SUPREME COURT OF NOVA SCOTIA

Citation: Casey v. Halifax (Regional Municipality), 2011 NSSC 267

Date: 20110630
Docket: Hfx. No. 258954
Registry: Halifax

Between:

Darren Casey

Plaintiff

v.

The Halifax Regional Municipality, Debbie Bonang, Dr. Richard MacGillivray

Defendants

Judge:	The Honourable Justice Peter P. Rosinski.
Heard:	June 28, 2011, in Halifax, Nova Scotia
Written Decision:	June 30, 2011
Counsel:	Anthony Brunt, for the Plaintiff Randolphe Kinghorn, for the Defendants, Halifax Regional Municipality and Debbie Bonang Michael Dunphy, Q.C. for the Defendant, Dr. Richard MacGillivray

By the Court:

Introduction

[1] On January 10, 2006, Darren Casey sued HRM (Halifax Regional Municipality), Debbie Bonang and Dr. Richard MacGillivray for intentional tort and negligence based anxiety and mental suffering. To date, HRM and Bonang have resisted all demands for disclosure based on their position that the matter is exclusively governed by the Collective Agreement.

[2] Darren Casey is a firefighter; his ex-wife, Lisa Casey is a police officer. Both were employees of HRM during the relevant time periods. Their respective employments were governed by separate Collective Agreements. Nevertheless, this Motion brings those Collective Agreements together in the following sense.

[3] Firefighters like Darren Casey have, and had at that time, an exclusive independent contractor Health Services Atlantic, that operates their occupational health and safety care. This service was specifically removed from the control and management of HRM staff and transferred to Health Services Atlantic in about 1999.

[4] In spite of (independent of HRM) counselling services being available to him for such matters, Darren attended March 5, 2004 at his wife's request and met with Dr. Richard MacGillivray. That meeting was pursuant to the HRM Police Force Employee Assistance Program. Darren was referred for a mental health assessment at the QEII Hospital and attended there that same day. He was assessed as having Adjustment Disorder (*vis-à-vis* the marital breakdown) and related counselling was recommended. Lisa was not satisfied with this outcome it would appear, because she then arranged the meeting with Bonang.

[5] Lisa Casey apparently had contact with Debbie Bonang, a nurse (R.N.) responsible for Occupational Health matters regarding applicable HRM employees.

[6] Possibly in an effort to address Lisa Casey's concerns about the deteriorating marital situation between her and Darren Casey, Lisa Casey arranged for Debbie Bonang (Bonang) to meet Darren Casey on March 11, 2005 at Bonang's office.

[7] On March 11, 2004, while at work, Darren received a telephone call from Bonang, requesting that he attend at her office immediately for discussion regarding the Caseys' marital issues.

[8] Darren and his Captain Joseph Ryan attended the meeting. Bonang informed them that Darren was a "safety concern" and "could not remain at work" based on Bonang's information, including her conversation with Dr. MacGillivray.

[9] She confirmed that until Darren obtained a health clearance, he would not be permitted to return to work.

[10] Management of HRM Firefighters specifically rejected Bonang's authority over Darren and themselves referred Darren for an assessment through Health Services Atlantic. That June 13, 2004 report concluded:

> Mr. Casey shows no evidence of suffering from a psychiatric disorder. Overall he seems to be coping well with the breakup of his relationship and I would not anticipate that this would have any deleterious effect on his work.
>
> - Dr. Scott Theriault -

[11] The recitation of those facts (pleaded and in Darren's affidavit) is perhaps unnecessary since the Motion for Summary Judgment on Evidence will be heard September 28, 2011, and will deal with the evidence herein.

[12] Nevertheless, I must have a certain regard for the alleged facts underlying the claims herein. I note HRM / Bonang's counsel felt it was sufficiently important on this Motion to cross-examine Casey on his sworn May 27, 2011 affidavit.

[13] On the other hand, I clearly recognize that HRM / Bonang maintain their position that since this Court has no jurisdiction over the matters claimed in the court action, they have no obligation to disclose anything to Casey.

Issue

[14] Are HRM / Bonang required by the *Civil Procedure Rules* (CPR) to provide Casey disclosure as contemplated in CPR 14 and 15? I find that they are so required. Let me explain why.

Analysis

[15] *Civil Procedure Rule* 14.08 reads:

> Making full disclosure of relevant documents, electronic information, and other things is presumed to be necessary for justice in a proceeding.

[16] *Civil Procedure Rule* 94.10 reads in part:

> "proceeding" means the entire process by which a claim is started in, and determined by, the court, such as an action...

[17] HRM / Bonang have made a Motion for Summary Judgment on Evidence, and argue that there is no jurisdiction in this Court to hear the legal action herein.

[18] They maintain the complained of actions of HRM / Bonang are grievable matters under the Collective Agreement governing Casey and HRM. They say that grievance process is the exclusive basis for resolution of such claims.

[19] They say the violation of the Collective Agreement could be characterized as a violation of the “management rights” clause - Article 4 in both the unsigned Agreements spanning June 1, 2000 - May 31, 2004 and June 1, 2004 - May 31, 2016.

[20] They say an arbitrator has the power under the Agreement to impose an effective damages award, although Casey lost no time at work as a result of the actions of HRM / Bonang (and was not being disciplined it would appear).

[21] They say once I conclude that HRM is Casey’s employer, and that their employment relationship is governed by the Collective Agreement, all claims, save perhaps malicious prosecution claims, must be processed as grievances under the Collective Agreement. They rely on Hood, J.’s decisions in *Nelson v. HRM* 2005 NSSC 210, and in *MacNeil v. Nova Scotia (Attorney General)* 2010 NSSC 138.

[22] I conclude that in the circumstances of this case, their arguments do not displace the presumption of disclosure set out in the CPR 14.08.

[23] Dr. MacGillivray supports Casey's position on this motion. His counsel Mr. Dunphy, wrote in its June 24, 2011 letter:

> As outlined in case of *Cherubini Metal Works Limited v. Nova Scotia* [2007] N.S.J. No. 134, the Court of Appeal stated that the court must determine the "essential character" of the dispute which underlines the court action. All documents regarding the dispute are relevant to ultimately assess the "essential character" of the dispute. This will be a significant issue in the Summary Judgment motion scheduled for September 28, 2011.

[24] Mr. Dunphy also noted in oral argument [my paraphrasing]:

1. Justice Hood in *MacNeil v. Nova Scotia (Attorney General)* 2010 NSSC 138, at para. 7, acknowledged that in all cases (including therefore those where the court's jurisdiction is challenged), there is no rule absolving a party from making no disclosure at all since it is "necessary that there be sufficient material before the motion judge to make a determination... each case, of course, will require different material".

2. The disclosure sought is limited - i.e. as it relates to the motion for summary judgment.

3. CPR 14.08 presumes full disclosure.

4. The courts have tended to a liberal view of disclosure to ensure justice is served.

5. The reluctance of Bonang to, at any time, apparently cooperate in the disclosure of materials, whether to the Plaintiff or the College of Nurses, is unusual and gives reason for caution.

[25] Whether a Collective Agreement ousts the jurisdiction of a Court was canvassed by Cromwell, JA (as he then was) in *Pleau v. Canada (Attorney General)* 1999 NSCA 159 leave denied [2000] SCCA No. 83.

[26] He stated for the Court:

> In the context of a challenge under [the summary judgment] Rule [14.25 CPR (1972)] to the court's **jurisdiction** on the basis of the **Weber** [**v. Ontario Hydro** [1995] 2 SCR 929] principle, **it must be plain and obvious that the court lacks jurisdiction**. It is not suggested that a significantly different test would apply in relation to the summary judgment application in the circumstances of this case.
>
> - para. 3.
>
> [My emphasis]

[27] Moreover:

> ...the decision by courts to decline jurisdiction in disputes like this one is not based simply on a clear, express grant of jurisdiction to an alternative forum... there are three main considerations which underpin these decisions of the Supreme Court of Canada.
>
> - para. 18.

[28] He then elaborated on these three main considerations:

> 19 The **first consideration** relates to the process for resolution of disputes. **Where the legislation and the contract show a strong preference for a particular dispute resolution process, that preference should, generally, be respected by the courts.** While it takes very clear language to oust the jurisdiction of the superior courts as a matter of law, courts properly decline to exercise their inherent jurisdiction where there are strong policy reasons for doing so.
>
> 20 **If the legislature and the parties have shown a strong preference for a dispute resolution process other than the court process, the second consideration must be addressed. It concerns the sorts of disputes falling within that process.** This was an important question in the *Weber* decision. The answer given by *Weber* is that one **must determine whether the substance or, as the Court referred to it, the "essential character", of the dispute is governed, expressly or by implication**, by the scheme of the legislation and the collective agreement between the parties. Unlike **the first consideration** which focuses on the process for resolution of disputes, **the second consideration** focuses on the substance of the dispute. Of course, the two **are inter-related**. The ambit of the process does not exist in the abstract, but is defined by the nature of the disputes to be submitted to it.
>
> 21 The **third consideration** relates to the practical question **of whether the** process favoured by the parties and the legislature **provides effective redress for the alleged breach of duty**. Generally, if there is a right, there should also be an effective remedy.
>
> [My emphasis]

[29] He also summarized the *Weber* principle and its rationale:

41 That brings me to Weber v. Ontario Hydro. Mr. Weber was a unionized employee of Ontario Hydro. He took an extended leave of absence during which Hydro paid him sick leave benefits. Hydro became suspicious Mr. Weber was malingering and hired a private investigator. The investigators posed as others and gained entry to his home. As a result of information so obtained, Hydro suspended Mr. Weber for abusing his sick leave benefits. The union filed grievances on his behalf. One alleged that Hydro's hiring of the private investigator was a violation of the collective agreement and requested that Hydro be ordered to pay Mr. Weber and his family damages for mental anguish and suffering arising from the surveillance. The arbitration was settled.

42 Mr. Weber also commenced an action in the courts claiming damages for the torts of trespass, nuisance, deceit and invasion of privacy as well as for violation of his rights under s. 7 of the Canadian Charter of Rights and Freedoms. Hydro applied to dismiss the claims against it and the Supreme Court of Canada upheld the order of the Chambers judge dismissing the action as against Hydro. The Supreme Court was unanimous in its agreement with the Chambers judge that the tort claims should be dismissed but the Court divided 4 - 3 on the question of whether the Charter claims should also be dismissed.

43 McLachlin, J., for the majority, stated that the issue in *Weber* was:

> ... when employees and employers are precluded from suing each other in the courts by labour legislation providing for binding arbitration.

44 It was common ground on the appeal to the Supreme Court of Canada that **civil actions based solely on the collective agreement were precluded by the provision in the Ontario Labour Relations Act**, requiring every collective agreement to contain a provision for final and binding settlement by arbitration of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement.

45 The Court in *Weber* adopted an "exclusive jurisdiction" model of grievance arbitration. Differences between the parties arising from the collective agreement must proceed to arbitration. The courts have no power to entertain actions in respect of such disputes: p. 956.

46 The Court gave three reasons for adopting this "exclusive jurisdiction" model:

> (1) The jurisprudential reason: McLachlin, J. relied on the decision in St. Anne Nackawic for the proposition that mandatory arbitration clauses in labour statutes deprive the courts of concurrent jurisdiction.
>
> (2) The statutory language: McLachlin, J. noted that **the Ontario legislation makes arbitration the only available remedy for differences arising from the interpretation, application, administration or alleged violation of the agreement.** The provision referred to was s. 45 of the Labour Relations Act, R.S.C. 1990, c. L-2:
>
> 45(1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.
>
> (3) The purpose of the scheme: McLachlin, J. considered that concurrent jurisdiction in the courts would undercut the purpose of the grievance arbitration regime which lies at the heart of all Canadian labour statutes.

47 In light of the three reasons discussed by McLachlin, J., I conclude that, **while an express statutory grant of exclusive jurisdiction to the grievance arbitration process is one of the bases of the decision in Weber, it is not, on its own, dispositive of the question whether the court should decline jurisdiction in favour of the grievance arbitration process**.

48 The Supreme Court's decisions in St. Anne, Gendron, and Weber show that there are a number of inter-related considerations relevant to whether courts

> should defer with respect to a particular case to an alternative dispute resolution process established by legislation or agreement of the parties. **Absent words clear enough to oust court jurisdiction as a matter of law, the question is whether the court should infer, in the particular circumstances, that the alternate process was intended to be the exclusive means of resolving the dispute.** In *Weber*, McLachlin, J. addresses these considerations under two main headings: the dispute and the ambit of the collective agreement. Underpinning this approach is the conclusion that the legislation and collective agreement at issue in *Weber* conferred exclusive jurisdiction on the grievance arbitration process (at 954), that such finding of exclusivity was consistent with the jurisprudence (at 952-953) and that it was also consistent with the policy considerations at the heart of Canadian collective bargaining statutes (at 954). The conclusion was reached, as well, on the basis that the arbitrator had the requisite authority to apply the common law and the Charter to the dispute and the remedial power to grant effective redress (at 963).
>
> [My emphasis]

[30] Justice Cromwell also confirms Mr. Dunphy's submission that courts will generally err on the side of caution before foreclosing a claim:

> 104 **The defendants also challenge these claims** on the basis that they are, in essence, claims for loss of consortium for which there is no basis in law. This point was not fully argued; **the defendants provided us with no authority** in support of this branch of the argument. I am not convinced that the claim, as pleaded, is absolutely unsustainable if ordinary tort principles were applied: see the decision by Hallett, J. (as he then was) in Blotnicky v. Oliver (1988), 84 N.S.R. (2d) 14 (S.C.T.D.). **While the claim pleaded is novel, that in itself is a reason not to strike it out.**
>
> [My emphasis]

[31] Keeping in mind Justice Cromwell's comments, I have examined the Collective Agreements (which I will note being unsigned, though contained in District Fire Chief Donald Strachan's October 2, 2006 affidavit, are troubling as their accuracy could not be vouchsafed for by HRM counsel).

[32] Ultimately, I should on this Motion for Disclosure, consider a high threshold ("plain and obvious") before concluding the Court is without jurisdiction.

Findings

[33] A proper interpretation of the Collective Agreements (in light of the *Trade Union Act* RSNS 1989 c. 475) satisfies me that:

- While the Collective Agreement contains a process for final settlements by grievance or arbitration, of differences concerning its violations, I need not respect the otherwise apparent strong preference for that dispute resolution process **because:**

    (a) It is not clear that the Plaintiff's dispute can be referred to a third party

adjudicator under the Collective Agreement because, it is not clear that what Casey is alleging is a "violation" of the Agreement [no obligation on HRM in the Agreement that appears obviously violated];

(b) It is not clear that the "essential character" of the dispute is one that is governed expressly or by implication by the scheme of the legislation (*Trade Union Act* RSNS 1989 c. 475 - ss. 4, 42 and 43) and the Collective Agreement; and

(c) It is not clear that the Collective Agreement provides **effective** redress - the Plaintiff seeks damages - the Agreement does not expressly provide for such or similar remedy.

[Although only parenthetically, I note Darren Casey approached the Union on March 11, 2005 to file a grievance and its counsel / agent

> advised him “the matter was not a matter that could be addressed by a grievance” - para. 33 of Darren Casey’s affidavit.]

[34] This Collective Agreement does not appear to constitute the effective equivalent of, what MacDonald, CJNS called, a “statutory contract”, in *MacDougall v. Nova Scotia (WCAT)* 2010 NSCA 92, where he referred to the inherent trade off in the context of workers compensation legislation:

> ...the legislative scheme represents a “statutory contract” binding the parties to the historic trade off - namely, guaranteed compensation in lieu of the right to sue.
>
> - para. 16.

[35] In *Pleau*, Justice Cromwell anticipated that “Generally if there is a right, there should also be an effective remedy” - para. 21. In the case at Bar, there is no such *quid pro quo*.

[36] Not expressly or by implication is it plain and obvious that the Collective Agreement permits the Plaintiff to seek damages, as opposed to compensation for lost earnings which is the purpose and extent of remedy in the *Workers Compensation Act* SNS 1994 - 95 c. 10 - see ss. 10, 34, 37, 38 and 39 for example.

I note as well that “stress other than an acute reaction to a traumatic event” does not fall within the definition of “accident” in the Act, and the “anxiety and mental suffering” Casey claims are not necessarily covered by the Act.

[37] The Collective Agreement (June 1, 2000 to May 31, 2004) contains an article wherein an opting out of the *Workers Compensation Act* is anticipated once the Agreement is signed and the Union puts in place “coverage for occupational injuries” - Art. 32.06.

[38] Presumably that Article is to substitute for the lost earnings compensation benefits that the Act would otherwise provide. Casey does not plead that he lost any earnings as part of his claim; and when asked by Mr. Kinghorn in cross-examination, Casey confirmed that he did not lose any time at work because of the actions of HRM / Bonang.

[39] There is however, no process in the Collective Agreement to claim for an equivalent to damages for “anxiety and mental suffering” as sought in the Plaintiff’s actions herein.

[40] Whether such a substitute process was set up by the Union or not, in neither situation under the Collective Agreement is it plain and obvious that an effective redress is available to the Plaintiff.

[41] Article 32.10 reads in part:

> Employees will not pursue any civil action against the Employer... for any injury or illness received on duty which would otherwise be covered under the *Workers Compensation Act*... this shall be an exclusive remedy and shall be in full and final satisfaction of any claim...

[42] Thus arguably, for any "injury or illness received on duty" which is not otherwise covered by the Act, an employee is not prohibited by this Collective Agreement from taking a civil action against his employer.

[43] It is not plain and obvious that Mr. Casey's claim is otherwise covered by the Act.

[44] It is not as simple as Mr. Kinghorn submitted - not every injury / illness, arising while on the job to an employee, is necessarily exclusively governed by,

and limited to, the Collective Agreement when such injury / illness is somehow referable to the employer's actions.

[45] Significantly, in the case at Bar, Mr. Kinghorn did not consider having the same counsel represent HRM and Bonang a potential conflict of interest. But Article 32.10 expressly prohibits on its face, civil action **only** "against the employer". Bonang is not expressly protected thereby as an individual. Neither is Dr. MacGillivray.

[46] Is the Plaintiff prohibited by his status as an employee from suing Bonang, another employee, who is not subject to the same Collective Agreement as he is?

[47] I conclude that the "essential character" of the dispute is not so plain and obvious as Mr. Kinghorn submits.

[48] I am unable to infer "in the particular circumstances, that the alternate process [arbitration] was intended to be the exclusive means of resolving the dispute" in issue herein - *Pleau* supra, at para. 48.

[49] This may be why the Defendants argue that “the matters raised in the Plaintiff’s Statement of Claim, while framed in tort, are actually matters of contract, arising out of a Collective Agreement to which the Plaintiff is bound and are accordingly matters under the exclusive jurisdiction of the applicable grievance / arbitration process” - p. 3 brief of HRM.

Conclusion

[50] For me to accept the Defendants arguments on the Motion for Disclosure would require me to conclude that the Court has no jurisdiction. Doing so would in essence be deciding the summary judgment motion, without the Plaintiff having had the benefit of any disclosure from the Defendants. *Civil Procedure Rule* 15.03 would require such disclosure “no more than 45 days after the day pleadings close”, which is “the day when each party claimed against has filed a Notice of Defence” - CPR 38.11.

[51] I am very reluctant at this early stage [of disclosure] to do so. I note that Dr. MacGillivray supports the Plaintiff’s position on the disclosure motion, and that

the other Defendants are not arguing that the disclosure would cause inordinate costs, burden and delay - CPR 14.08(3).

[52] In order for a court to fairly assess, at summary judgment motion **on evidence**, whether there is a genuine issue for trial, the Plaintiff must have the proposed disclosure to allow it to effectively advance its position.

[53] If the Defendants are concerned that providing such disclosure may cause them to have attorned to the Court's jurisdiction, I should think that this Court ordering disclosure would not prejudice their position - *Newton v. Lantz* 2010 NSSC 359, per LeBlanc, J.

[54] On the other hand, the Defendants, HRM and Bonang, filed a Defence on February 16, 2006 in which they did not dispute this Court's jurisdiction to hear the Plaintiff's action against them. That issue was only raised in its May 4, 2007, Motion for Summary Judgment.

[55] Without disclosure, these issues cannot be fairly presented to the Court hearing the Motion for Summary Judgment on September 28, 2011. That is not a long time to wait to have a more full hearing of the matter.

[56] I have not overlooked that the Plaintiff may request an amendment to the pleaded Statement of Claim once they have the Defendants' disclosure. Only with disclosure could the Plaintiff be aware whether such amendment is necessary or desirable. I emphasize that here the Defendants have disclosed nothing at all.

[57] It seems apparent to me that the disclosure is not extensive, or costly to produce, and at the Summary Judgment Motion, the Defendants HRM and Bonang, will have a full hearing for which they will be entitled to costs if successful.

Order

[58] In this Motion, I will therefore make the costs payable **in the cause**, [i.e. as between HRM / Bonang and Casey only] and in the amount of $300.

[59] The Defendants HRM and Bonang (assuming the Court has jurisdiction to deal with the Plaintiff's action) are ordered to file by July 20, 2011:

> Affidavits Disclosing Documents for each of them separately in accordance with the full requirements of *Civil Procedure Rules* 14.08 and 15.

J.