Date: 20010924
Docket: S. H. No.169634

IN THE SUPREME COURT OF NOVA SCOTIA
[CITE: Adams v. Metropolitan Regional Housing Authority.,2001 NSSC 134]

BETWEEN:

ANTHONY CHARLES ADAMS

PLAINTIFF

- and -

METROPOLITAN REGIONAL HOUSING AUTHORITY, INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 968, BOB GRANT, LAWRENCE DOREY and JIM RITCHIE

DEFENDANTS

D E C I S I O N

HEARD: **At Halifax, Nova Scotia (in Chambers), before the Honourable Justice C. Richard Coughlan on May 16th, 2001**

DATE OF DECISION: **September 24th, 2001**

COUNSEL: **Kevin A. MacDonald, for the plaintiff**
John H. Graham and Paul D. McLean, for the defendant, Metropolitan Regional Housing Authority
Jamie S. Campbell, for the defendants, International Union of Operating Engineers, Local 968, Bob Grant, Lawrence Dorey and Jim Ritchie (Watching Brief)

COUGHLAN, J.:

[1] This is an application by the Metropolitan Regional Housing Authority (the "Authority") for an order pursuant to Civil Procedure Rules 14.25(1)(a), 14.25(1)(d) and 11.05(a) for an order striking out and/or setting aside the statement of claim. The Authority contends the action cannot be maintained as its essential character is discrimination, which is dealt with in the collective agreement and also by the regime established pursuant to the **Human Rights Act**, R.S.N.S. 1989, c. 214.

[2] The Authority's solicitor, Jack Graham, filed an affidavit exhibiting the collective agreement between the Authority and the International Union of Operating Engineers, Local 968B. The plaintiff, Anthony Charles Adams, filed an affidavit exhibiting correspondence between Mr. Graham and his solicitor, Kevin A. MacDonald. Mr. Adams' affidavit also exhibits a letter from one of his co-workers in support of the substance of Mr. Adam's claim.

[3] In an application pursuant to Rule 14.25, the issue is decided on the pleadings and no evidence shall be admissible by affidavit or otherwise except by leave of the court. In the application pursuant to Rule 14.25(1)(a), I admit the affidavit of Mr. Graham exhibiting the collective agreement, as well as paragraphs 1 to 10 of Mr. Adams' affidavit and exhibits A to D.

[4] I allow the collective agreement as it is necessary to determine whether the court has jurisdiction to deal with the subject matter of the proceeding. I allow the specified portions of Mr. Adams' affidavit as they are necessary to deal with the estoppel issue he raises.

FACTS

[5] Anthony Charles Adams is employed by the Authority. He is also a member of the International Union of Operating Engineers, Local 968. The individual defendants are also members of the same Union.

[6] Mr. Adams is Afro-Canadian. He claims he was discriminated against on the basis of his race, colour and ancestry. The statement of claim sets out particulars of his claim of unequal treatment, racist comments, denial of opportunity to do work for which he was qualified, hostile work environment and denial of promotions. Mr. Adams reported the offensive conduct to his supervisor, met with the general manager of the Authority

concerning the discrimination, filed a grievance and made a complaint to the Human Rights Commission. On February 26th, 2001 he commenced action against the Authority, the Union and individual members of the Union.

[7] By letter dated February 28th, 2001, Mr. Graham notified Mr. MacDonald he was authorized to accept service on behalf of the Authority. By letter dated March 1st, 2001, Mr. MacDonald sent the originating notice (action) and statement of claim to Mr. Graham. By letter dated March 9th, 2001, Mr. Graham acknowledged receipt of the documents and stated:

> " On account of the length and complexity of the claim and in light of the fact I will be out of the office all of next week, it is my intention to get back to you on this matter some time in the week of March 19, 2001. I would ask that you take no steps in the interim and trust this will not be a problem."

[8] Mr. MacDonald replied on March 14th, 2001:

> "I acknowledge your respective letters asking for an extension of time to file your Defence."

[9] Mr. MacDonald then wrote Mr. Graham on April 23rd, 2001, when he stated in part:

> "I must say at the outset that I am dismayed that you have chosen to bring this Application given that our agreement to extend time for filing the Defence was so you would file a Defence not an Application to Strike.
>
> As such, that agreement will be relied upon as an estoppel to the Application to Strike."

[10] Mr. Graham replied on April 24th, 2001:

> "I have your letter of April 23, 2001. I disagree with your suggestion that there was any agreement to extend time only for filing a Defence in this matter."

[11] The Authority has not filed a defence.

ESTOPPEL

[12] Mr. Adams contends the Authority is estopped from bringing this application because of the correspondence between solicitors. I disagree. Mr. Graham requested no steps be taken until he got back to Mr. Adams' solicitor. He did not request an extension of time to file a defence. It was Mr. MacDonald who assumed the extension was to allow a defence to be

filed. Even if Mr. Graham had requested an extension of time to file a defence, and then brought the application, there would be no estoppel.

[13] The necessary circumstances to bring about an estoppel were set out in **Sales Promotion Services Inc. v. Ultramar Canada Inc.,** [1998] O.J. No. 1514 (Ont.C.A.) at para. 4:

> ... In order to grant an estoppel, there must be a promise or a representation in the nature of a promise; the promise must be intended by the promisor to affect the legal relationship between the parties; and, by the promise, the promisor must indicate that it will not insist on its strict legal rights arising from its relationship with the promisee. Even assuming that such a promise or representation may be made by silence, the promise must be an unequivocal representation that the promisor does not intend to enforce his strict legal rights against the promisee. To bring the legal doctrine into operation, the promise or representation must be "clear" or "unequivocal" or "precise and unambiguous": Treitel, The Law of Contract, 8th ed. 1991 at p. 103.

ANALYSIS

[14] The question for the court to decide is whether it has jurisdiction to deal with Mr. Adams' claim.

[15] What is the essential character of Mr. Adams' claim? In reviewing the statement of claim, I find the essential character of Mr. Adams' claim is discrimination.

[16] In **Weber v. Ontario Hydro** (1995), 125 D.L.R. (4th) 583, McLachlin, J. (as she then was), giving the decision of the majority of the Supreme Court of Canada, stated at p. 602:

> ... The question in each case is whether the dispute, in its essential character, arises from the interpretation, application, administration or violation of the collective agreement.

[17] As Cromwell, J.A. stated, in reviewing the **Weber** decision in **Pleau v. Canada (Attorney General) et al.** (2000), 181 N.S.R. (2d) 356 at p. 375:

> ... One principle, however, is clear. The Collective Agreement must, expressly or by implication, address the substance of the dispute.

[18] Is the subject matter of the dispute addressed in the legislation or the collective agreement?

[19] The **Human Rights Act** provides:

> **5(1)** No person shall in respect of

. . .

(d) employment;

. . .

(g) membership in a professional association, business or trade association, employers' organization or employees' organization,

discriminate against an individual or class of individuals on account of

. . .

(i) race;

(j) colour;

. . .

(q) ethnic, national or aboriginal origin;

. . .

(v) that individual's association with another individual or class of individuals having characteristics referred to in clauses (h) to (u).

. . .

[20] Article 3.01 of the collective agreement deals with discrimination:

3.01 It is agreed that there will be no discrimination or intimidation against any employee by the Employer, the Union or their respective officers, or other representatives, by reason of an employee's race, colour, creed, sex, or membership in the Union.

[21] Article 7 of the collective agreement sets out the grievance procedure and finally provides if the grievor is not satisfied, the matter shall be referred to an arbitrator whose decision shall be binding upon the parties.

[22] The **Trade Union Act**, R.S.N.S. 1989, c. 475 confers statutory power on an arbitrator acting under a collective agreement, including power to treat as part of the collective agreement the provisions of any statute of the province governing relations between the parties to the collective agreement.

[23] An arbitrator appointed pursuant to the collective agreement to which Mr. Adams is subject does have authority to deal with issues of discrimination.

[24] In **Pleau v. Canada (Attorney General) et al., supra,** Cromwell, J.A. conducted a thorough analysis of the **Weber** decision and concluded each case is to be examined under three headings:

(1) The process for dispute resolution established by the legislation and the collective agreement had to be examined to determine whether the process is expressly or implicitly regarded as an exclusive one and the overall legislative scheme to be examined.

(2) The nature of the dispute is to be examined to determine how closely the issue fits into matters which are addressed by the legislation and collective agreement.

(3) The scheme must provide for effective redress. There must be a remedy available.

[25] In this case, there is a process for dispute resolution established by the collective agreement. If Mr. Adams is not satisfied with the outcome, he can refer the matter to an independent arbitrator. The arbitrator has broad power under the collective agreement and the **Trade Union Act** to adjudicate the issues. This includes the power to treat as part of the collective agreement the provisions of any statute of the Province governing relations between the parties to the collective agreement. The decision of the arbitrator is subject to judicial review. Mr. Adams has used the grievance procedure.

[26] Mr. Adams' claim in its essential character is discrimination. It is specifically dealt with in the collective agreement. The **Human Rights Act** also sets out a statutory regime to deal with claims of discrimination.

[27] In this case, where the essential character in Mr. Adams' claim is discrimination, where the processes for resolving a claim are established pursuant to the collective agreement and the **Human Rights Act**, and where there is effective redress in the arbitration process, this is an appropriate case for the court to defer to the arbitration and grievance process and the statutory regime established pursuant to the **Human Rights Act**.

[28] As Cromwell, J.A. set out in **Pleau v. Canada (Attorney General) et al., supra,** at p. 358:

> ... The applicable test under rule 14.25, although at various times described in different words, is whether it is plain and obvious that the claim cannot succeed. In the context of a challenge under this rule to the court's jurisdiction on the basis of the **Weber** principle, it must be plain and obvious that the court lacks jurisdiction. ...

[29] In this case, it is plain and obvious the court lacks jurisdiction to deal with the subject matter of Mr. Adams' claim. Basically the same test applies for the application both under Rule 14.25 and also Rule 11.05.

[30] I allow the Authority's application.

[31] Subsequent to hearing this application, counsel for Mr. Adams applied to introduce evidence that the Human Rights Commission discontinued Mr. Adams' complaint. A judge has the discretion to allow new evidence after a hearing. As Cromwell, J.A. stated in **Griffin v. Corcoran** (2001), 193 N.S.R. (2d) 279 at

p. 297:

> I think the test under rule 15.08 as discussed in **Silver** is more onerous than the test applicable to a reopening after trial but before final judgment. Nonetheless, the final principle stated in **Silver** recognizes that procedural injustice resulting from a party's lack of diligence in obtaining evidence at trial will give way to the interests of substantial justice where the "new" evidence is

> credible and so important that a substantial injustice will occur if the matter is not reopened.
>
> In my view, a similar measure of flexibility applies when the application to reopen is made, as it was here, after trial and decision but before formal judgment. The risk of procedural injustice, including that flowing from a lack of diligence in relation to discovery and presentation of the evidence and the risk of substantial injustice judged mainly by the significance of the evidence to the outcome of the case should both be considered. Procedural concerns such as diligence should generally give way to the demands of substantial justice where failure to do so is likely to result in an obvious injustice.

[32] Here the proposed evidence was not available at the time of the hearing. However, the proposed evidence, if admitted, would not change my decision. Mr. Adams has recourse to his claim of discrimination through the collective agreement and the regime pursuant to the **Human Rights Act** and the court lacks jurisdiction to deal with the subject matter of Mr. Adams' claim. The application to introduce new evidence is dismissed.

[33] If the parties are unable to agree on costs, I will hear them.

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C. Richard Coughlan, J.