found that the Plaintiff was wrongfully terminated and ordered the Defendant to reinstate the Plaintiff at the start of the 2016 season.

[4] Due to concerns for his health and safety, and possible retaliation by the Defendant, the Plaintiff submitted a letter on March 18, 2016 offering to waive his right to return from work in exchange for payment of his lost wages and punitive damages. The Plaintiff claims that the Defendant did not respond to his letter but instead advised PSAC that it would seek legal action against the Plaintiff.

[5] The Plaintiff alleges that the Defendant "wrongfully and/or constructively dismissed him without just and without reasonable or any notice" on or about June 16, 2016 by sending him a letter which "unilaterally and substantially" altered the terms of the Plaintiff's employment. According to the Plaintiff, he was offered a lower paying position and his employment was made conditional pending the results of a disciplinary hearing.

[6] The Plaintiff treated the Defendant's conduct as a repudiation of his contract of employment. Since he had not been reinstated as ordered by the arbitrator, the Plaintiff did not consider himself bound by the grievance procedure contained within the Collective Agreement and concluded that he had standing to commence a civil action.

II. Defendant's Motion to Strike

[7] The Plaintiff claims general, special and punitive damages because the dismissal by the Defendant was conducted "in a harsh, vindictive reprehensible, and malicious manner that constituted an arbitrary and willful breach of the plaintiff's contract for employment."

[8] The Defendant has moved to strike the Statement of Claim under Rule 221(1) of the *Federal Courts Rules* [*FCR*] on the grounds that the Federal Court does not have jurisdiction to adjudicate the matters alleged or grant the relief claimed in the Statement of Claim, and that the proceeding constitutes an abuse of process.

[9] On a motion to strike out a pleading under Rule 221(1) of the *FCR*, the applicable test is whether it is "plain and obvious" that the claim discloses no reasonable cause of action: *Hunt v Carey*, 1990 CanLII 90 (SCC), [1990] 2 SCR 959, [1990] SCJ No. 93 at paragraph 32 (QL). The "plain and obvious" test applies to the striking out of pleadings for lack of jurisdiction in the same manner as it applies to the striking out of any pleading on the ground that it evinces no reasonable cause of action. The lack of jurisdiction must be "plain and obvious" to justify a striking out of pleadings at this preliminary stage.

[10] Rule 221(2) provides that no evidence is admissible on a motion to strike a statement of claim as disclosing no cause of action. However, where the motion is based upon a want of jurisdiction, the motion may be supported by evidence: *MIL Davie Inc v Hibernia Mgmt & Dev Co* 1998 CanLII 7789 (FCA), [1998] FCJ No. 614, 226 NR 369 (FCA).

[11] In support of its motion, the Defendant filed the affidavit of Jeffrey McEachern sworn October 12, 2016 (McEachern Affidavit) which sets out evidence with respect to the Plaintiff's employment with the Defendant. This includes a copy of the Collective Agreement between the Defendant and PSAC which governs the parties; particulars about the termination of the Plaintiff's employment on December 3, 2013 and the grievance pursued by PSAC on behalf of the Plaintiff; a copy of the arbitration award issued on December 15, 2015 setting aside the termination and substituting a period of suspension until the following spring; and a summary of events that transpired following the arbitration award. As the McEachern Affidavit establishes necessary facts going to the Court's jurisdiction, I am satisfied that the evidence is properly before the Court on this motion.

III. Issue to be Determined

[12] The Plaintiff alleges at paragraphs 23 to 31 of the Statement of Claim that he was wrongfully dismissed or constructively dismissed on or about June 16, 2016. The point of this motion is not to quarrel with the allegations made by the Plaintiff. He is, of course, entitled to his opinion and belief. The simple issue before me is whether this Court has jurisdiction to entertain the Plaintiff's claim.

IV. Analysis

[13] The Plaintiff submits that he was not an employee when he received the Defendant's letter dated June 16, 2016. According to the Plaintiff, the Defendant's conduct constituted a pre-employment breach of contract and is at the heart of his cause of action. However, the Plaintiff is raising arguments and taking legal positions that are not supported by any evidence.

[14] The uncontradicted evidence before me establishes that the Plaintiff was an employee at the time of the alleged termination of employment in June 2016. The Plaintiff's earlier dismissal was set aside on December 15, 2015 by an arbitrator, who substituted a period of suspension until the following spring. It follows that the Plaintiff was immediately reinstated as an employee (albeit under suspension) and that he was fully entitled to recall rights under Articles 11.03, 11.06 and 9.04(d) of the Collective Agreement.

[15] On March 18, 2016, the Plaintiff wrote a letter to the Defendant, as alleged at paragraph 20 of the Statement of Claim. The Plaintiff fails to mention, however, that he requested payment of $265,000.00 for back pay, interest and damages "for all the pain, suffering and humiliation" he and his family suffered because of "previous discrimination in the arbitration". He also fails to mention that he offered to "walk away to forget all the pain, suffering and humiliation" the Defendant put him through over the previous 2½ years upon payment of the amount of $530,000.00, failing which he would "take everything public and call every news station and reporters in the country and tell all about the discrimination tactics used by [the Defendant] to violate [his] rights and freedoms" during the arbitration hearing.

[16] The Defendant wrote to the Plaintiff on June 16, 2016, pursuant to Article 11 of the Collective Agreement, to provide a Notice of Recall to Work. The Plaintiff was informed that if he intended to accept the callback to work, a disciplinary interview would be conducted with union representation prior to his return to work to discuss the correspondence that he sent to the Defendant in the off season.

[17] The Plaintiff did not return to work. On July 5, 2016, the Vice President of Local PSAC submitted a letter stating that: "(i)n the absence of resignation from Mr. Oman, this letter will serve as his resignation...". The Plaintiff's employment was terminated effective July 8, 2016. No grievance was filed by the Plaintiff in respect to any of the matters that arose following the issuance of the arbitral award.

[18] The Plaintiff's tort action for wrongful dismissal or constructive dismissal cannot stand as the provisions of the Collective Agreement are broad and expressly regulate the conduct at the heart of this dispute. Parliament has created statutory remedies and institutions designed specifically to provide redress to persons aggrieved and the court should not lightly intervene before those statutory remedies have been exhausted – and even then, only by way of judicial review.

[19] Claims over which the courts have been found to lack jurisdiction include wrongful dismissal, constructive dismissal and wide range of workplace disputes covered by a collective agreement. In the seminal decision of *Weber v Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 SCR 929 [*Weber*], the Supreme Court of Canada determined that where the subject matter of a dispute is one that is covered by a statutory scheme or collective agreement, the court should, as

a general rule, defer jurisdiction to the mechanisms set out in the applicable scheme (paras. 50-58 and 67).

[20] The Federal Court is a court of statutory jurisdiction. The tri-partite test for Federal Court jurisdiction was set out in *ITO International Terminal Operators Ltd v Miida Electronics Inc,* 1986 CanLII 91 (SCC), [1986] 1 SCR 752 at 766. There must be: (1) a statutory grant of jurisdiction by Parliament; (2) an existing body of federal law essential to the disposition of the case; and (3) the law must be a law of Canada. The Federal Court of Appeal held in *Canadian Pacific Ltd v United Transportation Union*, [1979] 1 FC 609 that a claim arising out of a collective agreement was brought under a "statute of Parliament" for the purposes of section 23 of the *Federal Courts Act*, because collective agreements are sustained by the *Canada Labour Code*. However, the Court also held that the *Canada Labour Code* gave labour arbitrators exclusive jurisdiction to resolve the parties' disputes, as later confirmed in *Weber*.

[21] In *Vaughan v Canada*, [2005] 1 SCR 146, 2005 SCC 11 (CanLII), the Supreme Court emphasized that regard must be had to the facts giving rise to the dispute rather than the legal characterization of the wrong to determine whether there is an adequate alternative remedy (para.11). In all but the most unusual circumstances, the court should decline jurisdiction and defer to statutory grievance schemes (para. 2).

[22] The substance of the allegations made by the Plaintiff in the Statement of Claim relates to a labour dispute between an employee and his employer. The allegations set out at paragraphs 7 to 15 have already been adjudicated and are *res judicata*. The balance of the allegations relate to

events that arose following the issuance of the arbitral award. These are matters that clearly fall within the ambit of the grievance procedure.

[23] The Plaintiff was fully entitled to file a grievance to challenge any decision made by his employer to terminate his employment, as specifically provided in Article 7 of the Collective Agreement. These remedies must be exhausted before the Plaintiff can turn to the court. Even then, the relief must be sought by way of judicial review, and not through an action. Alternatively, he could have taken steps to enforce the arbitral award if he considered the terms of the Defendant's letter dated June 16, 2016 to have breached or frustrated the reinstatement order.

V. Conclusion

[24] Based on the foregoing, and for the reasons provided in the Defendant's written representations, which I adopt and make mine, I conclude that it is plain and obvious that the Federal Court does not have jurisdiction to entertain the Plaintiff's claim. Accordingly, the Statement of Claim shall be struck in its entirety.

[25] As for costs, I see no reason to deviate from the general rule they should follow the event. The Defendant has requested that costs be awarded on a solicitor-client basis on the grounds that the Plaintiff's action is scandalous, frivolous and vexatious and constitutes an abuse of process. However, solicitor-client costs are very much the exception in this Court and should only be awarded when one party engages in conduct that deserves sanction, which has often been described as conduct that is "reprehensible, scandalous or outrageous": *Young v Young*, 1993

CanLII 34 (SCC), [1993] 4 SCR 3 at para 66; *Louis Vuitton v Lin Pi-Chu Yang*, 2007 FC 1179 (CanLII) at para 55; *Chrétien v Gomery*, 2011 FCA 53 (CanLII) at para 3). No such conduct on the party of the Plaintiff has been established by the Defendant. In the exercise of my discretion, I hereby fix the costs of the motion and the action in the lump sum of $1,000.00, inclusive of disbursements and taxes.

ORDER

THIS COURT ORDERS that:

1. The Statement of Claim is struck out, without leave to amend.

2. Costs of the motion, hereby fixed in the amount of $1,000.00, inclusive of disbursements and taxes, shall be paid by the Plaintiff to the Defendant.

"Roger R. Lafrenière"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1390-16
STYLE OF CAUSE:	DARREN OMAN v HUDSON BAY PORT COMPANY DBA PORT OF CHURCHILL

MOTIONS IN WRITING CONSIDERED AT VANCOUVER, BRITISH COLUMBIA, PURSUANT TO RULE 369

ORDER AND REASONS:	LAFRENIÈRE P.
DATED:	NOVEMBER 14, 2016

APPEARANCES:

CHRISTINA J. COOK	FOR THE PLAINTIFF DARREN OMAN
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