SUPREME COURT OF NOVA SCOTIA

Citation: *Ashley v. Nova Scotia (Attorney General)*, 2024 NSSC 104

Date: 20240419
Docket: 520278
Registry: Halifax

Between:

Jason Ashley and Gareth Boudreau

Plaintiffs

and

His Majesty the King as Represented by the Attorney General for the Province of Nova Scotia

and

Jamie Vigliarolo, Jane Clark, Mark Pace, Curtis Coward, Bob Driscoll, Sandra LaForge and Ed Lake

Defendants

SUMMARY JUDGMENT DECISION

Judge:	The Honourable Justice Ann E. Smith
Heard:	January 2, 2024, in Halifax, Nova Scotia
Counsel:	Douglas W. Lutz, for the Plaintiffs Duane Eddy, for the Defendants

By the Court:

Facts:

[1] Two unionized employees (the "Plaintiffs") brought an action against a group of managers at the Metro Regional Housing Authority (the "MRHA") and the Province of Nova Scotia claiming defamation and negligent conduct. The Plaintiffs were members of a trade union, the International Union of Operating Engineers, local 721 B (the "union"). The Plaintiffs' union executed a Collective Agreement with the MRHA. The term of the Collective Agreement was November 1, 2015 to October 31, 2023.

[2] The Plaintiffs claimed to have witnessed a shooting while at work on October 30, 2020. They each applied for, and were granted permanent impairment benefits by the Nova Scotia Worker's Compensation Board on the basis that they sustained psychological injuries as a result of witnessing the shooting.

[3] After this shooting occurred, members of the management team of the MRHA sent e-mails to each other that seemed to imply that no shooting had occurred. The managers also held meetings with the Plaintiffs where they expressly or implied that the shootings did not occur. The Plaintiffs believe these statements were defamatory and were an act of intentional infliction of mental suffering.

[4] The Plaintiffs filed a Statement of Claim at the Supreme Court of Nova Scotia on January 5, 2023, and the Defendants filed a substantive Statement of Defence on February 29, 2023.

[5] On September 7, 2023, the Defendants filed this summary judgment motion to dismiss the claim, asking the court to strike or set aside the claim on the basis that it relies upon a cause of action that is in the exclusive jurisdiction of another tribunal, i.e., an arbitrator pursuant to the Collective Agreement.

[6] The Plaintiffs argue that the Supreme Court retains jurisdiction to hear the matter because the dispute arose outside of the ambit of the Collective Agreement. In the alternative, the Plaintiffs claim that by filing a substantive defence, the Defendants have attorned to the jurisdiction of the Court.

Issues:

[7] Does this Court have the jurisdiction to hear this action? If not;

(a) Did the Defendants, nonetheless, attorn to the jurisdiction?

Decision in Brief

[8] This Court does not have the jurisdiction to hear this dispute. The Statement of Claim makes it plain and obvious that this dispute arises out of the Collective Agreement and is under the exclusive jurisdiction of an arbitrator. The alleged defamatory statements were made by management towards unionized employees, at work, concerned the capacity and character of the employees, and arise impliedly out of the context of the Collective Agreement.

[9] Rule 13.03(1)(b) mandates that this Court must set aside the Statement of Claim.

[10] Further, a defendant cannot attorn to the jurisdiction of the Court if the Court does not possess that jurisdiction in the first place.

ANALYSIS

Does this Court have jurisdiction?

[11] Both parties have identified *Weber v. Ontario Hydro*, [1995] 2 SCR 929 (SCC) as the authority for determining when a court's jurisdiction is ousted by a collective agreement. McLachlin J.'s judgement in *Weber* can be summarized simply as: if the difference between the parties arises (expressly or inferentially) from the collective agreement, the courts have no power to hear an action in respect of the dispute.

[12] The Supreme Court of Canada in *Weber* held that the collective agreement must be read in the context of the relevant labour relations legislation, which in this case is the *Trade Union Act,* RSNS 1989, c. 475. (the "*TUA*"). In determining whether this Court has the jurisdiction to hear this matter, the Court must be respectful of the purpose of the *TUA* and its provisions which generally operate to prevent the bringing of civil actions in labour disputes. Given this context, the Supreme Court of Canada in *Weber* held that the court only retains jurisdiction when one of two conditions is met:

1. The dispute does not arise from the collective agreement; or
2. When a remedy is required that an arbitrator is not empowered to grant. (para. 59)

[13] In the within matter, the second condition is not met. The remedy the Plaintiffs request is in the form of damages, a remedy that is available to labour arbitrators, as explained by Brown & Beatty in *Canadian Labour Arbitration*, 4th Edition, 2015, at section 2:1504:

> Moreover, with the expansion of arbitral jurisdiction to include all disputes arising out of the workplace, the types of damages awards associated with the torts of negligence, intentional interference with economic relations, defamation and the like are today made in the context of arbitration.

[14] In *Mehta v. Acadia University*, 2022 NSSC 69 this Court noted that an arbitrator's powers extend to tort claims such as defamation:

> [55] For example, in *Masjoody v. Trotignon*, 2021 BCSC 1502, the British Columbia Supreme Court found that the defamation claims of Dr. Masjoody, a university professor, fell within the exclusive jurisdiction of an arbitrator. In that case, Dr. Masjoody commenced an action in defamation against his employer, Simon Fraser University and a former colleague for termination of his employment for "just and reasonable cause". Dr. Masjoody commenced an action in Court. The matter did not proceed to arbitration. Justice Fitzpatrick stated:
>
> > [85] In my view, the inescapable conclusion is that the "essential character" of Dr. Masjoody's dispute with Dr. Trotignon, SFU and the unnamed persons who are involved in the dispute...concern Dr. Masjoody's treatment at his workplace arising from his employment with SFU.
> >
> > [86] There is no dispute that Dr. Masjoody's allegations of harassment, including sexual harassment, defamation, conspiracy and (essentially) wrongful termination are matters covered within the purview of the TSSU Collective Agreement. There is also no doubt that, under that process, an arbitrator has the ability to grant Dr. Masjoody any remedy determined to be appropriate: Weber at paras. 56-57. [...]
> >
> > [89] The fact that the legal causes of action in the ANOCC principally relate to defamation and conspiracy do not detract from that fundamental exercise of considering the relevant matrix of this case. In any event, the claims in *Weber* were also tort claims. Other court proceedings involving harassment and criminal conduct (*Fereira* at paras. 56-57) and defamation claims (*Haight-Smith* at paras. 31-44, citing in part *Giorno v. Pappas*, [1999] O.J. No. 168 (C.A.); *Stene* at para. 64) did not detract from a consideration of

> the relevant facts toward concluding that the dispute in questions arose within the context of a collective agreement.
>
> [Emphasis added]

[15] Laskin, J.A. writing for the Ontario Court of Appeal in *Piko v. Hudson's Bay Co.*, 1998 CanLii 6874 (ONCA), noted that an arbitrator has the power to award damages in tort, even though he found in that case that the tort in question arose outside of the collective agreement:

> I do not rest my decision on any differences between the power of courts and the power of arbitrators to award damages for a tort, such as the tort of malicious prosecution. I recognize that arbitrators may apply common law principles in awarding damages, and, more importantly, the breadth of an arbitrator's power to award damages does not necessarily determine whether *Weber* applies.

[16] The remedy sought by the Plaintiffs (damages by way of defamation) can clearly be awarded by an arbitrator.

[17] The key issue this Court must determine is whether the first condition is met. If the dispute arises from the Collective Agreement, the Court does not have jurisdiction. The distinction between the two is not always obvious, as the Supreme Court of Canada in *Weber* noted (at para 57):

> In considering the dispute, the decision-maker must attempt to define its "essential character," […] In the majority of cases the nature of the dispute will be clear; either it had to do with the collective agreement, or it did not. Some cases, however, may be less than obvious. 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.

[18] This dispute is described by the Plaintiffs in their motion brief at paragraph 61 as:

> The damages […] resulting from the defamatory statements of the defendants and the ancillary negligent or intentional infliction of mental suffering that followed.

[19] The Plaintiffs claim that the Collective Agreement grievance provisions only extend to suspensions of work; specifically discharges or suspensions. They claim this means that other issues (like defamatory statements from management) arise from outside of the agreement. The Collective Agreement, however, must be read in conjunction with the *TUA* which provides:

> 42 (1) Every collective agreement shall contain a provision for final and binding settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or persons bound by the agreement or on whose behalf it was entered into, concerning its meaning or violation, including any question as to whether a matter is arbitrable.
>
> [Emphasis added]

[20] The scheme of the *TUA*, similar to the Ontario *Labour Relations Act*, RSO 1990, c L.2, in *Weber*, is to give arbitrators exclusive jurisdiction over disputes between parties to a collective agreement. As the Ontario Court of Appeal said in *Piko v. Hudson's Bay Co.* at paragraph 10:

> To deprive arbitrators of exclusive jurisdiction over these disputes would, according to *Weber* and *St. Anne-Nackawic*, disrupt the collective bargaining relationship and fail to give effect to the language of the *Labour Relations Act.*

[21] It cannot be said that only express terms of the Collective Agreement are subject to the exclusive jurisdiction of an arbitrator. If the allegedly defamatory statements inferentially arise out of the Collective Agreement, they are still subject to the exclusive jurisdiction of a labour arbitrator.

[22] The Plaintiffs rely on the decisions in *Piko v. Hudson's Bay Company*, *Fording Coal v. United Steelworkers of America, Local 7884* 1998 BCCA 38 (BCCA) and *Graham v Strait Crossing Inc.* 1999 CanLii 4004 PE SCAD (PECA) to support their argument that this dispute does not arise out of the Collective Agreement.

[23] In *Piko*, the Court found that it had jurisdiction to hear a tort claim of malicious prosecution from a unionized employee against her employer. The employer both fired the employee for fraud (an express consideration in the collective agreement) and then initiated a criminal prosecution after the employee was discharged. The key finding in *Piko* was that the employer took the dispute out of the labour relations context by bringing criminal charges. The Court of Appeal found that on those facts an action in damages founded on the tort of malicious prosecution could proceed in the court as it did not arise from the interpretation, application, administration or violation of the collective agreement between the parties.

[24] Whether or not the Defendants in this case defamed the Plaintiffs, they did so entirely within the workplace context. The statements made by the management

team arose from their job duties to either communicate with other senior leaders, the Plaintiffs themselves, or to the Joint Occupational Health and Safety Committee.

[25] The court in *Fording Coal* held that the collective agreement at issue did not contemplate remedies for defamatory statements, and that defamation actions may not be arbitrable, writ large, because plaintiffs have an absolute right to a jury trial in a defamation action. (paras 27 and 28). This finding was not appealed and is not supported by the Ontario Court of Appeal in two cases; *Ruscetta v. Graham,* 1997 CanLii 12334 (ONSC); aff'd 1998 CanLii 2118 (ONCA) and *Dwyer v. Canada Post Corp.*,1997 CanLii 1110 (ONCA).

[26] Further, while *Fording Coal* supports the Plaintiffs' position, with respect, the reasons are not consistent with the principles enunciated by the Supreme Court of Canada in *Weber*.

[27] The Ontario Court of Justice in *Ruscetta v. Graham* (affirmed by the Court of Appeal) held that defamation arising from a unionized work setting is properly under the jurisdiction of an arbitrator (at para 9):

> …In short, defamation complained of arises out of a communication from an employee of the CBC whose precise job was to communicate with the WCB regarding the claims of employees who are bound by the collective agreement and that communication was about the plaintiff solely in his capacity as an employee. As the collective agreement does govern issues such as injuries and LTD benefits, and the dispute arises in an employee-employer context, this court lacks jurisdiction to hear the matter. Parliament, through the Canada Labour Code, has manifested an intention that an arbitrator deal with such disputes. The merits of the plaintiff's case, if any, are properly determined in a hearing before such an arbitrator.
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> [Emphasis added]

[28] In *Dwyer* v. *Canada Post* [1995] OJ No 3265 (ONSC) where the cause of action was also defamation, the Ontario Court of Justice found that irrespective of the cause of action, the court lacked jurisdiction (para 19):

> …I must conclude, on the materials put before me, that the subject matter of the letter and the essential character of the acts complained of fall within the ambit of the collective agreement. This Court then has no jurisdiction to hear the claim of the plaintiff in this matter as it is presently drafted.

[29] The trial judge's decision was affirmed by the Ontario Court of Appeal (1997 CanLii 1110 ONCA).

[30] Further, the facts of *Fording Coal* are not the same as those before this Court. In *Fording Coal*, a union president gave defamatory statements to a news outlet. The principle from *Weber* is clear:

> Where the dispute, regardless of how it may be characterized legally, arises under the collective agreement, then the jurisdiction to resolve it lies exclusively with the labour tribunal and the courts cannot try it. (para 48)
>
> [Emphasis added]

[31] In *Graham v. Strait Crossing Inc*., 1999 CanLii 4004 (PESC AD) an employer made allegedly defamatory statements in respect of the employee's claim for workers' compensation benefits. Specifically, the employer wrote a letter to the Worker's Compensation Board objecting to the compensation. The Prince Edward Island Court of Appeal held that the essential character of the dispute was centered on the employee's right to compensation under the *Workers' Compensation Act*, and accordingly, the dispute did not arise, on the facts, from the collective agreement between the parties.

[32] The Plaintiffs say that although the MRHA made no effort to object to the Plaintiffs' benefits under the *Workers' Compensation Act*, its tortious conduct amounted to an "indirect attack on the Plaintiffs' entitlement to WCB benefits".

[33] However, there is nothing in the pleadings to suggest that the Plaintiffs' WCB benefits were ever put in jeopardy by the actions of the management team.

[34] Neither party referred to the decision of the Nova Scotia Supreme Court in *Frayn v. Quinlan,* 2008 NSSC 63. In that case the parties were all members of the Nova Scotia Teacher's Union. The claim was brought by the Plaintiff for alleged bullying by her colleagues, who were the principal of the school and her supervisors.

[35] Hood, J. reviewed the factual matrix giving rise to the allegations in order to determine whether the essential character of the dispute arose from the collective agreement. Justice Hood wrote:

> [77] She (the plaintiff) alleges that two supervisors harassed and bullied her and created a bad working environment. She initiated a grievance about how she was treated, just as she initiated a grievance about the Board Initiated Transfer. The fact that the two people about whom she complained are also members of the same union, although acting in a supervisory capacity in the school, does not mean that the complaints are outside the collective agreement. In fact, in my view, it is a further indication that this dispute is within the collective agreement.

> […]
>
> [90] In summary, the provisions of the collective agreements deal with teachers' working conditions, their well-being and the Board's obligation to act fairly and reasonably in exercising its rights under the collective agreement.
>
> [91] Previous decisions where similar provisions exist have found an implied obligation on the employer to safeguard employee's health, including mental health, and to require supervisors to supervise in a manner that is not abusive and harassing.
>
> [Emphasis added]

[36] The facts in *Frayn* share similarities to those before this Court. Both disputes arose out of interactions between workers and their supervisors. The plaintiffs in each case claim the collective agreement does not explicitly grant them a dispute resolution process for their type of dispute. The Court in *Frayn* held that even though there was no explicit mention of how to deal with a bullying dispute in the collective agreement, it could be implied that disputes between the employees and supervisors regarding their workplace interactions was under the ambit of the collective agreement. Hood, J. wrote at paragraph 95:

> It would do a disservice to the whole scheme of dealing with labour relations matters in the collective agreement, and ultimately through arbitration, to allow matters such as this to be dealt with in the civil courts. […] To allow the courts, in essence, to enforce matters which are the subject of a collective agreement would in my view subvert the carefully crafted process called for in the Teachers' Collective Bargaining Act…

[37] In *ABT Building Products Canada Ltd. and C.E.P., Loc. 434 (Shatford) (Re),* 2000 CanLII 50164 (NS LA), Arbitrator Christie rejected the application of the *Fording Coal* reasoning (see pp 34-36).

[38] Further, the Nova Scotia Court of Appeal in *Symington v. Halifax (Regional Municipality),* 2007 NSCA 90 confirmed that the substance of an allegation of defamation is properly before an arbitrator where its essential character arises from the collective agreement.

[39] The issue in *Symington* was whether police discipline should be dealt with under a collective agreement, under the *Police Act*, or whether the court could take jurisdiction. The appellant's claims included defamation. Fichaud J.A. said, for the court:

> [84] Article 2 of the collective agreement contains a standard management rights clause entitling the Region to exercise all authority for the management and

> operation of the Police Service, except as limited by the collective agreement. In Weber (¶ 72, 74) Chief Justice McLachlin referred to the express "unfair treatment" clause in the collective agreement. Disputes, whose essential character arise implicitly from the collective agreement, are for the arbitrator (*Regina Police* ¶ 25). Arbitral jurisprudence has established principles of fairness and reasonableness and protections against arbitrariness and bad faith to govern the employer's discretion in the exercise of management rights: Brown & Beatty *Canadian Labour Arbitration* (Fourth Edition) - Looseleaf, vol. 1, ¶ 4:2322-2326. I express no view whether these principles apply to Cst. Symington's dispute under this collective agreement. That would be for an arbitrator. But it would be a live issue.
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> [85] My conclusion includes Cst. Symington's defamation claim (above ¶ 24). The underlying dispute over sick leave under the collective agreement kindled employer reactions that Mr. Symington characterizes as defamatory. In these circumstances, *Weber* applies and the issue is for the collective agreement's dispute resolution process...
>
> [86] Subject to Article 29(8) of the collective agreement, that I will discuss next, the animating facts and seminal dispute between Cst. Symington and the Region are governed by the collective agreement. I note in passing that, on the chambers application (above ¶ 43), the Region submitted to the Chief Justice that this dispute was covered by the collective agreement's provisions that I have listed above. When I say that the dispute is governed by the collective agreement, I do not mean that the labour arbitrator would decide whether the Region committed malicious prosecution, defamation, negligence or intentional infliction of mental harm. The standards and terminology in arbitration derive from the collective agreement and arbitral jurisprudence. But the essential character of the issues under the collective agreement substantially overlaps the *lis* from the torts cited in Cst. Symington's statement of claim.

[40] Accordingly, the procedural differences between a court proceeding and arbitration (or a statutory dispute-resolution process) do not deprive an arbitrator of jurisdiction to deal with the substance of an allegation of defamation.

[41] Even in British Columbia, *Fording Coal* has not been taken as a universal prohibition on dealing with defamation in the arbitration context. In *Masjoody v. Trotignon*, 2022 BCCA 135, Marchand J.A. said, for the court:

> [35] This Court has applied the framework set out in *Phillips v. Harrison*, 2000 MBCA 150, for determining whether defamatory statements are work-related and therefore to be adjudicated under the mandatory dispute resolution procedures within collective agreements: *Haight-Smith v. Neden*, 2002 BCCA 132 at para. 43, leave to appeal to SCC ref'd, 29172 (21 November 2002); *Stuart v. Hugh*, 2009 BCCA 127 at para. 40. This framework provides that defamatory statements may

> be considered to be work-related and subject to mandatory dispute resolution procedures under a collective agreement if:
>
> 1. the comments concern the employee's character, history, or capacity as an employee;
>
> 2. the comments were made by someone whose job it was to communicate a workplace problem; and
>
> 3. the comments were made to persons who would be expected to be informed of workplace problems. See *Phillips* at para. 71.
>
> [36] In my view, the *Phillips* framework is a useful, but not exclusive, means of examining whether defamatory statements are subject to mandatory dispute resolution procedures within collective agreements. The broader *Weber* framework continues to govern. If the *Phillips* framework indicates that defamatory statements are work-related, the essential character of the dispute concerns subject matter that is covered by the collective agreement. If it does not, it is necessary, in my view, for the court to dig deeper to determine if the defamatory statements nevertheless arise out of the interpretation, application, administration or violation of the collective agreement.

[42] In *Pleau v. Canada (Attorney General)*, 1999 NSCA 159, the Nova Scotia Court of Appeal considered whether a plaintiff dismissed from the federal service, and his family members, could bring an action against other civil servants for conspiracy to cause injury, breach of fiduciary duty and abuse of office. Mr. Pleau brought a grievance and was reinstated.

[43] Cromwell, J.A. (as he then was) held that there were three main considerations underpinning *Weber* at paras 50-52.

[44] The first consideration related to the process for dispute resolution established by the legislation and the collective agreement. Second, consideration must be given to the nature of the dispute (the "essential character") and its relation to the rights and obligations created by the overall scheme of the legislation and the collective agreement.

[45] Third, "the capacity of the scheme to afford effective redress must be considered. Simply put, the concern is that where there is a right, there ought to be a remedy" (para 52).

[46] On the facts in *Pleau*, the Court found that even though the claimants could access the grievance procedure set out in the collective agreement and provided under the *Public Service Staff Relations Act,* R.S.C., 1985, c. P-35, they could not have the dispute referred for adjudication on the merits (para 85). The Court

concluded that access to the grievance procedure without the right to test the outcome by adjudication did not constitute effective redress for the alleged wrongdoing (para 95). As such, the Court retained jurisdiction.

[47] Further, in *Pleau* there was no express grant of exclusive jurisdiction to the grievance process in the collective agreement and the collective agreement did not address the substance of the plaintiffs' complaints.

[48] Here the allegedly defamatory statements in question, as set forth out in the pleadings, came from members of the management team of the MRHA and were aimed towards the Plaintiffs. All parties were subject to the terms of the Collective Agreement. However, the fact that the parties were subject to the agreement, in and of itself, is not determinative of whether the dispute arises from the Agreement.

[49] To assist in making this determination, the three-part framework in *Phillips v. Harrison*, 2000 MBCA 150 (MBCA) as adopted in *Masjoody v. Trotignon*, 2022 BCCA 135 is instructive:

> [35] This Court has applied the framework set out in *Phillips v. Harrison*, 2000 MBCA 150, for determining whether defamatory statements are work-related and therefore to be adjudicated under the mandatory dispute resolution procedures within collective agreements: [citations not included]. This framework provides that defamatory statements may be considered to be work-related and subject to mandatory dispute resolution procedures under a collective agreement if:
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> 1. the comments concern the employee's character, history, or capacity as an employee;
> 2. the comments were made by someone whose job it was to communicate a workplace problem; and
> 3. the comments were made to persons who would be expected to be informed of workplace problems.

[50] As the British Columbia Court of Appeal noted in *Masjoody* (at para 36), the *Phillips* framework is a useful, but not exclusive, means of examining whether defamatory statements are subject to mandatory dispute resolution procedures within collective agreements. However, the broader *Weber* framework continues to govern.

[51] In the case at hand, the first step of the *Masjoody* test is met. The comments made regarding the shooting directly concern the history of the two Plaintiff employees (what did they do and see on the day they witnessed the shooting) and indirectly concern the character and capacity of the Plaintiff employees (if they did

not see the shooting, can they still work?). This is supported by the Plaintiffs' Statement of Claim at paragraph 21:

> His (management's) words meant, and were understood to mean, that the Plaintiffs were liars, the shooting which they had witnessed had not occurred and that the Plaintiffs were fabricating symptoms of PTSD and trauma-induced stress and anxiety.

[52] The second and third parts of the *Phillips* test are also met based on the facts. Jane Clark, Sandra LaForge, and Jamie Vigliario all worked in management at MRHA and communicated the alleged defamatory statements by virtue of their position. For example, Jane Clark's email stating that "there was no supporting evidence of shots fired that day in the community" was sent exclusively to the MRHA management team to update them on an issue at the site of the property they oversee (para 15 of the Statement of Claim).

[53] The Statement of Claim clearly articulates that the defamatory behaviour was directed to others within the workplace: "…senior management of MRHA pursued a deliberate course of conduct […] encouraging the notion within MRHA that the shooting had not, in fact, occurred". The MRHA management communicated the statements to persons who would be expected to be involved in this type of workplace issue: Jane Clark's email to colleagues was sent to keep management apprised of an ongoing investigation into a workplace incident; Sandra LaForge's comments were made directly to the Plaintiffs regarding their capacity to work, and Jamie Vigliaro's comments were made to the joint occupational health and safety committee.

[54] Following argument in this matter, the Plaintiffs' counsel provided the Court with the decision of the British Columbia Court of Appeal in *Rooney v. Galloway*, 2024 BCCA 8 (BCCA). Counsel directed the Court to, *inter alia*, the following passages:

> [144] The "*Weber* defence" refers to the case of *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, 1995 CanLII 108, which described the process for determining the appropriate forum for proceedings that may be governed by a collective agreement.
>
> [145] *Weber* emphasized that "[t]wo elements must be considered: the dispute and the ambit of the collective agreement… In considering the dispute the decision-maker must attempt to define its 'essential character'" (paras. 51–52). Thus,"[t]he question in each case is whether the dispute, in its essential character, arises from the interpretation, application, administration or violation of the collective agreement" (para. 52).

> [146] Recently, this Court in *Masjoody v. Trotignon*, 2022 BCCA 135, addressed an appeal from the dismissal of the appellant's action on the basis that the court lacked subject-matter jurisdiction because the dispute between the parties was governed by a collective agreement. One aspect of the claim related to alleged defamatory statements made by a co-worker and the university where the appellant was employed. The Court first referred to *Phillips v. Harrison*, 2000 MBCA 150 where the court created a framework for determining whether defamatory statements are work-related and therefore to be adjudicated under the mandatory dispute resolution procedures within a collective agreement (para. 35). *Phillips* was applied by this Court in *Haight-Smith v. Neden*, 2002 BCCA 132, at para. 43, leave to appeal ref'd, 29172 (21 November 2002) and *Stuart v. Hugh*, 2009 BCCA 127, at para. 40.
>
> [147] The *Phillips* framework (at para. 71) asks whether:
>
> > 1. the comments concern the employee's character, history, or capacity as an employee;
> >
> > 2. the comments were made by someone whose job it was to communicate a workplace problem; and
> >
> > 3. the comments were made to persons who would be expected to be informed of workplace problems.
>
> [148] *Masjoody* said:
>
> > [36] In my view, the *Phillips* framework is a useful but not exclusive, means of examining whether defamatory statements are subject to mandatory dispute resolution procedures within collective agreements. The broader *Weber* framework continues to govern. If the *Phillips* framework indicates that defamatory statements are work-related, the essential character of the dispute concerns subject matter that is covered by the collective agreement. If it does not, it is necessary, in my view, for the court to dig deeper to determine if the defamatory statements nevertheless arise out of the interpretation, application, administration or violation of the collective agreement.

[55] This Court notes that nothing in *Rooney v. Galloway* changes the British Columbia Court of Appeal's analysis in *Masjoody*, which was reviewed earlier in this decision.

[56] It is clear to this Court that the issues in dispute arise out of a workplace incident, which is subject to the terms of the collective agreement. There is no suggestion in the Statement of Claim that the dispute was taken outside of the workplace in a way that the facts did in *Piko v. Hudson's Bay Company* or *Graham*

v. Strait Crossing. Rather, this dispute is inextricably bound up with and related to the Plaintiffs' employment and falls under the exclusive jurisdiction of an arbitrator.

Did the Defendants attorn to the jurisdiction of this court?

[57] Given the Court's conclusion above, the only remaining question is whether attornment is applicable in the circumstances.

[58] The concept of attornment and its roots were addressed by the Alberta Court of King's Bench in *Calgary (City) v Bagaric*, 2022 ABKB 635 at para 9:

> [t]he underlying rationale for having the legal principle of attornment is 'fairness.' Once a defendant has committed to defending in a jurisdiction, it is not fair that the defendant may change its mind and seek another jurisdiction.

[59] Attornment serves to deny defendants the chance to commit to defending in one jurisdiction and then change strategies when they feel it serves their interests. This principle is demonstrated in *Wamboldt Estate v. Wamboldt*, 2017 NSSC 288, where the court found that the defendant attorned to the court's territorial jurisdiction under Section 4(b) of the *Court Jurisdiction and Proceedings Transfer Act*, SNS 2003 (2d Sess), c 2. *Wamboldt* does not assist the Plaintiffs, as there is no dispute over whether this Court has territorial competence to hear this matter.

[60] The decision in *Waterbury Newton v. Lantz*, 2010 NSSC 359 (aff'd 2011 NSCA 34), deals with a dispute that could have been within the jurisdiction of an arbitrator. In *Waterbury*, the court found that the defendant attorned to the jurisdiction of the court by defending the action on its merits. However, the parties in *Waterbury* were bound by the *Arbitration Act*, RSNS 1989, c 19, and not the *TUA*. The *Arbitration Act* at section 7 expressly requires that a party apply for a stay of proceedings "before delivering any pleadings" when the opposing party brings an action in any court. In this way, the *Arbitration Act* foresees the possibility of the court adjudicating a dispute under its ambit, unlike the *TUA* which foresees all disputes being handled by an arbitrator. This decision does not assist the Plaintiffs.

[61] Attornment allows for a court to exercise its jurisdiction in favour of fairness and judicial economy. Such discretion may be exercised when it is unclear whether the court is the most appropriate forum for dispute resolution, particularly when the dispute is international or interprovincial.

[62] The Alberta Court of Appeal held in *Young Estate v. TransAlta Utilities Corp*, 1997 ABCA 349 at para 43 that the consent or "attornment of the parties cannot confer jurisdiction on a court that it does not have". Further, when a court does not have jurisdiction over a matter, the defendant is "entitled to assert a lack of jurisdiction at any stage in the proceedings". (para 43).

[63] The Plaintiffs correctly interpret Rule 4.07 as requiring a challenge to jurisdiction to happen before a defence is filed on the merits of the case. However, there is no support for their argument that a motion under Rule 13.03 has the same requirement.

[64] A party cannot attorn to the jurisdiction of a court which lacks jurisdiction.

Conclusions

[65] The motion for summary judgment is granted and the Plaintiffs' claim is dismissed with costs to the Defendants.

[66] If the parties cannot agree on costs, the Court will receive written submissions within 30 calendar days of this decision.

Smith, J.