CITATION: Jeffrey v. Open Storage, 2024 ONSC 634
COURT FILE NO.: CV-21-00669086-0000
DATE: 20240129

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: *Simon Jeffrey v. Open Storage Solutions Inc.*

BEFORE: Associate Justice Rappos

COUNSEL: *Charlie Fuhr*, for the Defendant

Jonathan Pinkus, for the Plaintiff

HEARD: October 13, 2023

REASONS FOR DECISION

Overview

[1] This is a wrongful dismissal action. The Plaintiff alleges that he was constructively dismissed without reasonable notice, as he was laid off at the beginning of the COVID pandemic and never reoffered employment on substantially comparable terms. The Defendant contends that he abandoned his position and unilaterally terminated his employment.

[2] The Plaintiff wants to examine for discovery Don Gilles, Purchasing/Logistics Manager and the Plaintiff's direct supervisor for 31 years, as the representative of the Defendant.

[3] Mr. Gilles did not appear to be examined by the Plaintiff on the agreed upon date. The Defendant subsequently took the position that Sathiyan Ratnam, Vice President of Corporate Strategy and Finance, should be examined instead of Mr. Gilles.

[4] The Defendant brings this motion for an order setting aside or quashing the Plaintiff's notice of examination for Mr. Gilles and substituting Mr. Ratnam as the individual to be examined.

[5] The Defendant argues that Mr. Ratnam is the correct individual to be examined, as he was the primary decision-maker with respect to the issue of layoff and recall decisions. The Defendant believes that Mr. Gilles is not an appropriate representative for examination, as he is a low-level supervisor, has no managerial role, and did not play a role in any of the decisions at issue.

[6] The Plaintiff argues that Mr. Ratnam has very little knowledge with respect to the factual matters at issue regarding the nature of his position, and that the Defendant has failed to meet the onus on it for this motion.

[7] At the conclusion of the hearing, I informed the parties that the Defendant's motion was dismissed with costs, for reasons to follow. These are those reasons.

Preliminary Issue: Affidavit Sworn by Articling Student

[8] The only affidavit tendered by the Defendant in support of its motion is sworn by an articling student with the law firm representing the Defendant.

[9] Affidavits of lawyers or their staff can be helpful with procedural motions and in situations where such individuals have knowledge relevant to the facts in issue before the court.[1] However, when swearing affidavits, lawyers (and by extension articling students) must keep in mind rule 5.2 of the Law Society's *Rules of Professional Conduct* that covers situations where lawyers act as witnesses. As stated in the commentary to rule 5.2-1 "[1] A lawyer should not express personal opinions or beliefs or assert as a fact anything that is properly subject to legal proof, cross-examination, or challenge."[2]

[10] In the affidavit, the articling student states that she has knowledge of the matters set out in the affidavit, and to the extent any information is not within her personal knowledge, she identifies the source of the information.

[11] The articling student then proceeds to make the following statements in the affidavit: "Don Gilles is a wholly inappropriate witness", "Sathiyan Ratnam is an entirely appropriate witness by virtue of his full and complete knowledge of each and every matter at the heart of this action", "Mr. Gilles had no involvement in the matters at the heart of this action", and "it would be unduly onerous and oppressive to the defendant to require Mr. Gilles to be examined."

[12] These statements clearly are not within the articling student's personal knowledge. She must be relying on a source for the information. However, nowhere in the affidavit does she identify any source of information, which violates subrules 4.06(2) and 39.01(4) of the *Rules of Civil Procedure*.

[13] Mr. Ratnam or another representative of the Defendant should have sworn an affidavit for this motion. It is not clear why this did not occur. It cannot be to shield an individual from cross-examination, as this action is governed by Simplified Procedure and subrule 76.04(1) prohibits cross-examination of a deponent on an affidavit for a motion.

[14] The Plaintiff does not ask that the affidavit be struck and only requests that the evidence be granted little weight.

---

[1] *Ferreira v. Cardenas*, 2014 ONSC 7119, paras. 14-15.
[2] *Ibid*. at para. 20, and *Rochon v. Commonwell Mutual Insurance Group*, 2021 ONSC 2880, paras 10-11.

[15] I agree that little weight should be afforded to the affidavit. It is replete with statements that belong in a factum and not in an articling student's affidavit.

[16] I echo the following comments made by Justice Myers in *Polgampalage v. Devani*, 2021 ONSC 1157:

> "40. I find it very disappointing that a principal allowed a student-at-law to swear and submit the affidavit that is before me. Closer supervision was required.
> …
> 42. But all students and lawyers also have independent duties to scrutinize with great care every word to which they put their names. … juniors need to insist that they receive full instructions and that their work product is properly reviewed. As difficult as it may be at times, junior lawyers and students alike must guard against allowing employers, clients, or anyone to put their integrity or reputations at risk by inadequate instructions or releasing inadequately reviewed material under their names."

Background

[17] The Plaintiff began working for the Defendant's predecessor in October 1989 as a Warehouse Manager. During his entire 31-year career, he reported to Mr. Gilles, who is a Purchasing/Logistics Manager. Mr. Gilles worked alongside the Plaintiff in the warehouse and is the only person that assigned duties to him.

[18] Mr. Ratnam is Vice President of Corporate Strategy and Finance and joined the Defendant in 2018. Mr. Ratnam reports to the Chief Executive Officer and is responsible for payroll and payroll decisions.

[19] The Plaintiff did not report to Mr. Ratnam and had little contact with him prior to his layoff.

[20] On February 5, 2020, the Defendant informed the landlord of its Brampton location, which had a warehouse and is where the Plaintiff worked, that it would be terminating its lease effective April 30, 2020.

[21] On or about March 25, 2020, Mr. Ratnam informed the Plaintiff via letter that he was being temporarily laid off with an expected return date of June 22, 2020.

[22] Mr. Ratnam was directly responsible for the decisions to temporarily law off the Plaintiff, extend the layoff, and recall him to work.

[23] On May 1, 2020, the Defendant transferred its operation to a North York office building location that does not have a warehouse.

[24] On or about June 16, 2020, Mr. Ratnam sent another letter to the Plaintiff and informed him that the temporary layoff was extended to September 21, 2020.

[25] On August 24, 2020, Mr. Ratnam sent an e-mail to the Plaintiff and informed him that his return-to-work date was September 14, 2020. In the e-mail, Mr. Ratnam stated that the Plaintiff's "compensation will be subject to a reduction of 10% adjustment due to COVID".

[26] In September 2020, Mr. Gilles called the Plaintiff, where they discussed the Plaintiff's return to work. They discussed the nature of the responsibilities that the Defendant would be able to offer to the Plaintiff. Mr. Gilles informed the Plaintiff that the Defendant was not engaged in many of the activities that he performed prior to the layoff, as the new location did not have a Warehouse Manager or a shipping and receiving department.

[27] The Plaintiff did not return to work on September 14, 2020.

[28] On September 18, 2020, the Plaintiff sent an e-mail to Mr. Gilles and Ralph Katz, the Defendant's Financial Controller, where he questioned whether the Defendant had a sustainable job for him given the reduction in shipping.

[29] On September 22, 2020, Mr. Ratnam sent an email to the Plaintiff and informed him that "non return to work without sufficient document for filing will mean that it will be an abandonment of your position."

[30] On September 28, 2020, the Plaintiff sent an email to Mr. Ratnam and rejected a position with the Defendant given the transfer of location, the lower pay that was offered, and because his proposed duties did not resemble his previous role.

[31] On October 9, 2020, Mr. Gilles sent an e-mail to the Plaintiff and stated that his "title and position remain the same" and inquired whether the Plaintiff intended to return to work.

[32] On October 13, 2020, the Plaintiff replied that he was declining "your offer on this different employment opportunity". On that same day, Mr. Gilles e-mailed Mr. Ratnam and indicated that "it would appear that" the Plaintiff quit.

[33] On September 21, 2022, this action was commenced through the issuance of a statement of claim. In the claim, the Plaintiff alleges that:

(a) the Defendant breached the fundamental terms of the employment agreement between the parties by temporarily laying him off without his consent, which amounted to constructive dismissal; and

(b) the Defendant failed to provide the Plaintiff with any notice of termination or pay in lieu of such notice.

[34] In a statement of defence dated September 28, 2021, the Defendant alleges that the Plaintiff unilaterally terminated his employment and resigned, as he refused to return to work once recalled. The Defendant also alleges that the Plaintiff was recalled to substantially the same role with the same function of shipping, receiving, and maintenance as part of the same logistic operation.

[35] In a reply dated January 13, 2022, the Plaintiff alleges that the relocation of the Defendant's operations effectively eliminated his Warehouse Manager position. The Plaintiff also alleges that the description of the job he was to return to was not at all comparable to the Warehouse Manager role that he had at the time of the layoff.

[36] On June 16, 2022, counsel to parties agreed that examinations would be held on October 28, 2022.

[37] On June 17, 2022, the Plaintiff served the Defendant with a notice of examination requiring Mr. Gilles to be examined for discovery on October 28, 2022.

[38] Prior to October 28, 2022, no correspondence was sent by counsel to the Defendant that objected to the Plaintiff examining Mr. Gilles.

[39] On October 28, 2022, Mr. Gilles did not appear to be examined. As a result, the Plaintiff obtained a certificate of non-attendance.

[40] On November 14, 2022, counsel to the Defendant sent an email to counsel to the Plaintiff setting out its position that Mr. Ratnam should be examined instead of Mr. Gilles.

[41] On January 23, 2023, counsel to the Plaintiff sent an email to counsel to the Defendant and advised that the Plaintiff does not expect Mr. Gilles to provide answers to questions that he has no personal knowledge of, and that the Plaintiff is content with undertakings regarding matters outside of Mr. Gilles' personal knowledge.

Issue and Applicable Legal Tests and Principles

[42] The issue before the Court is whether it should grant the Defendant's motion to require the Plaintiff to examine Mr. Ratnam for discovery instead of Mr. Gilles.

[43] The motion is brought under subrule 31.03(2)(a) of the *Rules of Civil* Procedure, which provides that where a corporation is examined for discovery:

> the examining party may examine any officer, director or employee of behalf of the corporation, but the court on motion of the corporation before the examination may order the examining party to examine another officer, director or employee.

[44] An examining party has a *prima facie* right to select the corporate officer, director or employee to be examined. A court should not lightly interfere with the party's selection. The onus is on the corporation to show that the person selected is inappropriate.[3]

[45] The starting point of the analysis is to note the purposes of discovery, which are to enable the examining party to know the case it must meet, to assess the strengths and weaknesses of the opposing party's case, and its own case, and to obtain admissions for use at trial.[4]

[46] The court should consider the following factors in deciding whether a corporate representative should be substituted for another:

> (a) whether the person selected by the opposing party is sufficiently knowledgeable in relation to the matters in issue;
>
> (b) whether it would be oppressive to require the person selected by the opposing party to be examined, for example by the witness being required to give an inordinate number of undertakings or unnecessarily being taken away from onerous managerial responsibilities; and
>
> (c) whether there would be prejudice to the examining party to be required to examine someone other than the person selected.[5]

[47] The parties agree as to the applicable test and principles on this motion.

Analysis

[48] The Defendant argues that Mr. Gilles is not an appropriate discovery representative for the Defendant and is not a "key witness" because he (a) is a " low-level supervisor" who has no decision-making power and almost no knowledge of the Defendant's corporate decisions; (b) has no authority to hire, layoff, or enter into contracts on behalf of the Defendant; and (c) was not involved and has no knowledge of the decision to temporarily law off the Plaintiff, to extend the layoff period, and to recall the Plaintiff to work.

[49] As a result, the Defendant claims that Mr. Gilles would need a significant amount of time to inform himself and need to give many undertakings, which would be prejudicial to the Defendant and lengthen the examinations.

---

[3] *Ciardullo v. Premetalco Inc.*, 2009 CanLII 45445 (ON SC) ("***Ciardullo***"), para. 9, *Great Lakes Copper Inc. v. 1623242 Ontario Inc*, 2013 ONSC 2600 ("***Great Lakes***"), para. 17, and *Shokar v Windsor Casino Limited*, 2018 ONSC 7644 ("***Shokar***"), para. 4.
[4] *Ciardullo*, para. 19 and *Great Lakes*, para. 19.
[5] *Ciardullo*, para. 9, *Great Lakes*, para. 20, and *Shokar*, para. 4.

[50] The Defendant believes that Mr. Ratnam is an appropriate discovery representative and is a "key witness", as he was the primary decision-maker regarding the issues at the center of the dispute.

[51] The Defendant argues that the court has the general discretion to order the discovery of a key witness where it will assist the trial of an action. It relies on the decision of *Yang v. Simcoe County* for this proposition.

[52] I do not believe this decision, nor the concept of "key witness", is applicable to this motion.

[53] The issue in *Yang v. Simcoe County* was that, following obtaining certain information on the examination for discovery of a representative of the defendants and reviewing answers to undertakings, the plaintiffs brought a motion under rule 31.03(2)(b), which permits the examining party to examine more than one officer, director or employee of the corporation with leave of the court.[6]

[54] In that case, Justice Ferguson set out the principles used to determine whether motions for leave to examine a second representative of a party should be granted. None of those principles apply to a motion under rule 31.03(2)(a).[7]

[55] It was in applying the applicable principles that Justice Ferguson held that the plaintiffs would be deprived of a meaningful discovery if they were unable to examine a second representative, given the ambiguities and contradictions arising from answer answers to undertakings and the inability of the first representative to inform himself.[8]

[56] The plaintiffs also brought a motion under rule 31.01 to examine a non-party for discovery. Justice Ferguson dismissed this motion on the basis that the plaintiffs had failed to meet the test under subrule 31.10(2).[9]

[57] Justice Ferguson went on to conclude that there was a general discretion to order discovery of a key witness to assist the trial of an action and allow the parties to obtain the information that they need to assess the case for settlement and trial purposes.[10]

[58] I do not see how this principle is applicable to a motion under subrule 31.03(2)(a) where no person has been examined to date and the issue is whether the court should go against the Plaintiff's *prima facie* entitlement to choose who it wishes to examine for discovery.

---

[6] *Yang v. Simcoe County*, 2009 CanLII 58058 (ON SC) ("***Yang***"), paras. 3-8.
[7] *Ibid.*, para. 9.
[8] *Ibid*., para. 10
[9] *Ibid*., para. 16.
[10] *Ibid*., paras. 23-26.

[59] The Defendant argues that Mr. Gilles is not an appropriate witness, as he was chosen for no overt purpose, and that it would be a nuisance and complicate and lengthen the examinations and increase costs if he is examined for discovery.

[60] The Defendant relies on the decision of the Divisional Court in *Thorne v. AXA Canada Inc.* In that case, the plaintiff sought to examine the president and CEO of a large insurance company. The insurance company took the position that the plaintiff's request was based on an ulterior motive to cause nuisance and go "over the head" of the executive in charge.[11]

[61] The motion judge concluded that the president was not an appropriate witness and ordered that the executive in charge be examined for the insurance company.[12] The Divisional Court dismissed the plaintiff's appeal.

[62] On the issue of nuisance, the Divisional Court held that it is an exception to the *prima facie* rule "where clearly the employee, officer, director chosen is so remote from the events in issue that his or [her] presence could only be construed as some kind of harassment or manifestation to cause inconvenience to either the corporation or its employees, directors, officers."[13]

[63] In my view, this is not the case here. As detailed in the pleadings, the key factual issues to be determined in this action is job abandonment, mitigation, and the nature of the pre-layoff and post-layoff positions. Mr. Gilles appears to be well suited and sufficiently knowledgeable to be examined on these issues. I do not see him as being a remote witness.

[64] Outside of bald allegations stated in the articling student's affidavit that I place little weight on, the Defendant has failed to satisfy me that it is appropriate to substitute Mr. Gilles with Mr. Ratnam, or that it would be oppressive or prejudicial to allow Mr. Gilles to be examined on behalf of the Defendant.

[65] I am not persuaded that the mere possibility of additional undertakings would result in oppressive circumstances, especially in this case, where the Plaintiff has confirmed that he does not expect Mr. Gilles to answer questions that he has no personal knowledge of, and is content with undertakings from the Defendant's lawyer regarding matters outside of Mr. Gilles' personal knowledge. As a result, Mr. Gilles will not have to familiarize himself with any of the internal discussions to temporarily layoff the Plaintiff or extend the layoff, as those questions will not be asked of him.

Disposition and Costs

[11] *Thorne v. AXA Canada Inc.*, 2012 ONSC 2409, paras. 2-3.
[12] *Ibid.*, para. 6.
[13] *Ibid.*, paras. 13 and 43.

[66] For the reasons set out above, the Defendant's motion is dismissed, as they have failed to satisfy me that it would be inappropriate to permit the Plaintiff to examine Mr. Gilles.

[67] With respect to costs, the Plaintiff seeks $10,927.64 on a partial indemnity basis. If successful, the Defendant would have sought $7,040.35 on a partial indemnity basis.

[68] The Defendant argues that the Plaintiff's costs should be reduced, as it includes approximately $2,300 plus HST in fees for the Plaintiff's preparation to examine Mr. Gilles. The Defendant claims that this amount is not properly included for costs of the motion.

[69] Costs of a step in a proceeding are in the discretion of the Court, as set out in section 131 of the *Courts of Justice Act*. Rule 57.01 of the *Rules of Civil Procedure* sets out factors that the court may consider in exercising such discretion. The overriding principles in determining costs are fairness and reasonableness (*Boucher v. Public Accountants Council for the Province of Ontario*, 2004 CanLII 14579 (ON CA), at paras. 24, 26, and 37-28).

[70] As noted above, on June 17, 2022, the Plaintiff served its notice to examine Mr. Gilles on October 28, 2022. At no time during the 4.5-month period did the Defendant inform the Plaintiff of its position that Mr. Gilles was not an appropriate witness.

[71] In my view, this conduct lengthened unnecessarily the duration of this proceeding (subrule 57.01(1)(e)), and as a result, it is fair and reasonable to include preparation costs as part of the Plaintiff's costs in this motion.

[72] Having reviewed the costs outlines and heard submissions of counsel, and having considered the factors set out in rule 57.01, I believe a fair and reasonable amount of costs for the motion is $10,000 all inclusive. As a result, I hereby fix costs in this amount, payable by the Defendant to the Plaintiff within 30 days.

[73] The parties shall agree to a form of draft order and send it to my Assistant Trial Coordinator for my review.

_____

Associate Justice Rappos

DATE: January 29, 2024