IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Chestacow v. Mount St. Mary Hospital of Marie Esther Society,* 2024 BCSC 783

Date: 20240509
Docket: S222433
Registry: Victoria

Between:

Lucy Chestacow

Plaintiff

And:

Mount St. Mary Hospital of Marie Esther Society

Defendant

Before: The Honourable Justice Morley

Reasons for Judgment (Application to Strike Claim)

Agent for the Plaintiff:	E. Chestacow
Counsel for the Defendant:	T. Wedge S. Pourmand
Place and Date of Hearing:	Victoria, B.C. May 3, 2024
Place and Date of Judgment:	Victoria, B.C. May 9, 2024

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I. INTRODUCTION AND OVERVIEW

[1] Lucy Chestacow worked as a resident care attendant for Mount St. Hospital of Marie Esther Society (the "Employer") from 1999 to 2020. She has filed a lawsuit claiming that the conduct of some managerial employees of the Employer created an employment environment she could not tolerate, forcing her to quit. She also alleges that this conduct caused mental injuries and loss, and that the Employer failed to accommodate her.

[2] In this application, the Employer asks me to strike Ms. Chestacow's Amended Notice of Civil Claim without leave to amend under Supreme Court Civil Rule 9-5. I am going to allow the Employer's application, which means that Ms. Chestacow's civil lawsuit in the Supreme Court of British Columbia will be at an end unless there is a successful appeal.

[3] The reason I am doing this has nothing to do with the merits of Ms. Chestacow's dispute with her Employer. Rather, the essential nature of her dispute is not within the original jurisdiction of the B.C. Supreme Court. All the pleaded facts relate to one of the following disputes, none of which can be the basis for a civil action:

a) **A dispute with her Employer about whether her terms of employment were violated.** At all times, Ms. Chestacow was in a bargaining unit represented by the Hospital Employees' Union ("HEU"). Because of this, any dispute about whether the Employer had violated her terms of employment, including disputes the common law would address under the heading of "constructive dismissal", had to be addressed through the grievance and arbitration procedure. HEU had and has the exclusive right and obligation to represent Ms. Chestacow in this process.

b) **A claim for mental injuries that occurred at work.** Ms. Chestacow alleges that mental disorders were caused or exacerbated by the conduct of the Employer and of other employees at works. Such claims

are within the exclusive jurisdiction of the WorkSafeBC ("WorkSafe") and the Workers' Compensation Appeal Tribunal ("WCAT"). Under s. 127 of the *Workers Compensation Act*, R.S.B.C. 2019, c. 1, no civil action lies in respect of injury or disablement arising out of and in the course of employment. This is part of the "grand bargain" that permitted for comprehensive workers compensation over a century ago. The essential nature of this aspect of Ms. Chestacow's claim is therefore not the basis of a cause of action in this Court.

c) **A dispute with the HEU about how it represented her.** Through her authorized representative, Ms. Chestacow argued to me that the dispute could not go through the grievance and arbitration procedure because of inadequate representation by the HEU. This is not really set out in the Amended Notice of Civil Claim and the HEU is not named as a party and therefore not in a position to defend itself. But in any event, such disputes are within the exclusive jurisdiction of the B.C. Labour Relations Board under ss. 12 and 13 of the *Labour Relations Code*, R.S.B.C. 1996, c. 244. They cannot be the basis of a civil action in this Court.

[4] The Legislature has set up special statutory regimes to adjudicate the disputes that are at the core of the Amended Notice of Civil Claim. These regimes are "exclusive jurisdiction" regimes. That means that if the "essential nature" of the dispute alleged in a civil action is appropriately addressed through these regimes, the action cannot be sustained. The Court's role is limited to the supervisory role of judicial review. It does not decide facts and law at first instance as it would in a civil action.

[5] Ms. Chestacow has in fact used the processes provided by her collective agreement, by the *Workers Compensation Act* and the *Human Rights Code*, R.S.B.C. 1996, c. 210. In some cases, decisions made under these processes are under judicial review to this Court. That is the appropriate process. The claims set

out in her Amended Notice of Civil Claim are, plainly and obviously, matters for which the essential nature of the disputes are not ones that can be brought by way of civil action and therefore do not disclose any reasonable claim.

II. THE AMENDED NOTICE OF CIVIL CLAIM

[6] At the outset, it is important to clarify that this application must proceed on the facts as Ms. Chestacow alleges them. The Employer relies on Supreme Court Civil Rule 9-5(1)(a). That means it is bringing this application before Ms. Chestacow has a chance to obtain records and evidence through pre-trial discovery and before she has a chance to try to prove her case at a trial or summary trial under. An order under Rule 9-5(1)(a), at least if made without the option of amending the Amended Notice of Civil Claim, has the draconian effect of ending the litigation without any chance to discover or submit evidence.

[7] As a result, such an order is only available on the assumption that Ms. Chestacow will be able to prove everything she says is true in her Amended Notice of Civil Claim (at least if it is capable of proof and I accept that everything she says could be): *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 [*Atlantic Lottery Corporation*] at para. 14. Of course, the Employer does not agree that these statements really are true, and if I were to dismiss the Employer's application, Ms. Chestacow would have to prove them. But for the purposes of this application, I treat them as fact.

[8] I will sometimes explicitly qualify the statements here with phrases like "Ms. Chestacow alleges". Sometimes I will just state what she has pleaded as fact. Either way, these facts are presumed for the purposes of the application and my decision is on the assumption they are true, but they have not been proven and should not be relied on for any other purpose.

[9] Ms. Chestacow worked for the Employer from 1999 to 2020. Her job required her to provide daily care to residents of the hospital, such as bathing, dressing, skin care, meal assistance, oral hygiene and toileting.

[10] In 2011, five months after her 60th birthday, she had what she describes as "a conflict" with the Employer's Director of Resident Care and Director of Human Resources. They alleged misconduct against her and attempted to impose discipline. According to the pleading, this led to a mental disorder that had not existed before. Ms. Chestacow developed anxiety attacks, connected to a belief the Employer would fire her without cause.

[11] The HEU grieved the statements and disciplinary action against Ms. Chestacow. As a result of the grievance, the Employer issued what the HEU, at least, considered an apology letter to Ms. Chestacow and apparently discontinued the discipline. The HEU was satisfied with this resolution and did not go further to arbitration. Ms. Chestacow was not satisfied, however. She believed the cause of the Employer's action was her age and that it wanted her to quit.

[12] On February 24, 2015, Ms. Chestacow injured her left knee at work. A claim was filed with WorkSafe and her physical injury and psychiatric disorders were found to be compensable.

[13] In September 2015, Ms. Chestacow was referred to WorkSafe's vocational rehabilitation services. Ms. Chestacow pleads that the Employer refused to participate in vocational rehabilitation. I note parenthetically that the Employer denies this and says the contrary has already been found by the Workers Compensation Appeal Tribunal. However, as I have already explained, for the purposes of this application I will take the pleading to be true.

[14] In February 2016, Ms. Chestacow notified the Employer that she considered herself ready to return to work. According to the Amended Notice of Civil Claim, the Employer did not initially object to her return, and she submitted a report from her attending physician, confirming she was fit for work, to both the Employer and the HEU.

[15] She pleads that she returned to work on February 22, 2016, and the shift proceeded uneventfully. However, on the next day, she says "a psychological injury

and a physical injury" were inflicted on her by the Employer's Director of Resident Care and Director of Human Resources and by a union representative. She pleads that this aggravated and accelerated the psychiatric disorders caused by the 2011 incident and she was unable to attend work again until the end of May 2016. She says she has had nightmares since (and implicitly because of) these events.

[16] I will again note that the Employer, in pursuing an application for "abuse of process" under Rule 9-5(1)(d), has submitted evidence that its actions in February 2016 were found by the WCAT to be "reasonable attempts by the employer to engage the worker in the return-to-work process". However, once again, because I address this application entirely under Rule 9-5(1)(a), I will presume the correctness of Ms. Chestacow's version of events.

[17] Ms. Chestacow sets out in her Amended Notice of Civil Claim that she made a claim to WorkSafe for injuries as a result of the February 2016 events and that compensation was denied. This denial has been upheld by the WCAT, in a decision that is currently the subject of judicial review in this Court.

[18] Ms. Chestacow goes on to say that after May 2016, when she returned to work, she asked for accommodation with the assistance of the HEU. The Employer refused to communicate about the accommodation request through Ms. Chestacow's husband, Eugene Chestacow.

[19] Ms. Chestacow filed a human rights complaint with the B.C. Human Rights Tribunal, which was dismissed under s. 27(1)(c) of the *Human Rights Code*. This dismissal is the subject of an unresolved judicial review in this Court.

[20] Ms. Chestacow said she searched for alternative employment from January 2017 on, sometimes with the assistance of WorkSafe and sometimes on her own.

[21] In April 2017, Ms. Chestacow received a letter from the Employer's Director of Human Resources stating they would not meet with her regarding a return-to-work plan. The Amended Notice of Civil Claim refers to an additional human rights

complaint made in March 2018, which was similarly dismissed and is also under judicial review.

[22] In September 2017, she received another letter saying her employment and benefits were terminated. This created additional shock, which she pleads was a psychological crisis, aggravating and accelerating her psychiatric disorders. WorkSafe did not, however, accept the compensability of this shock, in a decision that was confirmed by the WCAT and is also under judicial review in this Court.

[23] Ms. Chestacow, Mr. Chestacow, two representatives of the HEU and two representatives of the Employer all met on February 27, 2020. Ms. Chestacow pleads that one of the Employer representatives spoke with a threatening tone of voice in a provocative and hostile manner and asked her questions she pleads had an embarrassing or negative connotation. She burst into tears and the meeting ended.

[24] Ms. Chestacow says she received seven letters over the next four months from this same representative which “contained threats of termination of my employment”. She pleads that on June 26, 2020, one letter also threatened discipline. Her psychological health worsened after reading each letter.

[25] She pleads that as of July 29, 2020, her mental health was destroyed. On July 30, 2020, Mr. Chestacow, as her Authorized Representative, sent a notice of retirement.

[26] The relief sought is for general damages, special damages, damages for past loss of income, damages for future loss of income, court-order interest, non-pecuniary damages and costs.

[27] In the Legal Basis section of the Amended Notice of Civil Claim, Ms. Chestacow specifically claims for constructive dismissal. She says she was owed a fiduciary duty by the Employer, and it was breached. She also claims for “moral damages” and “moral suffering”. I take this to be some kind of tort claim for mental health problems caused by the facts she has pleaded.

III. IS THE DISPUTE WITHIN THE JURISDICTION OF THE BC SUPREME COURT?

[28] Not all disputes are given to the courts to resolve at first instance. For various reasons, the Legislature may choose to give jurisdiction to resolve a category of disputes to a statutory tribunal or "administrator". While this can sometimes be concurrent jurisdiction, it can also be *exclusive* jurisdiction.

[29] When determining whether a set of material facts set out in a notice of civil claim are true would plainly and obviously be within the exclusive jurisdiction of an administrator, then it is appropriate to strike the claim and dismiss the action under Rule 9-5(1)(a), which authorizes a court to strike out a pleading if it discloses no reasonable claim or defence. That is because, even if the facts disclose a *dispute*, they do not disclose a reasonable *claim*: *Masjoody v. Trotignon*, 2022 BCCA 135.

[30] As I have already mentioned, a civil action cannot be brought in respect of injury or disablement arising out of and in the course of employment. Any dispute about an allegation of such injury or disablement must go to WorkSafe and then the WCAT. The Court's role is restricted to judicial review of a WCAT decision. Similarly, if a dispute is about the terms and conditions of employment in a unionized workplace or about representation given by a union, then it is under the exclusive jurisdiction of a labour arbitrator or the Labour Relations Board, and the courts have no power to entertain a civil action in respect of that dispute: *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, CanLII 108 (SCC), at para. 50; *Labour Relations Code*, ss. 12, 13, 136(1), 137(1).

[31] *Weber* says that when analyzing whether a dispute comes within the exclusive jurisdiction of an administrator what matters is the "essential character" of the dispute, not how it has been legally or formally characterized: *Weber* at para. 52.

[32] Ms. Chestacow's claims for non-pecuniary damages and, on some interpretations, her claims for loss of income as a result of mental conditions caused or exacerbated by statements of the Employer or of other employees are claims in

respect of injury or disablement arising out of and in the course of employment. These cannot be brought as civil actions.

[33] To the extent Ms. Chestacow alleges that the Employer has breached her conditions of employment, including any workplace bullying or harassment policies, then I find that these are plainly and obviously within the scope of what can be addressed through a grievance and arbitration procedure in a unionized workplace. I note that in *Weber*, the Supreme Court of Canada gave the following examples of such disputes: “wrongful dismissal”, “bad faith on the part of the union”, “conspiracy and constructive dismissal” and “damage to reputation”: *Weber* at para. 53.

[34] Ms. Chestacow explicitly pleads “constructive dismissal” and in my respectful view, her other pleadings, if not specifically in respect of mental conditions she says were caused at work, clearly fall within *Weber* at para. 53.

[35] The Alberta Court of Appeal has held that in “exceptional circumstances”, such as where a grievor *could not* comply with a collective agreement’s time lines for bringing a grievance, the superior courts retain a residual jurisdiction and therefore if such exceptional circumstances are pleaded, a civil action relating to breach of terms of employment by a bargaining unit employee should be permitted to go to trial: *Wanke v. University of Calgary*, 2011 ABCA 235. This has been followed in British Columbia, at least to the extent of providing a basis for not allowing a Rule 9-5(1)(a) application: *Hartley v SNC-Lavalin*, 2022 BCSC 2106.

[36] However, it is critical for these “exceptional circumstances” to remain exceptional if the integrity of “grand bargains” represented by collective labour relations and workers’ compensation are to be respected. As the Supreme Court of Canada reminded us in *Atlantic Lottery Corporation* at para. 18, the need for a culture shift to promote timely and affordable access to the civil justice system means that where it is possible, courts should resolve legal disputes promptly, rather than referring them to full trial. This includes resolving questions of law by striking claims that have no reasonable chance of success.

[37] While the plaintiffs in *Wanke* and *Hartley* were found to have pleaded sufficient material facts to make it a triable issue as to whether they *could* have accessed the grievance procedure, in this case, on the face of the pleadings, Ms. Chestacow clearly *did* access it, as well as the procedures of WorkSafe. There can be no basis for an "exceptional circumstance" on this account.

[38] It was argued to me that Ms. Chestacow's situation can be distinguished from the one in *Weber* because she is alleging that the HEU did not properly represent her and that she prefers to be represented by Mr. Chestacow. However, this cannot be an exceptional circumstance. In a unionized bargaining unit, the certified bargaining agent (in this case, the HEU) has exclusive authority (and obligation) to represent bargaining unit members. This is not a matter of individual choice that Ms. Chestacow can alter so long as the HEU is the chosen bargaining agent of the bargaining unit as a whole.

[39] If Ms. Chestacow has a complaint about the HEU's representation, it must be addressed to the B.C. Labour Relations Board under ss. 12 and 13 of the *Labour Relations Code*. Those sections do not simply apply to bargaining, but to any "acts" in "representing any of the employees" in the appropriate bargaining unit. In fact, the Amended Notice of Civil Claim does not allege any "arbitrary, discriminatory or bad faith" acts by the HEU and the HEU is not named as a defendant. But in any event, the court has no jurisdiction over claims about a failure of a union to properly represent a bargaining unit member. Further, because s. 12 of the *Labour Relations Code* is available, an alleged failure on the part of the bargaining agent to pursue a grievance is not an "exceptional circumstance" that would warrant allowing a bargaining agent employee to bring a civil claim for constructive dismissal (or for other causes of action that amount to constructive dismissal).

[40] In short, the essential character of this dispute is either about the terms and conditions of work (in which case it is within the exclusive jurisdiction of a grievance arbitrator) or about an injury or disablement arising out of or in the course of employment (in which case it is within the exclusive jurisdiction of WorkSafe and the

WCAT). Ms. Chestacow's dispute with the HEU does not change that: on its own terms, it is within the exclusive jurisdiction of the Labour Relations Board and it does not constitute an "exceptional circumstance" that could allow the dispute with the Employer to go to this Court as a matter of original jurisdiction.

[41] Because I have addressed this application under Rule 9-5(1)(a), I do not need to address the Employer's submission that Ms. Chestacow is engaged in an "abuse of process" by relitigating matters already decided either by the WCAT or the B.C. Human Rights Tribunal.

IV. CONCLUSION AND ORDER

[42] I therefore make the following orders:

a) The application is allowed.

b) The Amended Notice of Civil Claim is struck under Supreme Court Civil Rule 9-5(1)(a).

c) The action is dismissed.

d) Costs of the action are awarded to the defendant at Scale B.

"J. G. Morley, J."
The Honourable Justice Morley