CITATION: Stomp v. 3M Canada, 2023 ONSC 5180
COURT FILE NO.: CV-23-00000082-0000
DATE: 20230913

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Joseph Stomp, Plaintiff

AND

3M Canada Company, Defendant

BEFORE: Justice Spencer Nicholson

COUNSEL: C. Goldsmith, for the Plaintiff

C. Sinal and J. Herpers, for the Defendant

HEARD: August 18, 2023

REASONS ON MOTION

NICHOLSON J.:

[1] The defendant, 3M Canada Company ("3M") brings this motion to strike the plaintiff's statement of claim in its entirety as disclosing no reasonable cause of action under rule 21.01 of the *Rules of Civil Procedure*.

[2] Rule 21.01 provides as follows:

> 21.01 (1) A party may move before a judge,
>
> …
> (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,
>
> and the judge may make an order or grant judgment accordingly.
>
> (2) No evidence is admissible on a motion,
> …
> (b) under clause (1)(b).
>
> (3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,
> (a) the court has no jurisdiction over the subject matter of the action;
> …

and the judge may make an order or grant judgment accordingly.

[3] The motion was originally framed under both rule 21.01 (1)(b) and 21.01(3)(a). However, the parties proceeded to argue the motion under only rule 21.01 (1)(b). Accordingly, although the plaintiff adduced affidavit evidence, that evidence was inadmissible under the rule and I did not consider it.

Background:

[4] The plaintiff was employed by 3M from September 1999 to January 2, 2022. In August 2020, the plaintiff left work on a medical leave of absence after suffering a heart attack, fall and head trauma. He applied for short term disability ("STD") coverage while he was on medical leave. 3M's short term disability plan is self-insured with adjudication through a third party adjudicator. The plaintiff's claim for STD was allowed from August 7 to November 22, 2020. Following that date, the plaintiff's claim was denied. The adjudicator also denied the plaintiff's appeal from that denial in December 2020.

[5] The plaintiff returned to 3M in February 2021 on a gradual return to work basis. At the same time, he applied for and was approved for long term disability benefits ("LTD"). According to the statement of claim, he was subjected to a poisoned and toxic work environment. The statement of claim specifies conduct on the part of agents for 3M that created this allegedly toxic environment, repeatedly referring them failing to accommodate his medical disability.

[6] On January 13, 2023, the plaintiff commenced an action against 3M. In his statement of claim, the plaintiff seeks:

(a) Damages for wrongful dismissal in the amount of $282,000.00 representing a 24 month reasonable notice period;
(b) Damages for lost wages for the period of August 2020 to March 2021, in the amount of $82,500.00;
(c) Damages for lost bonus during Q2, Q3 and Q4 of 2021, in the amount of $75,000.00;
(d) Damages for lost bonus for the 24 month reasonable notice period in the amount of $200,000.00;
(e) Damages for lost benefits in the amount of $56,400.00;
(f) Damages for accrued vacation pay and lost vacation pay throughout the applicable notice period;
(g) Damages in the amount of $50,000.00 for breach of the *Ontario Human Rights Code*, R.S.O. 1990, c. H. 19, s. 46.1;
(h) Punitive, aggravated and/or moral damages in the amount of $200,000.00.

[7] Within the body of the statement of claim, I note the following examples of the plaintiff's allegations:

- In paragraph 4—"…until his constructive termination on January 2, 2022. At this time of his constructive dismissal, …"

- In paragraph 5—"In exchange for his service, Mr. Stomp was entitled to receive…"

- In paragraph 8—"…Mr. Stomp pleads that on January 2, 2022, the Defendant constructively terminated his employment as a result of his prolonged exposure to a toxic and poisoned work environment stemming from the Defendant's failure to accommodate his disability, and the discriminatory treatment to which he was repeatedly subjected to by the Defendant's representatives."

- In paragraph 9—"…he was forced to resign his employment on January 2, 2022, as he could no longer withstand months of the Defendant disregarding and/or discounting his needs and accommodations required upon his return to work following a medical leave of absence. In brief, Mr. Stomp experienced a poisoned workplace that was untenable for him to remain employed in. To this end, Mr. Stomp states that the Defendant's inactions, conduct and behaviour caused his mental and physical ailments to worsen.

- In paragraph 14—"…Mr. Stomp pleads that he had a discussion with his Manager, Eric McMillan about: excessive workload; Mr. Stomp's inability to keep up due to his mental and physical state, and his recurring heart arrhythmia. Mr. Stomp pleads that Mr. McMillan did not provide him any reasonable accommodation…

- In paragraph 16—"Upon his return to work, Mr. Stomp pleads that he again received no assistance from the Defendant in terms of accommodating his disability. Due to the constructive dismissal, Mr. Stomp was subjected to by the Defendant, he resigned his employment on January 2, 2022 due to the Defendant's failure to accommodate him up to the point of undue hardship and the Defendant creating a poisoned and/or toxic workplace for him making his continued employ untenable.

- In paragraph 17—"…At no time did the Defendant make any reasonable effort to accommodate Mr. Stomp, nor did it provide him with the significant bonuses and wages he had earned but did not receive on account of his disability. These factors coalesced into a poisoned and toxic work environment that Mr. Stomp could no longer tolerate, forcing him to submit his resignation to protect his mental and physical well-being, effective January 17, 2022. Mr. Stomp pleads that in viewing the Defendant's inactions, and poisonous and discriminatory behaviour, as a whole, it is obvious the Defendants no longer had any intention to be bound by its contractual obligations owed to him….

[8] The next portion of the statement of claim follows a heading "Wrongful Dismissal Damages". Mr. Stomp claims reasonable notice, or pay in lieu of. He also seeks lost income for the period while he was on medical leave of absence.

[9] Mr. Stomp also pleads that the defendant breached the *Ontario Human Rights Code* (the "*Code*"), by failing to accommodate his disability, entitling him to damages under the *Code*.

Legal Analysis:

Rule 21.01

[10] The basis of the defendant's complaint is that the *Code* grants exclusive jurisdiction over human rights claims to the Human Rights Tribunal of Ontario, such that the Superior Court of Justice has no jurisdiction. Further, the defendant argues that the statement of claim discloses no reasonable cause of action as against the defendant since there is no independent duty to accommodate.

[11] The test under rule 21.01 (1)(b) is, assuming that the facts as stated in the statement of claim can be proved, whether it is plain and obvious that the statement of claim discloses no reasonable cause of action. The court is not to consider the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to have a strong defence. It is only if the action is certain to fail because it contains a "radical defect" should it be struck (see: *Hunt v. Carey Canada Inc*., 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93 and *Reynolds v. Kingston (Police Services Board)*, 2007 ONCA 166 (CanLII)).

[12] The statement of claim should be read as generously as possible to accommodate any drafting inadequacies in the pleading. The facts pleaded should be assumed to be true unless they are patently ridiculous or manifestly incapable of proof. If the claim has some chance of success, it should be permitted to proceed (*Beaudoin Estate v. Campbellford Memorial Hospital*, 2021 ONCA 57 (CanLII) at para. 14).

The *Code*:

[13] S. 5 of the *Code* provides that person has a right to equal treatment with respect to employment without discrimination because of several enumerated grounds. These grounds include disability. S. 5 also provides that an employee has a right to freedom from harassment in the workplace by the employer based on the same enumerated grounds, again including disability.

[14] S. 46.1 of the *Code* provides as follows:

> 46.1(1) If, in a civil proceeding in a court, the court finds that a party to the proceeding has infringed a right under Part I of another party to the proceeding, the court may make either of the following orders, or both:
>
> 1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of

the infringement, including compensation for injury to dignity, feelings and self-respect.

2. An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect.

(2) Subsection (1) does not permit a person to commence an action based solely on an infringement of a right under Part I.

[15] In *Jaffer v. York University*, 2010 ONCA 654 (CanLII), a student sued the university for failing to accommodate him as a student with a disability. The university sought to strike the claim on the basis that it failed to disclose a reasonable cause of action.

[16] Karakatsanis J.A. (as she then was) noted at para. 36 that "[t]he duty to accommodate is a central part of the public policy of the *Code*". Accommodation is required under s. 17 of the *Code*, unless it cannot be provided without undue hardship on the person responsible for providing accommodation.

[17] Karakatsanis J.A. then referred to *Seneca College of Applied Arts and Technology v. Bhadauria*, 1981 CanLII 29 (S.C.C.), [1981] 2 S.C.R. 181, a decision of the Supreme Court of Canada in which it was held that a civil cause of action cannot be grounded directly on an allegation of a breach of human rights legislation or the public policy expressed therein. She noted, at para. 37, that if a claim for discrimination is founded directly upon a breach of the *Code*, or invokes the public policy expressed in the *Code*, that claim cannot be brought in the courts.

[18] She then described, at para. 38, that in *Honda Canada Inc. v, Keays*, 2008 SCC 39 (CanLII), [2008] 2 S.C.R. 362, at para. 63, the Supreme Court of Canada concluded that a breach of the *Code* is neither an actionable tort, nor an "independently actionable wrong" for the purposes of awarding punitive damages.

[19] Accordingly, in *Jaffer*, it was held that there is no common law duty of care that required the university to provide reasonable accommodation. Karakatsanis J.A. stated at para. 39 that:

> "…A civil action based upon the allegation that a university breached its duty of care to its student by failing to accommodate disabilities (or in its process related to that duty) cannot be based solely upon the duty created by the *Code*. To do so would be to recognize the independent tort that was specifically rejected in *Bhadauria*."

[20] Importantly, she added, that "it may be however that breach of the *Code* is relevant to a cause of action that is otherwise based upon breach of contract or negligent misrepresentation (at para. 41)(my emphasis). She then referred specifically to situations

in which the court has expressly upheld pleadings that contained allegations of discrimination in constructive dismissal claims.

[21] From *Jaffer*, the key takeaway is that whether or not a claim for breach of the duty to accommodate disabilities can proceed in the Superior Court depends upon whether or not the pleading discloses a reasonable cause of action that does not arise solely from a breach of the *Code* (at para. 44).

Constructive Dismissal:

[22] In *Chapman v. GPM Investment Management*, 2017 ONCA 227, the Ontario Court of Appeal described two routes to establishing constructive dismissal. The first is where the employer has, by a single unilateral act, breached an essential term of the contract of employment. This requires the court to conclude that the employer's conduct constitutes a breach of the employment contract. The conduct must also be found to substantially alter an essential term of the contract.

[23] The second branch allows for constructive dismissal to be made out where there has been "a series of acts that, taken together, show that the employer no longer intends to be bound by the contract". The focus here is on the cumulative effect of past acts by the employer that establish that the employer no longer intends to be bound by the contract.

[24] On both branches, it is the employer's perceived intention no longer to be bound by the contract that gives rise to the constructive dismissal.

[25] It should be noted that courts have taken a "flexible approach" in determining whether the employer's conduct evinced an intention to no longer be bound by the contract (see: *Colistro v. Tbaytel*, 2019 ONCA 197 (CanLII) at para. 38 and 42).

[26] In *Colistro*, at para. 50, Hoy A.C.J.O. stated as follows:

> [50] Further, I would add this. While the trial judge employed the second approach to constructive dismissal described in *Potter*, there is overlap between the two approaches *Potter* describes. Some courts have found constructive dismissal based on the breach of an implied term or duty that the employer will treat the employee with civility, decency, respect and dignity (*Piresferreira*; *Sweeting v. Mok*, [2015] O.J. No. 5646, 2015 ONSC 4154, 27 C.C.E.L. (4th) 161 (S.C.J.), affd [2017] O.J. No. 1185, 2017 ONCA 203, 37 C.C.E.L. (4th) 1) or that the work atmosphere be conducive to the well-being of its employees (*Stamos v. Annuity Research & Marketing Service Ltd*., [2002] O.J. No. 1865, 18 C.C.E.L. (3d) 117 (S.C.J.)). The trial judge could have approached his task by considering whether there was a similar implied term in the appellant's contract and a sufficiently serious breach to constitute constructive dismissal. Tbaytal does not suggest that under the first approach described in *Potter* a single, serious breach of an implied term cannot give rise to constructive dismissal.

[27] In *L'Attiboudeaire v. Royal Bank* (1996), 17 C.C.E.L. (2d) 86 (Ont. C.A.), the plaintiff alleged constructive dismissal from his employment because he was subjected to "differential treatment" consisting of physical and verbal harassment—including racist dehumanizing, derogatory and sexist comments. The motion judge, relying on *Bhadauria*, dismissed his action.

[28] Morden A.C.J.O., concluded that the motion judge erred in relying upon *Bhadauria*. The cause of action was not based upon a breach of the *Canadian Human Rights Act*, nor was it "based on" an invocation of the public policy expressed in that *Act*. He noted the employment relationship and that in order to prove conduct on the part of the defendant which amounted to constructive dismissal, he did not need to invoke the policy of the *Act*. That did not mean that factors enumerated in the *Act* could not be relevant factors to take into account in assessing the defendant's conduct.

[29] Similarly, in *Gnanasegaram v. Allianz Insurance Company of Canada*, 2005 CanLII 7883 (ON CA), the plaintiff alleged that she had been constructively dismissed, and also raised that the defendant had prevented her advancement due to her race. The Court of Appeal reversed the motion judge's decision to strike allegations of systemic racism, relying upon *L'Attiboudeaire*.

[30] Courts have dismissed similar motions in constructive or wrongful dismissal cases in *MacDonald v. 283076 Ont. Inc*. (1979), 26 O.R. (2d) 1, [1979] O.J. No. 4355 (C.A.) (on the basis of gender), *Alpaerts v. Obront*, 1993 CarswellOnt 935 (on basis of sexual harassment), *Andrachuk v. Bell Globe Media Publishing Inc*., 2009 CanLII 3974 (ON SC) (in relation to a pregnancy leave), *Mohammed v. Her Majesty the Queen in Right of Ontario*, 2019 ONSC 532 (duty to accommodate), and *Storm v. ADP Canada Inc*., 2003 CarswellOnt 648 (age).

[31] In fact, the trial decision in *Keays v. Honda Canada Inc*., 2005 CanLII 8730 concluded that the plaintiff had been wrongfully dismissed arising from a failure of the defendant to accommodate the plaintiff's disability. This was not disturbed by the Supreme Court of Canada in *Honda Canada Inc. v. Keays*, [2008] 2 S.C.R., which focused on the damages aspect of the case.

Legal Conclusion:

[32] In my opinion, it is not plain and obvious that the statement of claim discloses no reasonable cause of action, although I may have drafted it differently. Rather, the plaintiff's statement of claim, read generously and allowing for drafting deficiencies, clearly lays out a claim for constructive dismissal whereby it asserts "a series of acts that, taken together, show that the employer no longer intends to be bound by the contract". Those series of acts include the failure of 3M to accommodate the plaintiff's disability. Even if those series of acts only include the failure to accommodate, in my opinion, the independent cause of action remains constructive dismissal.

[33] The key allegation in the statement of claim is that the defendant created a poisoned workplace that was untenable for the plaintiff to continue to work in. That the reason that the workplace was "poisoned" was due to a breach of the *Code* does not alter the nature of the claim as being about the constructive termination of the plaintiff's contract of employment.

[34] Thus, this is, in pith and substance, not an action solely founded on a breach of the *Code*. Rather, it is a claim for a breach of the employment contract between the parties, express or implied. Read generously, the claim seeks a remedy for the constructive breach of an implied term or duty that "the employer will treat the employee with civility, decency, respect and dignity". Whether the claim is ultimately successful is left for another day.

[35] The duty to accommodate in the *Code* is inextricably bound with disability. Thus, an allegation that an employer has failed to accommodate, is really another way of alleging that the employer is discriminating on the basis of disability. Such a claim, so long as it is tethered to an independent cause of action such as a claim for constructive dismissal, is within the purview of the court.

[36] In my view, this case falls squarely within the *L'Attiboudeaire* line of cases. It is not the same situation as, and does not run afoul of, *Bhadauria*. The damages sought clearly relate to a breach of the employment contract, not damages for failure to accommodate, although that claim has also been included as permissible under the *Code*.

[37] As I have not been asked to strike particular paragraphs of the claim, I do not do so. The defendant's motion to strike the claim in its entirety as disclosing no reasonable cause of action is dismissed.

[38] In accordance with the parties' agreement on costs, the plaintiff shall have his costs of the motion fixed in the amount of $7,500.00, which I order to be paid forthwith.

Motion dismissed.

"Justice S. Nicholson"
Justice Spencer Nicholson

Date: September 13, 2023