IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Symington v. Halifax (Regional Municipality), 2006 NSSC 254

Date: 20060926
Docket: SH 214598
Registry: Halifax

Between:

James Symington and Angeline McCarthy
Plaintiffs/Respondents

and

Halifax Regional Municipality and Halifax Regional Police Service
Defendants/Applicants

Judge: The Honourable Chief Justice Joseph P. Kennedy

Heard: November 10, 2005 in Chambers
Decision: September 26, 2006

Counsel: Daniel W. Ingersoll/W. Harry Thurlow
Solicitor for the Defendants/Applicants

Stephen Moreau/Michael D. Wright
Solicitor for the Plaintiffs/Respondents

By the Court:

[1] This is an application brought by the defendants, Halifax Regional Municipality and Halifax Regional Police Service, to strike the Statement of Claim herein on the basis that it discloses no reasonable cause of action.

[2] More specifically, the applicants' submission is that this Court should find that it has no jurisdiction to determine this matter or decline to exercise jurisdiction, because the claims properly belong to the resolution process under a collective agreement, which also incorporates the adjudicative procedures under the *Police Act*, R.S.N.S. 1989, c. 348.

[3] The plaintiff (respondent) James Symington was employed by the Halifax Regional Police Service (H.R.P.) as a constable between 1988 and 2005.

[4] As such, he was a member of the Municipal Association of Police Personnel (M.A.P.P.) which is a certified trade union under the *Trade Union Act* R.S.N.S. 1989, c. 475.

[5] Further, as a police officer employed by of the H.R.P., Symington was subject to the *Police Act*

[6] The H.R.P. and M.A.P.P. were, at all relevant times, parties to an Agreement governing labour relations (the Agreement).

BACKGROUND

[7] In June of 2001, Cst. Symington went on sick leave and was eventually diagnosed as having stress-related illness which he claimed was caused by a hostile work environment. While on leave he periodically worked as an actor in Nova Scotia based movie productions. He says he did so with the knowledge and consent of his superiors at H.R.P.

[8] Among the duties that Symington had exercised with the H.R.P. was that of a dog handler. After the September 11, 2001 attack on the World Trade Center in New York City, Symington, together with his dog, went to that site to assist in the search and rescue operation, which action attracted considerable Nova Scotia media coverage. He was still on sick leave at the time. Subsequently the H.R.P.

commenced disciplinary actions against Symington, alleging that he was collecting sick leave benefits when he was not actually sick. At the same time a criminal investigation was commenced by the H.R.P. to determine if Symington had committed fraud in connection with his sick leave. These discipline complaints were determined in Symington's favour and the criminal investigation was eventually dropped.

[9] For his part, Symington lodged nine complaints under the *Police Act* against various other members of the H.R.P. All of these complaints were investigated and determined as required by the *Act*. None of these complaints was sustained and Symington then unsuccessfully appealed on five of the complaints to the Police Review Board.

THE CLAIMS

[10] Now Symington brings action in this Court, alleging the following:

Malicious Procurement of a search warrant (or misfeasance in public office).

[11] This allegation is that Sgt. Mosher of H.R.P., as part of the criminal investigation, obtained (and executed) search warrants against Symington by swearing false informations before a Justice of the Peace and then improperly disseminated materials seized under the warrants throughout the police force.

Malicious Prosecution

[12] The allegation is that the defendants who pursued criminal and *Police Act* investigations into Symington's use of sick leave benefits knew, or ought to have known, that there was no reasonable or probable cause to suspect him of fraud.

Defamation.

[13] These allegations are (1) that there was an innuendo created by an "all points bulletin," aired by H.R.P., the purpose of which was to locate Symington in order to complete medical paperwork, but which did not indicate why he was being sought; and (2) that the H.R.P. publicized the respondent's suspension and other information, implying his guilt.

Negligence.

[14] The claim is that the employer ought to have known that requiring the respondent "to deal with certain superiors in the workplace would exacerbate his stress-related illness."

Intentional Infliction of Mental Suffering.

[15] By this allegation the plaintiff claims that the facts relating to the search warrant, the "all points bulletin" and defamation, as well as the employer's "interference with his medical treatment and breaches of his right to privacy and/or medical confidentiality" also found claims of intentional infliction of mental suffering and misfeasance in public office. The interference with medical treatment and violation of privacy and confidentiality is also said to establish harassment.

THE APPLICATION

[16] This application is brought pursuant to Civil Procedure Rules 11.05(a) and 14.25(1)(a), (b) and (d) which read as follows:

Application to set aside originating notice, etc.

11.05. A defendant may, at any time before filing a defence or appearing on an application, apply to the court for an order,

(a) setting aside the originating notice or service thereof on him;

...

and the application shall not be deemed to be a submission to the jurisdiction of the court.

Striking out pleadings, etc.

14.25 (1) The court may at any stage of a proceeding order any pleading, affidavit or statement of facts, or anything therein, to be struck out or amended on the ground that,

(a) it discloses no reasonable cause of action or defence;

...

and may order the proceeding to be stayed or dismissed or judgment to be entered accordingly.

[17] Civil Procedure Rule 11.05(a) provides the court with the authority to make an early determination of jurisdiction in a proceeding. This Rule is regularly invoked by defendants on the basis that the appropriate forum for an action is in another jurisdiction, (whether geographic or adjudicative). [see for example: *Dennis v. Salvation Army Grace General Hospital et al* (1977), 156 N.S.R. (2d) 372 (C.A.); *MacDonald v. Mahoney*, 2003 N.S.S.C. 207.]

[18] Civil Procedure Rules 14.25(1)(a), (b) and (d) have been used in conjunction with Rule 11.05(a) to strike out claims on the basis that the plaintiff is restricted to an alternate forum. [see for example: *Adams v. Metropolitan Regional Housing Authority* (2001), 196 N.S.R. (2d) 396 (N.S.S.C.); *MacDonald v. Mahoney, supra,* and *Nova Scotia Union of Public Employees, Local 2 v. Halifax Regional School Board* (1998), 171 N.S.R. (2d) 373 (N.S.C.A.)].

[19] The applicants are also seeking an order setting aside the statement of claim under the *issue estoppel* and abuse of process branches of the doctrine of *res judicata*. Civil Procedure Rules 14.25(1)(b), and (d), (and their equivalents in other provinces), have been used for this purpose.

[20] The applicants question the court's jurisdiction to hear this action because of the Agreement that exists between the police department and the union. They submit that the plaintiffs' claims herein are subject to the adjudication process under the Agreement or the process provided for in the *Police Act* as incorporated by the Agreement.

[21] The applicants argue that it is settled law that where an Agreement provides a grievance arbitration procedure, a civil action in respect of matters that may be the subject of that procedure is barred.

[22] The respondents reply that it is not "plain and obvious" that either the agreement or the *Act* create exclusive jurisdiction over these claims.

[23] Further, Symington says, he will be denied a remedy if this Court does not exercise jurisdiction.

THE CASE LAW

St. Anne Nackawic Pulp & Paper Co. Ltd. v. Canadian Paper Workers Union, Local 219, [1986] 1 S.C.R. 704

[24] This decision is the foundation stone for later cases on point. It establishes a theme.

[25] The issue in *St. Anne Nackawic* was whether the courts could entertain an employer's claim against a union for damages arising from an illegal strike. Their Agreement included a "comprehensive provision for the submission to arbitration of all differences between the parties... ." Estey J. at pgs. 718 and 179 held:

> The collective agreement establishes the broad parameters of the relationship between the employer and his employees. This relationship is properly regulated through arbitration and it would, in general, subvert both the relationship and the statutory scheme under which it arises to hold that matters addressed and governed by the collective agreement may nevertheless be the subject of actions in the courts at common law ... The more modern approach is to consider that labour relations legislation provides a code governing all aspects of labour relations, and that it would offend the legislative scheme to permit the parties to a collective agreement, or the employees on whose behalf it was negotiated, to have recourse to the ordinary courts which are in the circumstances a duplicative forum to which the legislature has not assigned these tasks.

[26] Estey J. at p. 702 concluded that the courts:

> ... have no jurisdiction to consider claims arising out of rights created by a collective agreement ...
>
> ... it might be said, therefore, that the law has so evolved that it is appropriate to hold that the grievance and arbitration procedures provided for by the *Act* and embodied by legislative prescription in the terms of a collective agreement provide the exclusive recourse open to parties to the collective agreement for its enforcement.

Weber v. Ontario Hydro, [1995] 2 S.C.R. 929

[27] The issue in *Weber* was "[w]hen may parties who have agreed to settle their differences by arbitration under a collective agreement sue in tort?" The appellant sued his employer on account of alleged conduct related to a disability claim he had made. The plaintiff suspected he was malingering and hired investigators, who entered the plaintiff's home under false pretences and obtained information upon which the employer relied in suspending the plaintiff for abusing sick leave benefits. The *Labour Relations Act* , R.S.O. 1990, c. L2, s.45(1) required "all differences between the parties" to an Agreement to be settled by arbitration. The statute ousted the courts' jurisdiction to hear "civil actions which are based solely on the collective agreement." McLachlin,J. (as she then was) adopted the

"exclusive jurisdiction" approach: if the dispute "arises from the collective agreement, the claimant must proceed by arbitration and the courts have no power to entertain an action in respect of that dispute." In order to determine whether the matter arises out of the Agreement the court must consider "the dispute and the ambit of the collective agreement." This involves asking whether the dispute, "in its essential character, arises from the interpretation, application, administration, or violation of the collective agreement." McLachlin, J. concluded that the language of the collective agreement caught the conduct alleged, and therefore the dispute related to the administration of the collective agreement and was within the exclusive jurisdiction of the arbitrator.

[28] *Weber, supra,* 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.

Piko v. Hudson's Bay Co. (1998), 167 D.L.R. (4th) 479 (Ont. C.A.)

[29] In *Piko* a dismissed employee was charged with fraud pertaining to a workplace incident that led to her dismissal. Her grievance was dismissed for

being filed out of time, without a decision on the merits. She commenced an action for malicious prosecution and mental distress, claiming that the employer initiated criminal proceedings maliciously and without reasonable cause. The motions judge dismissed the action, but the Court of Appeal restored it on the basis that it did not arise under the collective agreement. Laskin, J.A. said:

> 11 ... *Weber* also recognizes that the collective agreement does not govern every dispute between an employer and an employee. Some disputes between employers and employees may not arise under the collective agreement; others may call for a remedy that the arbitrator has no power to grant. The courts may legitimately take jurisdiction in these disputes.

[30] The Court held that the torts of malicious prosecution and intentional infliction of mental distress were not covered by the collective agreement. While it was clear that her discharge could only be adjudicated under the collective agreement, the employer had taken the dispute outside the collective bargaining regime when it resorted to the criminal process. Once it took its dispute with *Piko* to the criminal courts, the dispute was no longer just a labour relations dispute. Having gone outside the collective bargaining regime, the employer cannot turn around and take refuge in the collective agreement when it is sued for maliciously instituting criminal proceedings against *Piko*.

[31] Furthermore, the Court stated, "[a] dispute centred on an employer's instigation of criminal proceedings against an employee, even for a workplace wrong, is not a dispute which in its essential character arises from the interpretation, application, administration or violation of the collective agreement." The Court distinguished *Weber* on the basis that the conduct alleged in *Weber* was "directly related to a process which is expressly subject to the grievance procedure."

> 21 ... The language of the collective agreement for the Bay's employees is not nearly as broad as the language in the Hydro agreement [in *Weber*]. And the Bay's actions in instigating criminal proceedings are not directly related to the dispute over whether Piko was unjustly dismissed. The Bay's actions are neither a prerequisite to nor a necessary consequence of its dismissal of Piko. In short, the collective agreement does not regulate the Bay's conduct in invoking the criminal process, which is the conduct at the heart of the present dispute. The dispute, therefore, does not arise under the collective agreement.

[32] This is a decision that the respondent submits is similar to the situation herein and invites this Court to accomplish a like result.

Pleau v. Canada (Attorney General) (1999), 181 N.S.R. (2d) 356 (C.A.)

[33] The Nova Scotia Court of Appeal revisited *Weber* in *Pleau*. A civil servant (a "whistle blower") was dismissed, then reinstated by order of an adjudicator under a collective agreement and the federal *Public Service Staff Relations Act*,

R.S.C. c.P.35 (PSSRA). He subsequently commenced an action alleging conspiracy to injure, breach of fiduciary duty and abuse of office, among other things. The *Act* permitted a grievance to be filed by an employee who felt "aggrieved" by the interpretation or application of an enactment or collective agreement in respect of which there was no administrative redress procedure; the collective agreement provided a grievance procedure for "an employee who feels that he or she has been treated unjustly or considers himself or herself aggrieved by any action or lack of action by the Employer in matters other than those arising from the classification process ... ." It was conceded that the claims could not be referred to adjudication. The defendants contended that they were nevertheless subject to the grievance procedure. They claimed that when grievances were not referable to adjudication, the decision at the final level of the grievance process was "final and binding" pursuant to the *Act*. The Chambers judge dismissed an application to strike. On appeal, Cromwell, J.A. held that a court's decision to decline jurisdiction in these circumstances does not necessarily require an express grant of jurisdiction to another forum. There are three "inter-related 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.

[34] The *Act* did not expressly confer exclusive jurisdiction over "disputes arising from the interpretation, application and administration of the collective agreement," nor did it require collective agreements to include mandatory arbitration provisions. Furthermore, certain types of disputes were excluded. Cromwell, J.A. said:

> 74 While the process is not explicitly made an exclusive one, the legislation and the Collective Agreement deal comprehensively with situations in which an employee feels unjustly treated or aggrieved by occurrences affecting the terms and conditions of employment. Matters for which there is administrative redress

> under other federal statutes are excluded, but that does not support an argument in favour of court jurisdiction. If the provisions of the P.S.S.R.A. and the other *fora* of administrative redress are considered, there exists a quite comprehensive scheme for dispute resolution outside the courts. However, the absence of a provision requiring (as opposed to entitling) recourse to the grievance procedure and the inability to submit the dispute to adjudication in my mind make this scheme, in relation to such disputes, entitled to considerably less deference than those under consideration in *Weber* and related cases. It may be that where employees invoke the grievance procedure, as they are entitled, but not required to do, they are bound by the results, subject to judicial review ... No recourse to the grievance procedure was taken here.

[35] Cromwell, J.A. commented that "[t]he essential character of a dispute is not always easy to determine. One principle, however, is clear. The Collective agreement must, expressly or by implication, address *the substance* of the dispute." He referred to comments by other courts to the effect that the court must examine the facts to determine "*if the essential character of the alleged conduct is covered by the collective agreement*" and that the question is "whether the dispute, in its essential character, arises *under the collective agreement*. He went on:

> 80 The claims made by the plaintiffs in this action arise out of alleged conduct in the workplace by fellow federal public servants during the course of Mr. Pleau's employment. The allegations include:
>
> - conspiracy to cause injury, loss and damage;
>
> - intentional and malicious conduct designed to discredit the plaintiff, Paul Pleau's, character and veracity;

> - defamation in the course of an investigation into allegations made by Mr. Pleau in relation to the improprieties in his workplace;
>
> - abuse of office and authority;
>
> - breach of fiduciary duty; and,
>
> - negligent exercise of authority.
>
> ...
>
> 85 We were not referred to provisions of the Collective Agreement or the P.S.S.R.A. which set out any standard relevant to consideration of the allegations made in the action. The Collective Agreement does not expressly or by implication deal with the substance of these allegations. The most that can be said is that the scope of the grievance procedure, which Mr. Pleau was entitled (but not expressly required) to employ, is broad enough to cover these complaints. The Collective Agreement provides no standards for assessing the claims and no process for adjudication of them in their merits by a third party.

[36] There was a departmental harassment policy that arguably addressed the substance of the allegations. It gave a complainant access to "any other legal redress procedure such as a complaint with the Canadian Human Rights Commission or with the Public Service Commission's Investigations Directorate." Cromwell, J.A. said this policy did not support ousting court jurisdiction; instead, it "specifies that where the complainant is not content with the results of the Policy, he or she ... may avail him/her self of *any other legal redress procedure*."

In the result, the defendants' position exceeded the scope of the *Weber* principle at para. 88:

> ... Here it is submitted that the Court action should be struck even though there is no possibility of recourse by the employee to adjudication and the substance of the dispute is not addressed in any way by the Collective Agreement. To paraphrase Laskin, J.A. in *Piko* ... while the dispute described in the Statement of Claim arises out of the employment relationship, it does not arise under the Collective Agreement; the Collective Agreement does not address the conduct complained of in this action.

[37] The defendant submitted that the grievance procedure provided redress. Cromwell, J.A. held, however, that "access to the grievance procedure without the right to test the outcome by adjudication on the merits by a third party does not constitute effective redress for the alleged wrongdoing in this case." He left open the possibility that parties could agree to limit their available redress, but found that this was not the case in the matter before him. The final comment suggests that where a statutory grievance procedure is incorporated into a collective agreement it may prevail, even if it does not provide binding arbitration.

Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners, [2000] 1 S.C.R. 360

[38] In *Regina Police* an officer was threatened with discipline and resigned, then withdrew his resignation. The Chief rejected the withdrawal. The union grieved unsuccessfully, and requested arbitration. The arbitrator held that she had no jurisdiction because the dispute was not subject to the collective agreement, but fell under the *Police Act*. The collective agreement provided that disputes falling under the *Police Act* were not arbitrable. Elaborating on the "essential character" analysis from *Weber*, Bastarache, J. said at para. 25:

> ... Simply, the decision-maker must determine whether, having examined the factual context of the dispute, its essential character concerns a subject matter that is covered by the collective agreement. Upon determining the essential character of the dispute, the decision-maker must examine the provisions of the collective agreement to determine whether it contemplates such factual situations. It is clear that the collective agreement need not provide for the subject matter of the dispute explicitly. If the essential character of the dispute arises either explicitly, or implicitly, from the interpretation, application, administration or violation of the collective agreement, the dispute is within the sole jurisdiction of an arbitrator to decide ....

[39] The task for the Court was to decide "whether the essential character of the dispute ... falls within the ambit of the collective agreement, or whether it falls within the statutory scheme set out in *The Police Act* and *Regulations*." The union argued that the issue was the validity of the resignation - not discipline - which could only arise from the employment relationship and the collective agreement. Bastarache, J. rejected this interpretation:

> 29 ... To determine the essential character of the dispute, we must examine the factual context in which it arose, not its legal characterization ... [T]his dispute clearly centres on discipline. The dispute began when Sgt. Shotton was advised that he would be charged with discreditable conduct pursuant to the Regulations. He was also told that the Chief of Police intended to initiate disciplinary proceedings with a view to dismissal. Some time later, Sgt. Shotton was informed by the Chief of Police that discipline orders would be signed if notices of formal discipline proceedings were successful. It was in this factual context that Sgt. Shotton was given the option of resigning rather than being disciplined ... [T]he informal resolution of this disciplinary matter did not change its essential character.

[40] Bastarache, J. concluded:

> 31 ... [B]oth *The Police Act* and the *Regulations* specifically address the procedural issues at the investigative, adjudicative and appeal stages of a disciplinary process. The detailed provisions in the legislative scheme governing disciplinary matters are a clear indication that the legislature intended to provide a complete code within *The Police Act* and *Regulations* for the resolution of disciplinary matters involving members of the police force. This is reflective of a well-founded public policy that police boards shall have the exclusive responsibility for maintaining an efficient police force in the community. The ability to discipline members of the force is integral to this role. Accordingly, no discretion exists to select another legal mechanism, such as arbitration, to proceed against a police officer in respect of a disciplinary matter ...
>
> 32 Having examined the ambit of the collective agreement, and of *The Police Act* and Regulations, it is clear that the dispute between Sgt. Shotton and the Employer did not arise, either explicitly or inferentially, from the interpretation, application, administration or violation of the collective agreement. The essential character of the dispute was disciplinary, and the legislature intended for such disputes to fall within the ambit of *The Police Act* and Regulations. As a result ... the arbitrator did not have jurisdiction to hear and decide this matter.

Vaughan v. Canada, [2005] 1 S.C.R. 146

[41] In *Vaughan* the issue was "whether the doctrine of judicial restraint preached in the *Weber* line of authorities applies to the statutory labour relations scheme set out in the *Public Services Staff Relations Act* which does not in its relevant aspects provide for independent adjudication." The dispute related to an early retirement benefit conferred by statute, with the final decision vested in the Deputy Minister, and no provision for independent adjudication. There was no clear ouster of court jurisdiction as there was in *Weber*. Binnie, J. held that "the absence of 'recourse to independent adjudication'" was not "of itself a sufficient reason for the courts to get involved." He distinguished *Pleau* on the basis that the case "dealt with the alleged harassment of a whistle-blower and raised serious questions of conflicted interests within the employer department, whereas the appellant's claim here is an ordinary garden variety employment benefit case." The majority held that this was a situation where, although the courts' jurisdiction was not ousted by the legislation, the courts should nevertheless defer to the statutory grievance procedure. The specific reasons are worth noting at some length, as they set out the Supreme Court of Canada's most recent opinion in this area:

> 34 Firstly, the language of the PSSRA sends an unambiguous signal that in the run-of-the-mill case of benefits conferred by a regulation outside the collective

agreement, the decision of the Deputy Minister or his or her designate should be final.

35 Secondly, the present dispute arises from the employment relationship and falls within the dispute resolution scheme set out in the PSSRA.

36 Thirdly, the appellant's claim to ERI could have been remedied in the s. 91 grievance procedure. As the Manitoba Court of Appeal stated in *Phillips v. Harrison* (2000), 196 D.L.R. (4th) 69, 2000 MBCA 150: "What is important is that the scheme provide a solution to the problem" (para. 80).

37 Fourthly, the appellant's legal position should not be improved by his failure to grieve the ERI issue. The dispute resolution machinery under s. 91 was there to be utilized. Efficient labour relations is undermined when the courts set themselves up in competition with the statutory scheme ....

38 Fifthly, I do not accept for reasons already expressed, the central assumption of the appellant's argument that comprehensive legislative schemes which do not provide for third-party adjudication are not, on that account, worthy of deference. It is a consideration, but in the case of the PSSRA it is outweighed by other more persuasive indications of clues to parliamentary intent.

39 Sixthly, where Parliament has clearly created a scheme for dealing with labour disputes, as it has done in this case, courts should not jeopardize the comprehensive dispute resolution process contained in the legislation by permitting routine access to the courts. While the absence of independent third-party adjudication may in certain circumstances impact on the court's exercise of its residual discretion (as in the whistle-blower cases) the general rule of deference in matters arising out of labour relations should prevail.

40 Seventhly, the fact that we are dealing with a labour dispute almost a decade old demonstrates (if demonstration is necessary) that more informal dispute resolution procedures are generally faster, cheaper, and get the job done.

> 41 Finally, the dispute in question is entirely straightforward ... . If this simple ERI issue can be litigated in the courts, so can every other regulation-conferred benefit applicable to over a quarter of a million employees of the federal public service. The outcome could give a new dimension to the concept of "floodgates".

[42] The facts in *Vaughan* are different from those in the present case, but the reasons appear to articulate clearly the principles on this point.

[43] It should be noted that Binnie, J. characterized *Pleau* as a "whistle-blower" case, at para. 20 where the:

> ... courts were understandably reluctant to hold that in such cases the employees' only recourse was to grieve in a procedure internal to the very department they blew the whistle on, with the final decision resting in the hands of the person ultimately responsible for the running of the department under attack ...

[44] He narrowed Cromwell, J.A.'s comments in *Pleau,* holding that "effective redress" was "a factor for consideration," but held that the absence of independant adjudication would not be conclusive; the court's task remained "to determine whether, looking at the legislative scheme as a whole, Parliament intended workplace disputes to be decided by the courts or under the grievance procedure established by the PSSRA."

ARGUMENTS

[45] The applicants address the specific allegations in the statement of claim:

Malicious Procurement of a Search Warrant (or Misfeasance in public offices)

[46] The applicants say the essential character of the allegation is that the respondent's supervisors "were aware that he suffered a workplace stress-related disorder and intentionally exacerbated his symptoms." This subject matter would fall under the Agreement and would constitute *Police Act* complaints. As such, say the applicants, they fall under the exclusive jurisdiction of the Agreement or the *Act*.

Malicious Prosecution

[47] According to the applicants, this allegation is directed at the respondent's "treatment by his superiors with respect to their internal investigation of his use of sick benefits" and is therefore "within the employee/employer relationship." The allegations were the subject of four *Police Act* complaints, each of which was dismissed. The applicants say the allegation of malicious prosecution "in its essence deals with matters arising out the employment relationship. Not only is there a collective agreement and legislative scheme in place to deal with such matters, the plaintiff has, in fact, already taken advantage of such a scheme." As such , it is argued, the allegation is a collateral attack on the decisions reached under the statutory process.

Defamation

[48] As to the claim relating to "All Points Bulletin," the applicants say it substantially relates to discrimination or unfair treatment, thus falling under the Agreement and that it resulted in an unsuccessful *Police Act* complaint. As to the allegation that the police publicized the respondent's suspension, the applicants say, it arises from the employment relationship and is subject to the agreement:

“[n]otwithstanding legal characterizations sounding in tort, if the complaints are directly [or] indirectly related to the exercise of management functions (in this case the discipline process) the MAPP Agreement prevails.” This, too, was the subject of an unsuccessful *Police Act* complaint.

Negligence

[49] The applicants say, “the crux of the claim” is that the employer ought to have known that requiring the respondent “to deal with certain superiors in the workplace would exacerbate his stress-related illness.” This complaint was addressed in *Police Act* complaints, and “[a]lthough characterized as negligence, the acts or omissions alleged ... clearly involve either Mr. Symington’s work environment or the *Police Act* disciplinary process.

The Intentional Infliction of Mental Suffering

[50] The plaintiff claims that the facts relating to the search warrant, the “all points bulletin” and defamation, as well as the employer’s “interference with his medical treatment and breaches of his right to privacy and/or medical

confidentiality" also found claims of intentional infliction of mental suffering and misfeasance in public office. The interference with medical treatment and violation of privacy and confidentiality is also said to establish harassment. According to the applicants, this allegation implies that the respondent "feels his employer used discrimination and unfair practices in order to cause him injury," bringing the allegations under the Agreement or the *Act*.

[51] The applicants say Article 4 of the Agreement encompasses "in substance" the allegations in the statement of claim:

> 4(1) The region, and union agree that there will be no discrimination, restriction or coercion exercised or practiced by it with respect to any employee, regardless of bargaining unit or non-bargaining unit status by reason of his membership in that union, or by reason of any prohibited grounds of discrimination as outlined in the *Human Rights Act*, R.S.N.S. 1990 [sic.:1989], c.214 (*bona fide* occupational requirement do not constitute [prohibited] grounds of discrimination). ...
>
> (3) The region shall accommodate injured employees to the extent required under the laws of Nova Scotia, however, if members are not able to perform full operational police duties, they shall not maintain the status of a police officer. If such members are accommodated within the regional police service or the central dispatch centre, they shall remain members of the union; if members are accommodated to other positions in the region, they shall not remain members of the MAPP union.

[52] Grievance and arbitration procedures appear at Article 29 of the Agreement. A grievance is "a difference between the Region and the Union, or the region and a member, arising from the interpretation, application or administration or alleged violation of the Agreement."

[53] The applicants note that Article 44 bars a civil action where leave has been granted in respect of an injury or condition that would be otherwise compensable under the *Workers' Compensation Act*. Thus, the applicants say, if the respondent "sustained injuries, related to stress or otherwise, he is limited to either the benefits program described in Article 44 of the MAPP Agreement, or the grievance procedure under Article 29.

[54] However, it is significant, I believe, that the respondent here is not claiming directly on account of the condition that led him to be granted leave, rather, his claim relates to alleged misconduct in dealing with his leave.

[55] The respondent, Symington says the Agreement defines the scope of the adjudicator's jurisdiction more narrowly than was the case in *Weber*. He says it is not plain and obvious that his claims are within the exclusive jurisdiction of an

arbitrator; the "factual matrices" do not arise from the "interpretation, application or administration or alleged violation" of the Agreement. He says the claim does not relate to the denial of sick leave benefits, but "to interference by the applicants with his medical treatment and breaches of privacy."

[56] The respondent says the Agreement "does not expressly deal with the rights and obligations of employers and employees when the employer prosecutes an employee in the criminal courts, falsely swears an information to obtain a search warrant, or improperly prosecutes a member through the *Police Act* ... ." He refers to *Piko* in support of the view that the applicants removed the dispute from the Agreement by commencing criminal - as well as disciplinary - proceedings.

[57] The respondent says the "all points bulletin" cannot be characterized as an "internal workplace issue" or part of a dispute over his sick leave, as it does not meet the test set out in *Phillips v. Harrison* (2000), 196 D.L.R. (4th) 69 (Man.C.A.) To establish whether an allegedly defamatory statement about an employee is arbitrable:

> ... Otherwise defamatory statements could be considered to be work-related and to be adjudicated pursuant to the statutory dispute mechanism where the comments

> concern the employee's character, history, or capacity as an employee, the comments were made by someone whose job it was to communicate a workplace problem, and the comments were made to persons who would be expected to be informed of workplace problems.

[58] Basically, he argues, it is not "plain and obvious" that the release of the "all points bulletin" was a "workplace wrong" subject to the arbitration procedure.

[59] The respondent makes similar arguments with respect to the release of information to the media, stating that the applicants should not be able to keep the matter before an arbitrator after departing from the Agreement by making statements to the media. He cites *Serdar v. Metroland Printing, Publishing and Distributing Ltd.,* 2001 CarswellOnt 1434; [2001] O.J. No. 1596 (Ont. S.C.J.). In *Serdar* the essential character of the dispute was the plaintiff's claim that her employer "wrongfully disclosed confidential information about her to third parties." The Court held that there was no "express or implicit term in the agreement out of which this dispute could be said to arise."

[60] As to the applicants' submission that the *Police Act* creates a comprehensive statutory scheme that ousts the jurisdiction of the Court, the respondent counters

that the statement of claim raises allegations that can be adjudicated under the *Act*, but not exclusively so.

[61] Article 29 of the Agreement designates the *Police Act* disciplinary process as the applicable procedure and makes matters of *Police Act* discipline inarbitrable:

> All disciplinary matters of sworn members covered under the *Police Act* shall be dealt with by the region in accordance with the *Police Act* ... [and] its regulations ... The final disposition of disciplinary matters under these procedures and provisions shall be final and binding - the parties and not arbitrable under this agreement.

[62] The *Act* describes the establishment, composition and duties of municipal police forces, including the requirement to establish municipal boards of police commissioner ("the board"). It goes on to deal with the "complaints," defined as:

> (e) "complaint" means any communication received from a member of the public in writing, or given orally to the chief officer or his delegate and reduced to writing and signed by the complainant, which alleges that a member of a force breached the Code of Conduct and Discipline or alleges the failure of the force itself to meet public expectations.
>
> ...
>
> 27 Where the Commission does not satisfactorily resolve the complaint, the complaint shall be referred to the Review Board in accordance with the

> regulations and the Review Board shall conduct a hearing in respect of the complaint.

[63] The Review Board's composition and powers are then described. The latter include the power to conduct hearings into complaints and internal disciplinary matters, referred to it pursuant to the *Regulations*. An officer who has been the subject of a disciplinary decision may seek a review of the decision by the Review Board.

[64] As to the nature of a Review Board hearing:

> 32 A hearing by the Review Board shall be a hearing *de novo* and the parties to the proceeding may
>
> (a) appear and be heard and be represented by counsel ;and
>
> (b) call witnesses and examine or cross-examine all witnesses.

[65] The Review Board's decisions are protected by a privative clause; ss. 33(3) provides that "[t]he decision of the Review Board shall be final." The Regulation-making power is set out at section 46. The Governor-in-Council is authorized to make regulations, among other subjects,

(a) for the government of police forces and governing the conduct, duties, suspension and dismissal of members of police forces; [...]

(I) prescribing the procedures for dealing with complaints;

(j) respecting the investigation powers of the person assigned by the Commission to conduct an investigation pursuant to this *Act*;

(k) respecting the powers, privileges and immunities of the Police Review Board; [...]

(n) respecting internal discipline procedure including the disciplinary authority, disciplinary hearings, investigations, time limit for commencing a proceeding, right to representation, reasons for decisions, notice of review to the Police Review Board, the time limit for a review, procedures for the internal discipline of a chief officer, participation by the Commission in discipline matters, classification of disciplinary defaults and penalties for defaults; [...]

[66] Further detail is provided by the *General Regulations*. Where a member of a police force alleges that another member has committed a disciplinary default, an investigator is appointed, who investigates the allegation and reports to the chief officer (or to the municipal board, if the complaint is against the chief officer). The investigator provides an opinion as to guilt and penalty; the decision lies with the chief officer or the Board, as the case may be.

[67] The applicants submit that thus incorporated by reference in the Agreement, the *Police Act* process is an exclusive forum for discipline. The *Act* includes a privative clause and provides for a full and final hearing before the Review Board, suggesting a legislative intention that discipline should be handled exclusively through the statutory process.

[68] The respondent, Symington says that even if the allegations in the statement of claim can be dealt with under the *Police Act*, that the *Act* does not create exclusive jurisdiction. Article 29(8) indicates that, while some matters in the statement of claim could constitute "disciplinary defaults," these are non-arbitrable. An arbitrator "has no jurisdiction ... over the disputes set out in the statement of claim." As to the *Act* and *Regulations* in their own right, the respondent says they allow him no disclosure rights and permit him only to "wait for the investigation to be completed and the complaint disposed of."

[69] According to the respondent, the appeal stage of the *Act* and *Regulations* do not permit a complainant who is a member of the force to appeal to the Review Board. This interpretation is based on the wording of s. 29(a) of the *Act*, which permits the Review Board to "conduct hearings into ... complaints referred to it in

accordance with the regulations." A "complaint" is a communication "received from a member of the public ... which alleges that a member of the force breached the Code of Conduct and Discipline ... ." The effect of limiting the right to be heard by the Board to public complainants, he says, is that the *Act* does not grant the Review Board jurisdiction to hear complaints from HRP members nor does it grant HRP members who are complainants the right to insist on a review or appeal of the decision at the investigation stage. A provision in the *Regulations* that purports to allow "the person who filed the allegation" to appeal a decision that no default was committed has been declared *ultra vires* by the Review Board. The respondent therefore argues he is "denied an independent adjudication of his complaints." In view of the absence of language in the legislation indicating that the process is meant to be exclusive, and the procedural inadequacy of the *Police Act* procedures, the *Act* should not be taken to oust the Court's jurisdiction.

[70] The applicants concede that the respondent cannot appeal to the Review Board, but submit, based on *Vaughan, supra*, that the mere lack of independent adjudication in a statutory process should not lead to the Court taking jurisdiction.

[71] The respondent claims that the *Police Act*, as a disciplinary statute is not intended to provide a complainant with a remedy. There is concurrent jurisdiction between the Court and the disciplinary process. He says police officers can be liable intort for malicious prosecution or negligent investigation. In *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, the Court said:

> What the appellants seek ... is not the opportunity to file a complaint that might result in the imposition of disciplinary sanctions but, rather, compensation for the psychological harm that they have suffered as a consequence of the Chief's inadequate supervision. The public complaints process is no alternative to liability in negligence.

[72] The respondent distinguishes *Abbot v. Collins* (2003), 64 O.R. (3d) 789 (Ont. C.A.), which is cited by the applicant, on the basis that it only stands for proposition that matters of police discipline must be dealt with through statutory discipline procedures. Actions in court, he argues, are only precluded "where the substance of the discipline itself is at issue (i.e. whether an action merits discipline or not), not where the conduct of officers in bringing disciplinary actions against other officers is malicious or negligent."

[73] The respondent denies that the Agreement assigns exclusive jurisdiction over the subject matter of this proceeding to the *Police Act* procedure. He refers to Article 29(8) of the Agreement, which he says

> does not say that 'no action lies in court for matters covered by the *Police Act*. It just says that, for the purposes of disciplining HRP members, the matter either falls under the collective agreement or under the *Police Act*.
>
> In short, the MAPP collective agreement is only designed to carve out the respective jurisdictions of the labour arbitrator and the statutory decision-maker over allegations concerning the HRP's and its members' conduct. It is not designed to oust this Court's inherent jurisdiction to adjudicate tort claims and award damages for tortious conduct.

[74] The applicants argue that Symington had access to effective redress for all matters raised in the statement of claim by way of the grievance and arbitration procedures in Article 29(3) and 42 of the Agreement and the *Police Act*. The fact that the plaintiff was unhappy that the *Police Act* allegations and appeals were dismissed should not provide him with access to an alternate forum to relitigate issues.

[75] The applicants emphasize that "[e]ven if the Plaintiff cannot claim damages under some of the specific grounds listed in the statement of claim through the arbitration or *Police Act* process, this does not in itself give entitlement to proceed

with the claim." The essential point, they say, is that the arbitrator can provide a remedy. Article 29(6) - unlike the agreement in *Pleau* - provides for final and binding arbitration by a third party. Further, there is a third-party disciplinary process available under the *Police Act*, by way of the Police Review Board. So long as there is an adjudicative body capable of providing "a solution to the problem," the applicants say, the civil claim is barred.

CONCLUSIONS

[76] If the essential character of the dispute arises "explicitly or implicitly" from the "interpretation, application, administration or alleged violation of the collective agreement" - to use the words of Article 29(3) - it would be within the exclusive jurisdiction of the grievance procedure mandated by the agreement. This seems to be a narrower scope than was created by the collective agreement in *Weber*, which encompassed allegations of "unfair treatment." It also appears to be narrower than the relevant provisions in *Pleau*, the leading Nova Scotia decision. I am mindful that disputes may arise out of the employment relationship without necessarily arising, expressly or inferentially, from the collective agreement.

[77] The applicant employer attempts to characterize the dispute as essentially one relating to discrimination and accommodation under Article 4, and to a sick leave claim under Article 44. The statement of claim alleges a deliberate campaign of “harassment and hostility” against the respondent, “including the refusal to accommodate his disability thereby exacerbating his condition and protracting his recovery.” Leaving aside the precise wording, which evokes Article 4 (“refusal to accommodate: the region shall accommodate injured employees”), I do not think this dispute can be characterized as one relating to discrimination on a prohibited ground. The allegations are not of discriminatory treatment because of the respondent’s stress-related illness, rather the dispute seems to have been triggered by the disciplinary measures taken after the respondent went to New York, and the resulting publicity.

[78] The Agreement assigns discipline issues exclusively to the procedures set out in the *Police Act*. To the extent that the essential character of the dispute arises from discipline or threatened discipline, I do not think it can be a matter for adjudication under the Agreement. I think the same applies to the extent that the matter involved threatened criminal charges against the respondent; here too, as in *Piko, supra,* the essential character of the dispute would be outside the Agreement.

[79] If the dispute actually centred on a refusal to accommodate, it would fall within the wording of the Agreement, however, that aspect of the dispute appears to me to be secondary to the wider "harassment and hostility" claims which I believe to be in 'substance' a discipline issue.

[80] I find that the allegations, if established, constitute disciplinary default in that they all arise in the context of a disciplinary investigation into the behaviour of the respondent while on "sick leave."

[81] I find that the "substance of the dispute" in this case arises from disciplinary matters and while the agreement does not apply to such matters the *Act* incorporated by the agreement does.

[82] That said, I do not think the issues here are as easy to locate within the scope of the statute as were those in *Vaughan*, where the dispute related directly to statutory benefit, or the recent Ontario Superior Court decisions in *Richards v. Catney*, [2005] O.J. No. 1159 and *Renaud v. La Salle (Town) Police Assn.,* [2005] O.J. No. 4474, where the disputes involved promotions and demotions. Matters

would be much clearer, if the dispute were over a clear denial of a benefit, such as medical leave. Nevertheless, I repeat that the essential character of the dispute seems to me to be one of police discipline.

[83] The *Act* does not explicitly oust the jurisdiction of the Court, but I believe there is good reason for deference to be given to the procedures preferred by the Legislature, in view of what I perceive to be the continued movement of the Supreme Court in the direction of deference to statutory mechanisms, as exemplified by the *Vaughan* decision.

[84] I conclude that this action is not one that this Court should entertain. It comes to us out of the workplace and the employee-employer relationship and, I have found disciplinary issues that arise therefrom.

[85] I conclude, as did Bastarache, J. In *Regina Police, supra,* that "... the legislature intended to provide a complete code within the *Police Act* and *Regulations* for th resolution of disciplinary matters involving members of the Police Force."

[86] I believe that this well founded intent should be respected by this Court.

[87] The Review Board has decided - whether correctly or not - that it cannot review a disciplinary decision where the review is instigated by the complaining officer. It is clear again from the Supreme Court of Canada decision in *Vaughan,* that the absence of independent adjudication will not be fatal to an application to strike in these circumstance.

[88] It was the respondent who invoked the disciplinary process under the *Act* and the Board was capable of providing him with a remedy. Presumably he could have sought judicial review of that decision.

THE BOTTOM LINE

[89] Having concluded that, the applicants' claim in this action are in their "essential characteristics" matters of a police discipline nature, I determine that these claims were addressed under the provisions of the *Police Act* as incorporated by the Agreement and that the applicants took advantage of the process afforded by that *Act*.

[90] As a result for reasons stated, I determine that this is an action that this Court should not entertain.

[91] I therefore strike this action pursuant to Civil Procedure Rules 11.05(a) and 14.25(a)(b) and (d).

[92] It is not necessary for me to determine the *resjudicata* issue and I chose not to do so.

[93] If necessary I will accept written submissions as to costs.