Federal Court of Appeal | Cour d'appel fédérale

**Date: 20220127**

**Docket: A-19-21**

**Citation: 2022 FCA 13**

**CORAM:** **PELLETIER J.A.**
**LOCKE J.A.**
**LEBLANC J.A.**

**BETWEEN:**

**AFFAN ASHRAF**

**Appellant**

**and**

**JAZZ AVIATION**

**Respondent**

Heard by online video conference hosted by the Registry on January 20, 2022.

Judgment delivered at Ottawa, Ontario, on January 27, 2022.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: LOCKE J.A.
LEBLANC J.A.

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## REASONS FOR JUDGMENT

**PELLETIER J.A.**

[1] Mr. Affan Ashraf, the appellant, was dismissed from his employment as a flight attendant with Jazz Aviation on November 21, 2019. His union filed a grievance on his behalf but later withdrew it. Mr. Ashraf filed an unfair labour practice application with the Canada Industrial Relations Board alleging that the union had failed in its duty of fair representation. That application was dismissed. Mr. Ashraf then commenced an action in the Federal Court in which

he alleged that Jazz wrongfully dismissed him, discriminated against him and other employees, did not ensure that the workplace was free of harassment and discriminatory behaviour and contravened the Charter in its workplace practices. While the statement of claim was not prefaced as a proposed class action, the prayer for relief asked that the matter be certified as a class action and that Mr. Ashraf be appointed as the representative plaintiff.

[2] In a decision reported at 2021 FC 28 (the Decision), the Federal Court dismissed Mr. Ashraf's action without leave to amend pursuant to Rule 221 of the *Federal Courts Rules*, S.O.R./98-106, on the basis that the pleadings did not disclose a reasonable cause of action.

[3] Mr. Ashraf appealed to this Court. For the reasons which follow, I would dismiss the appeal.

[4] As noted earlier, Mr. Ashraf's statement of claim contained a number of claims based upon different theories of liability. The Federal Court identified various difficulties with these theories of liability that justified the claim's dismissal under Rule 221.

[5] After noting that the claim, while not styled as a proposed class action, nonetheless requested certification as a class proceeding and the appointment of Mr. Ashraf as the representative plaintiff, the Federal Court pointed out that Rule 121 requires a representative plaintiff to be represented by a solicitor except in special circumstances. As no special circumstances were shown, the Federal Court considered this defect as a factor justifying its dismissal of Mr. Ashraf's claim: see Decision at para. 5.

[6] The Court then noted that since the essential character of Mr. Ashraf's claim arose from "a dispute concerning [Mr. Ashraf's] employment relationship with the Defendant", the *Canada Labour Code*, R.S.C. 1985, c. L-2 and the collective agreement in force between the union and the employer applied to the dispute: Decision at para. 8. The Court was satisfied that Mr. Ashraf's claim was subject to the mandatory arbitration clause in the collective agreement and was therefore beyond the jurisdiction of the Federal Court. The Court then noted that to the extent that any of the Federal Courts would have jurisdiction over this dispute, "it would be the Federal Court of Appeal on judicial review (*Federal Courts Act*, R.S.C. 1985, c. F-7, s. 28(1)(h))": Decision at para. 8. This is a reference to this Court's jurisdiction with respect to decisions of the Canada Industrial Relations Board.

[7] Finally, the Court found that it was plain and obvious that the claims based on the Charter, negligence, and breach of fiduciary duty disclosed no reasonable cause of action. Mr. Ashraf's claim was therefore dismissed.

[8] After some exchanges with the Bench in the course of arguing his appeal, Mr. Ashraf conceded that there was nothing wrong with the Federal Court's decision and that his appeal was brought in error, in part because of the Federal Court's reference to this Court having jurisdiction. It was then pointed out that this Court only had jurisdiction to judicially review decisions of the Canada Industrial Relations Board. The only such decision in this case involved Mr. Ashraf and his union and not his employer, so any such judicial review would not address Mr. Ashraf's dismissal. When asked by the Court what he wanted this Court to do, Mr. Ashraf

replied that he wished us to view the situation holistically and, essentially, to provide him a remedy which, to this point, he had not been able to obtain.

[9] In theory, Mr. Ashraf's admission that the Federal Court's decision contained no error is sufficient to dispose of this appeal. However, Mr. Ashraf is not legally trained and in order to avoid future regrets about this admission, it is important to show that neither the admission nor the Federal Court's decision were made in error.

[10] The Federal Court's conclusion with respect to Mr. Ashraf's ability to bring a class action accurately reflects Rule 121. The rationale behind Rule 121 is that class proceedings deal with the rights of other persons besides the representative plaintiff. A lack of skill on the latter's part could prejudice the rights of members of the class. As a result, representative plaintiffs must be represented by a solicitor: see *Rooke v. Canada (Health)*, 2019 FC 765, [2019] F.C.J. No. 690 (QL) at para. 17.

[11] As for Mr. Ashraf's dismissal, it is clear from the jurisprudence that a collective agreement displaces the common law remedies for wrongful dismissal and limits the parties to their remedies under the collective agreement: *McGavin Toastmaster Ltd. v. Ainscough*, [1976] 1 S.C.R. 718, 54 D.L.R. (3d) 1 at 725; *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42, [2021] 12 W.W.R. 1 at paras. 10-13. This is recognized in industrial relations legislation which contain provisions similar to subsection 57(1) of the *Canada Labour Code*:

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| 57 (1) Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or employees bound by the collective agreement, concerning its interpretation, application, administration or alleged contravention. | 57 (1) Est obligatoire dans la convention collective la présence d'une clause prévoyant le mode — par arbitrage ou toute autre voie — de règlement définitif, sans arrêt de travail, des désaccords qui pourraient survenir entre les parties ou les employés qu'elle régit, quant à son interprétation, son application ou sa prétendue violation. |

[12] As a result, the Federal Court did not err in holding that it did not have jurisdiction and that Mr. Ashraf's remedy for his wrongful dismissal was to be found in the collective agreement.

[13] Mr. Ashraf's claim also made extensive references to Charter violations and claimed Charter damages for those violations. Section 32 of the Charter provides that it applies to government action:

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| 32 (1) This Charter applies | 32 (1) La présente charte s'applique : |
| (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and | a) au Parlement et au gouvernement du Canada, pour tous les domaines relevant du Parlement, y compris ceux qui concernent le territoire du Yukon et les territoires du Nord-Ouest; |
| (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province. | b) à la législature et au gouvernement de chaque province, pour tous les domaines relevant de cette législature. |

[14] Private bodies may be subject to the Charter to the extent that they are controlled by government to a sufficient degree or discharge a governmental function, in effect being treated as government for Charter purposes: *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, 151 D.L.R. (4th) 577 at para. 44. Mr. Ashraf commented in argument that since

airlines are federally regulated, the Charter applied to them. It has been held that the Charter does not apply to Air Canada: *Thibodeau v. Air Canada*, 2005 FC 1156, [2006] 2 F.C.R. 70 at para. 70, aff'd 2007 FCA 115, 375 N.R. 195. By extension, it would not apply to Jazz which contracts to provide services to Air Canada. As a result, Jazz is not subject to the Charter. This does not mean that Mr. Ashraf does not have rights under the Charter; it simply means that those rights protect him from the government or its proxies and not from non-governmental actors.

[15] Mr. Ashraf has also referred to the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the Act) and its prohibition on discrimination in employment on the basis of race or ethnicity. However, the Supreme Court has held that a violation of human rights legislation does not create a private right of action against the alleged offender: *Seneca College v. Bhadauria*, [1981] 2 S.C.R. 181 at 195, 124 D.L.R. (3d) 193; see *also Canada (Human Rights Commission) v. Canada (Attorney General)*, 2016 FCA 200, [2017] 2 F.C.R. 211 at para. 87. The enforcement of the Act is left to the Human Rights Commission and to human rights tribunals appointed under the Act.

[16] It is apparent that Mr. Ashraf's action was doomed to fail and was, therefore, properly dismissed. From Mr. Ashraf's point of view, he has come to a dead end. This is unfortunate as there were choices which he could have made along the way that might have provided him with a hearing as to his dismissal which, of course, would not necessarily change the result. At this point, the passage of time has likely put those avenues beyond his reach. This is an unfortunate outcome but one which we are not in a position to alter.

[17] As a result, I would dismiss the appeal with costs.

"J.D. Denis Pelletier"
J.A.

“I agree.
George R. Locke J.A.”

“I agree.
René LeBlanc J.A.”

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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| **DOCKET:** | A-19-21 |
| **STYLE OF CAUSE:** | AFFAN ASHRAF v. JAZZ AVIATION |
| **PLACE OF HEARING:** | BY ONLINE VIDEO CONFERENCE |
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| **REASONS FOR JUDGMENT BY:** | PELLETIER J.A. |
| **CONCURRED IN BY:** | LOCKE J.A.<br>LEBLANC J.A. |
| **DATED:** | JANUARY 27, 2022 |

**APPEARANCES:**

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| Affan Ashraf | FOR THE APPELLANT<br>(ON HIS OWN BEHALF) |
| Geoffrey J. Litherland | FOR THE RESPONDENT |

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