SUPREME COURT OF NOVA SCOTIA
Citation: Slack v. Capital District Health Authority, 2014 NSSC 235

Date: 20140625
Docket: Hfx. No. 408380
Registry: Halifax

Between:

Stephen Slack and **Elizabeth Gidney**

Plaintiffs

-and-

Capital District Health Authority, a body corporate, and **Linda Fougere**

Defendants

Decision

Judge: The Honourable Justice Cindy A. Bourgeois

Heard: April 9, 2014 at Halifax, Nova Scotia

Written Decision: June 25, 2014

Counsel: Counsel for the Plaintiff/Respondent - Michael Dull
Counsel for the Defendant/Applicant (CDHA) - Nancy Rubin, Q.C.
Counsel for the Defendant/Applicant (Linda Fougere) - Scott Sterns

Bourgeois, J.:

Introduction

[1] By virtue of an Amended Notice of Action and Statement of Claim dated April 9, 2014, the plaintiffs Stephen Slack and Elizabeth Gidney bring action against Linda Fougere and the Capital District Health Authority (the "Health Authority"). It is alleged that Fougere, a former employer of the Health Authority, accessed the private medical records of the plaintiffs without valid reason, and as such breached their right of privacy. It is submitted that the Health Authority is vicariously liable for the actions of its employee. In the context of this motion, it is important to note what has been removed from the plaintiffs' pleadings. The plaintiffs have removed an allegation that they have suffered emotional distress due to the invasion of privacy. Further, the plaintiffs have removed an independent allegation that the Health Authority acted negligently in failing to put in place appropriate procedures to prevent and monitor for such breaches of privacy in relation to health records.

[2] The Defendants have brought motions for summary judgment pursuant to Civil Procedure Rule 13.04 against the plaintiff Gidney only. The motions and the supporting materials were all filed prior to the above noted amendment. It is submitted that Gidney, also an employee of the Health Authority cannot bring an action against her employer, as there is a Collective Agreement which contemplates the type of dispute in question, and provides the sole forum for a resolution. It is submitted that this Court should dismiss the action brought by Gidney accordingly.

[3] Ms. Gidney argues that the motions should be dismissed, as the substance of her claim is not related at all to her employment and not therefore governed by the Collective Agreement. She submits the dispute arises from her relationship, just as Mr. Slack's does, with the Health Authority as a patient.

<u>Evidence</u>

[4] Several affidavits were filed with the Court in support of, and in opposition to the motions. The Health Authority filed the following affidavits:

a) An affidavit of Jessica L. Morrison, sworn February 4, 2014, an associate with the offices of the Health Authority's legal counsel. The affidavit served to outline the pleadings, most notably the Health Authority's reliance on the decision of **Weber v. Ontario Hydro** [1995] 2 S.C.R. 929 and the *Trade Union Act*, R.S.N.S. as support for its position that this court does not have jurisdiction to hear the dispute.

b) An affidavit of Cathy Kasemets, sworn February 5, 2014, a Human Resources Consultant with the Health Authority. Ms. Kasemets provided evidence that the plaintiff Gidney has been an employee of the Health Authority and its predecessor since July 21, 1998 and is a member of the Nova Scotia Government Employees Union ("NSGEU") Health Care Bargaining unit. The plaintiff Gidney has worked with the defendant Fougere from August 1, 2001 until March 31, 2011 in the same location at the Queen Elizabeth II Health Sciences Centre. Ms. Kasemets attaches the relevant portions of the Collective Agreement which governed at all material times, the employment relationship between the Health Authority and the plaintiff Gidney. Ms. Kasemets asserts that in or around February of 2012, Ms. Gidney brought concerns regarding the accessing of her medical records by the defendant Fougere to the Health Authority Privacy Officer, which prompted an investigation. The plaintiff Gidney participated in the investigation by virtue of attending meetings, while in the presence of her Union representative.

c) An affidavit of Karen Foster, Claims Manager and Insurance Advisor, Legal Services of the Health Authority, sworn April 9, 2014, which attaches a letter from Privacy Officer Shea to the co-plaintiff Stephen Slack. That letter concludes as follows: "Please be assured that Capital Health takes its responsibilities with respect to the protection of patient confidentiality very seriously. On behalf of Capital Health, I apologize that your personal information was accessed. If you have questions or concerns, please do not hesitate to contact me".

[5] The defendant Fougere filed an affidavit sworn February 13, 2014, in which she states that she is a former employee of the Health Authority, but had previously worked with the plaintiff Gidney. She states that she is a former

member of the NSGEU, but would have been in a different bargaining unit than the plaintiff Gidney. The defendant Fougere states that her employment with the Health Authority had been governed by the terms of a Collective Agreement, with a specified grievance process.

[6] The plaintiff Gidney filed an affidavit sworn March 31, 2014. She states that for over a decade she has been both an out-patient and in-patient of the Health Authority. She has made Emergency room visits and attended at Health Authority facilities for various medical tests. The plaintiff Gidney further asserts she has had surgeries performed as an in-patient. She further asserts that she understands that the patient records generated by virtue of these visits are maintained by the Health Authority on the "Horizon Patient Folder system" which is accessible to treatment providers within the Health Authority. The plaintiff Gidney states that she received correspondence from the Health Authority Privacy Officer advising that the privacy of her patient care records had been breached by Linda Fougere, an employee. That letter, attached to the affidavit concludes as follows: "I want to say again, on behalf of Capital Health, how sorry we are that this breach of confidentiality has occurred in relation to your health records. Capital Health firmly and sincerely believes that maintaining the confidentiality of our patients'

information is integral to the trust that our patients place in Capital Health and its associated health care providers and we have taken these breaches very seriously. Please feel free to call me with any questions or concerns that you have."

[7] The plaintiff Gidney further states that in the course of her employment with the Health Authority she has on occasion provided medical information relevant to her employment, such as in support of sick leave to "Occupational Health". She asserts that this information is kept separately from the Horizon Patient Folder referenced above, and is only accessible to employees within Occupational Health. She testified that after the Health Authority became aware of the inappropriate accessing of her patient information she was requested to participate in the investigation and attended various meetings. The plaintiff Gidney asserts she believed the purpose of the meetings was to address the nature of discipline Ms. Fougere would receive.

[8] There was no cross-examination undertaken in relation to any of the affidavits filed.

The Law

[9] There is no real dispute between the parties as to the law. The contest relates to its application to the matter before the Court. All parties have cited Civil Procedure Rule 13.04 and the Court of Appeal's recent decision in **Burton Canada Company v. Coady,** 2013 NSCA 95, and the two stage analysis set out therein for summary judgment on evidence.

[10] This matter is somewhat different in the sense that the issue before the Court is not whether there is from an evidentiary perspective a material fact in issue, but whether the Court has jurisdiction to hear the matter at all. Such matters have been found to be properly the subject of a motion for summary judgment. In **Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General),** 2007 NSCA 38, Justice Cromwell, as he then was, determined that the question of the Supreme Court's jurisdiction to hear a matter arising from a unionized labour context was a proper subject for a summary judgment application. He writes as follows:

> 10. In my view, this case turns on the question of whether the respondent's court action must be dismissed because the complaints advanced in it should have been pursued at arbitration rather than in court. To answer that question, one must determine the "essential character" of the dispute which underlies the court action and consider it in relation to the ambit of the collective agreement. There are, in this case, no factual questions requiring trial at either of these steps. The essential

> character of the dispute is determined by examining the respondent's claims, not assessing what it can prove. The ambit of the collective agreement is determined by construing the agreement. In short, the relevant legal considerations do not depend on disputed facts.
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> 11. I conclude, therefore, that the question of the court's jurisdiction over this action is a proper subject for consideration on a summary judgment application. The jurisdictional issue does not, in this case, raise any arguable issue of material fact requiring trial.

[11] Decided under the 1972 Civil Procedure Rules, **Cherubini, supra**, has been followed since the implementation of the 2009 Rules and in my view remains unaltered in its authority. See **MacNeil v. Strait Regional School Board et. al.,** 2010 NSSC 167.

[12] The leading decision from the Supreme Court of Canada addressing the jurisdiction of courts to address matters which arise in the unionized labour context is **Weber, supra**. That decision of McLachlin, J, as she then was, has been followed on numerous occasions by courts of this province. In **Gillan v. Mount Saint Vincent University,** 2008 NSCA 55, Oland, J.A. reviews the status of the law as follows:

> 13 The model of exclusive jurisdiction of arbitrators over disputes arising from collective agreements commenced with *St. Anne Nackawic Pulp & Paper Co. Ltd. v. Canadian Paper Workers Union, Local 219,* [1986] 1 S.C.R. 704. In *Weber*,

McLauchlin J. for the majority referred to the analysis in that decision, before stating in para. 50 that if the difference between the parties arises from the collective agreement, then the claimant must proceed by arbitration and the courts have no jurisdiction in respect of that dispute. After identifying the two elements that must be considered in determining the appropriate forum for the proceedings as being the nature of the dispute and the ambit of the collective agreement, she elaborated:

> 52 In considering the dispute, the decision-maker must attempt to define its "essential character", to use the phrase of La Forest J.A. in *Energy & Chemical Workers Union, Local 691 v. Irving Oil Ltd.* (1983), 148 D.L.R. (3d) 398 (N.B.C.A.). The fact that the parties are employer and employee may not be determinative. Similarly, the place of the conduct giving rise to the dispute may not be conclusive; matters arising from the collective agreement may occur off the workplace and conversely, not everything that happens on the workplace may arise from the collective agreement ... 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.
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> 53 Because the nature of the dispute and the ambit of the collective agreement will vary from case to case, it is impossible to categorize the classes of case that will fall within the exclusive jurisdiction of the arbitrator. ...
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> 54 This approach does not preclude all actions in the courts between employer and employee. Only disputes which expressly or inferentially arise out of the collective agreement are foreclosed to the courts: *Elliott v. De Havilland Aircraft Co. of Canada Ltd.* (1989), 32 O.A.C. 250 (Div. Ct.), at p. 258, per Osler J.; *Butt v. United Steelworkers of America*, [1993] N.J. No. 200*, supra; Bourne v. Otis Elevator Co.*, [1984] O.J. No. 3111, supra, at p. 326. Additionally, the courts possess residual jurisdiction based on their special powers, as discussed by Estey J. in *St. Anne Nackawic, supra*.

14 In *Pleau v. Canada, supra* Cromwell, J.A. for the court described three inter-related considerations arising from several Supreme Court of Canada decisions, including Weber and O'Leary:

> 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.
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> 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.
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> 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. (Emphasis in original)

[13] Although the Court heard argument, and considered the applicability of the first and third **Pleau** factors, it is the “essential character” of the dispute between

these parties which is central to the outcome of the motion. A review of the case law highlights that this is not an unusual experience, in that many determinations appear to pivot on whether the dispute between employee and employer "arises from the interpretation, application, administration or violation of the collective agreement". Two examples are illustrative.

[14] In **Gillan, supra,** a unionized employee of the university fell in the course of her employment and brought action against the employer alleging unsafe premises. The trial judge, in an advance motion, determined that the court did not have the jurisdiction to hear the matter as the essential character of the dispute arose under the collective agreement governing the employment relationship. The appeal of this finding was dismissed.

[15] In **Frayn v. Quinlan,** 2008 NSSC 63, an application for summary judgment claiming the court had no jurisdiction to hear the dispute in question was successful. There, a high school guidance counsellor brought an action against the defendants who were the principle and vice-principle of the school where she worked. It was alleged that the defendants had engaged in harassing and bullying

behavior, which caused the plaintiff mental distress. The conflict centered on the parties' differing views as to how to handle students who threaten self-harm. Although the relevant collective agreements did not specifically reference harassment, it was determined that such complaints were implicitly covered, and thus must be resolved within the forum provided therein.

Analysis

[16] The Health Authority, supported by the defendant Fougere, submits "that there is no question that the grievance arbitration mechanism in the Collective Agreement is exclusive in relation to disputes falling within their terms". Based on the provisions of the Collective Agreement and the interplay with the *Trade Union Act*, R.S.N.S. 1989, c.475, I agree.

[17] Similarly, I accept the position advanced by the Health Authority that the grievance process available under the relevant Collective Agreement provides an effective remedy, and the fact that such may have been lost due to the passage of time, cannot permit the plaintiff to seek a remedy in an inappropriate forum.

[18] I turn now to consider the essential nature of the dispute. The Health Authority submits that the concerns giving rise to the plaintiff's claim are both specifically and inferentially included in the Collective Agreement governing their employment relationship. It is submitted that Article 21.14(b) specifically addresses the confidentiality of employee health records. That Article contains three separate provisions as follows:

> (a) An employee shall not be required to provide her management supervisor specific information relative to an illness during a period of absence. However, such information shall be provided to Occupational Health Services, if required by the Employer. Occupational Health Services shall only release such necessary information to the employee's immediate management supervisor, such as the duration or expected duration of the illness, the employee's fitness to return to work, any limitations associated with the employee's fitness to work, and whether the illness is bona fide.
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> (b) All employee health information shall be treated as confidential and access to such information shall only be given in accordance with this collective agreement or as authorized by law. The Employer shall store employee health information separately and access thereto shall be given only to the persons in Occupational Health Services who are directly involved in administering that information or to qualified health care professionals retained by Occupational Health Services.
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> (c) The Employer shall provide access to health information held in its Occupational Health Department relating to an employee upon a request, in writing, from that employee. Where an employee requests health information about an issue that has become the subject of a grievance, the employee shall

> promptly provide the Employer with all health information obtained from the Employer's Occupational Department which is arguable relevant to the grievance. All information provided through this process shall be treated as confidential by the Employer and shall be used exclusively for the purpose of reaching a resolution of the grievance in question or, where applicable, adjudicating issues in dispute through the arbitration process.

[19] The Health Authority further submits that the management rights contained in the Collective Agreement specifically contemplate the type of complaint before the Court, as it provides the employer with the right to manage and direct its employees and operations, but not to do so in a manner inconsistent with the Collective Agreement. It is also submitted that Article 31 inferentially includes damage suffered by the plaintiff due to a breach of her privacy. It provides:

> 31.01 The Employer shall continue to make and enforce provisions for the occupational health, safety, and security of employees. The Employer will respond to suggestions on the subject from the Union and the parties undertake to consult with a view to adopting and expeditiously carrying out reasonable procedures and techniques designed or intended to prevent or reduce the risk of employment injury and employment-related chronic illness.

> 31.02 The Employer, the Union, and the employees recognize they are bound by the provisions of the *Occupational Health and Safety Act*, S.N.S. 1996, c. 7, and appropriate federal acts and regulations. Any breach of these obligations may be grieved pursuant to this Agreement.

[20] In summary, the Health Authority submits that the essence of the plaintiff Gidney's claim relates directly to her employment, including in the following ways:

> a) All of the events complained of occurred while the plaintiff was employed by the Health Authority;
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> b) The plaintiff Gidney and defendant Fougere were co-workers in the same unit of the Queen Elizabeth II Health Sciences Center for many years;
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> c) The defendant Fougere, as part of her employment, had access to the Health Authority's electronic medical record database;
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> d) The database included health information regarding the plaintiff Gidney;
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> e) All of the alleged privacy breaches took place at the workplace, where the plaintiff and the defendant Fougere were performing their employment duties;
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> f) The conduct was enabled by the work relationship.

[21] The plaintiff Gidney submits that the dispute before the Court is founded upon both plaintiffs' relationship with the Health Authority as patients receiving

health care, not upon an employment relationship, and that nothing specific or inferentially in the collective agreement governing Ms. Gidney's working relationship governs such a dispute.

[22] From the materials before the Court it would appear that there are two different types of health information that the Health Authority may have possession of in relation to its employees. The first is the information provided to Occupational Health which relate to the management and monitoring of sick leave, fitness to work decisions and other aspects of how an employee's health may impact on their ability to carry out their employment duties. In my view, it is this information which Article 21.14 specifically addresses. The second type of health information is that which is generated by virtue of an employee's use of the health care services provided by the Health Authority, as a member of the public. Which type of information was allegedly accessed by the defendant Fougere, in my view, is determinative as to whether this court has jurisdiction to hear the matter.

[23] If the information which was accessed was that of an occupational nature, i.e. the materials collected and held by Occupational Health, the outcome is clear.

The information is possessed by the Health Authority solely by virtue of the fact that the employment relationship exists, and its management and protection is clearly covered by the terms of the Collective Agreement. In my view, the outcome is not similarly as clear with respect to the patient care information, which is what was inappropriately accessed, allegedly by the defendant Fougere.

[24] In my view, "the essential character" of the dispute relates not to the plaintiff Gidney's status as an employee of the Health Authority, but rather her status as a member of the public accessing health services as a patient. The Health Authority had possession of the material in question not because the plaintiff Gidney was an employee, rather because she was a patient. The Defendant Fougere was able to access the plaintiff's information not because of Gidney's status as an employee of the Health Authority, but because it was patient information available for view by those involved in her care. Just because the defendant Fougere' s status as an employee facilitated her access to the information and brings her within the parameters of her Collective Agreement in terms of the consequences of her actions, such does not serve to alter the "essential character" of the dispute between the plaintiff Gidney and the Health Authority.

[25] The fact that the alleged acts occurred at the plaintiff Gidney's workplace, or that she and the defendant Fougere may know each other by virtue of where they work, are not determinative that the "essential character" of the dispute arises from the employment relationship. If the parties had met outside of work, Fougere could still have accessed this information, just as she allegedly did with the plaintiff Slack. At its core, this information was available because the plaintiff Gidney accessed health services offered by the Health Authority to members of the public. Notwithstanding the able arguments advanced by Counsel for the defendants relating to the exclusive regime governing the employment relationship between the plaintiff Gidney and the Health Authority, this dispute is about their relationship as patient and health care provider.

[26] The motions are dismissed. Unless waived by all parties, Counsel are to arrange to have this matter brought forward to Chambers for directions, as required by Civil Procedure Rule 13.07(1).

J.