

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Boutcher v. Clearwater Seafoods Limited Partnership,
2008 NSSC 23

Date: 20080129

Docket: SH 244471

Registry: Halifax

Between:

Cecil Boutcher and Clyde Knickle

Plaintiffs

v.

Clearwater Seafoods Limited Partnership, a Nova Scotia Limited Partnership

Defendant

Judge: The Honourable Justice Arthur W.D. Pickup

Heard: January 10, 2008, in Halifax, Nova Scotia

Written Decision: January 29, 2008

Counsel: Mark David Tector, for the plaintiffs
Nancy F. Barteaux, and Bradley Bates for the defendant

By the Court:

[1] This application is brought by the defendant pursuant to 34(a)(2) of the *Judicature Act*, R.S.N.S. 1989, c. 240 to strike the plaintiffs' notice of trial with a jury on the grounds that the matter involves issues of law and issues of mixed law and fact and, therefore, should be heard by way of judge alone.

Background

[2] The plaintiffs/respondents are fishing captains who were employed since 1986 by the defendant/applicant, Clearwater Seafoods Limited Partnership. It appears the respondents were employed by indefinite term contracts until each received a notice of termination which was to be effective April 30, 1998. Following this termination, the respondents entered into written contracts of employment with the applicant. These contracts included terms governing termination of employment. These written contracts were in effect until approximately the end of 2002. From January 1, 2003 until approximately December 19, 2004 the respondents were engaged by the applicant under a contract known as a Single Trip Employment Agreement. The respondents were advised in 2004 that there would be no further such agreements offered on the vessels on which they worked as captains after the end of 2004.

[3] A statement of claim was issued by the respondents claiming wrongful dismissal, negligent misrepresentation and breach of obligation of good faith and fair dealing.

[4] The applicant denied that these individuals were employed on the alleged date of termination, January 17, 2005 maintaining that they completed the last Single Trip Employment Agreement on December 7, 2004.

[5] The applicant, in its defence, pleads several provisions of the Single Trip Employment Agreements and denies any negligent misrepresentation, warranty, bad faith, malicious or like conduct.

[6] The respondents claim that the terms of the Single Trip Employment Agreements are unenforceable on the following grounds:

a) They are unclear and ambiguous;

- b) they are unconscionable and harsh and, in this respect, they allege that:
 - (i) there was an inequality of bargaining power;
 - (ii) the defendant unconscionably used its position of power as long-term employer to achieve the advantages in the agreement; and,
 - (iii) the agreements are substantially unfair to Captain Knickle and Captain Boutcher or sufficiently divergent from community standards of commercial morality that the agreements should be set aside.
- c) they lack consideration.

The Law

[7] In Nova Scotia, the right of a party to have a civil matter heard by a jury is set out in the *Judicature Act*, s. 34.

[8] Under this provision, a party has a *prima facie* right to a jury trial. It is well established that this right should not be taken away arbitrarily.

[9] In *Barrow v. Keating*, [1985] N.S.J. No. 116, Justice Nunn reiterated this principle at para. 2:

The right of a party to a trial with a jury is a substantive one. The defendant in this case gave notice of trial by jury, and he is not lightly to be deprived of his right to have the trial proceed in that way. A trial Judge has a wide, and indeed one might say an absolute, discretion as to the mode of trial, but his power to decide whether a case should be tried with a jury or without a jury is one that cannot be exercised arbitrarily or capriciously. It must be exercised in a judicial manner and there must be sufficient reason to deprive a party of the substantive right to trial in the manner chosen by him.

[10] A three part test has been developed to assist courts in the exercise of this discretion as to the appropriate mode of trial. In *Lintaman v. Goodman*, [1983]

N.S.J. No. 37, Justice Burchell laid out the following three factors to consider, at para 4 :

... (a) where the case involves scientific or technical questions that cannot be conveniently presented to a jury, (b) where the evidence is extensive and (c) where the case involves issues of law rather than issues of simple fact or where the issues of fact are negligible or closely interwoven with the issues of law.

[11] In *Derosches v. Di-Carra Inc.*, [1999] P.E.I.J. No. 33 (“*Desroches*”), the Court set out three exceptions which may support depriving a party of its substantive right to a jury trial:

(i) the substantive issue being one of law, with respect to which issues of fact are merely incidental; (ii) the issues of law and fact being so substantially interwoven and interdependent as to be virtually inseparable; and/or (iii) the intricacy or complexity of the case indicating that much difficulty might be anticipated or encountered by a trial judge in properly instructing a jury as to the applicable principles of law which it must apply to the decided facts, giving rise to a great probability of error by the jury.

[12] A trial judge must provide cogent reasons for striking a jury notice.

Discussion

[13] The applicant argues that the legal matters at issue in this action are more complex than standard wrongful dismissal issues and claim that the determination of this matter will require the resolution of significant legal questions involving the interpretation of various documents. It is not a case, according to the applicant, which involves a determination of the reasonableness of the notice period. Rather, the issue is a legal interpretation of the documents which set out the legal relationship between the parties, all of which are matters of law.

[14] The respondents submit that the applicant has fallen short of meeting its onus of establishing that their *prima facie* right to a jury trial should be denied.

[15] The respondents allege that they were employed for an indefinite term and are entitled to reasonable notice of termination, which was not provided by Clearwater. Alternatively, they allege that the applicant’s agent, namely Clearwater

supervisors, made representations that amounted to assurances of continued employment.

[16] The respondents do not foresee a complicated trial, but rather a trial which will last four days with no expert evidence. They say the questions of fact that the jury will have to consider will include, but are not limited to, the terms of their contracts with the respondent, whether there was a breach and what damages flow from the breach. They assert that these are all issues that can be heard by a jury. The trial judge, according to the respondents, would be able to explain the legal issues to the jury.

[17] I am satisfied that the determination of this matter will revolve around the resolution of significant legal questions involving the interpretation to be placed on various documents and contracts referred to in the pleadings. From a specific review of the statement of claim and defence it is noted that:

1. The initial employment contracts were oral contracts which governed the employment relationship from on or about 1986 until April 30, 1998 when such employment terminated after the defendant gave the plaintiffs notice of termination on December 4, 1996.
2. The applicant claims that for the period of May 1998 to December 31, 2002 there are written contracts which included agreed terms applicable upon termination.
3. For the period on or about January 1, 2003 until on or about January 19, 2004 the parties were employed under written contracts, namely Captain Single Trip Employment Agreements, whose terms, the applicant claims, determine the matter.
4. The plaintiffs claim that the Captain Single Trip Employment Agreements are unenforceable.

[18] All of these issues, in my view, require legal determinations and are closely interwoven with the facts. This is not a straightforward fact dependent wrongful dismissal case, which the respondents note are routinely decided by juries. It appears that the central issue is the effect and enforceability of the various agreements. This issue, to a great extent, will be decided by the interpretation to be

placed on various documents, which I am satisfied would be a matter for the trial judge. There does not appear to be significant factual disputes with respect to the terms of the various agreements. While I am mindful that a jury notice should not be struck lightly, I am satisfied that, on the principal issues in this proceeding, it would be difficult, if not impossible, to extract any substantive factual questions for a jury from the predominantly legal questions that will determine the effect, if any, of the successive contracts of employment.

[19] I allow the application and would ask the applicant's solicitor to prepare an appropriate order for approval.

Pickup, J.