CITATION: Elzayat v. Rogers Communication, 2024 ONSC 4477
COURT FILE NO.: CV-22-00690473-0000
DATE: 20240819

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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: HAYTHAM ELZAYAT, Plaintiff

AND:

ROGERS COMMUNICATION, Defendant

BEFORE: Akazaki J.

COUNSEL: Haythem Elzayat, self-represented

Stephanie Kolla, for the Defendant

HEARD: August 6, 2024

REASONS FOR DECISION

OVERVIEW

[1] In 2015, Haythem Elzayat attended a job interview at Rogers. Out of the blue, according to him, the interviewer inquired into his country of origin, his religion, and his family.

[2] For the instant motion, I assume this happened as he described it in his statement of claim. They were intrusive versions of the question, "Where are you from?" Perhaps appropriate when welcoming a tourist, in most other situations the inquiry is a form of discrimination. It implies the questioner is from here, and the questionee is not. Ethnic triage for allocating social and economic opportunities offends Canadian human rights law.

[3] Rogers brought a motion to dismiss the action on the grounds that it was barred by the expiry of the two-year limitation period under the *Limitations Act, 2002,* S.O. 2002, c. 24, Sched. B, ss. 4 and 5, and by a final release executed by Mr. Elzayat in a Canadian Human Rights Tribunal case arising from a subsequent 2018 interview. They also argued the statement of claim did not disclose a viable cause of action because the claim ought to have been made to that Tribunal and not to the Superior Court.

[4] Mr. Elzayat responded to the limitations defence by asserting that disability and homelessness rendered him incapable of starting a lawsuit under s. 7(1)(a) of the *Limitations Act*. He stated the release did not apply to the 2015 interview. His response to

the viability argument was that he had received advice from a pro bono lawyer that he could bring his discrimination claim in Superior Court.

[5] Because the viability issue imports a question of jurisdiction, I will change the analytical order and emphasis of the issues. (If the court lacks jurisdiction, the other issues are moot.) I will dismiss the action based on my determination of the following points:

1. The discrimination claim against Rogers, a federally regulated undertaking, is not viable in this court because there is no tort of discrimination. The lack of a common-law remedy does not oust the jurisdiction of the court to state there is no remedy or to deal with the other two issues.

2. The action is barred as having been brought out of time. Mr. Elzayat's claim for a tolling of the limitation period based on mental and physical disability falls well short of the incapacity exemption because he was able to sue and defend suits throughout the entire interval between 2015 and the 2022 start of this action.

3. The release signed at the Tribunal mediation does not bar the action because its scope is ambiguous and appears to be limited to the 2018 discrimination. Because of the determination of the first two issues, the unenforceable release does not have any effect on this action.

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PROCEDURE ON THE MOTION

[6] I should first state that Mr. Elzayat brought his own motion. It was to dismiss or to strike Rogers' motion to dismiss his action. Some litigants, including those represented by lawyers, frequently bring such motions in the belief that either they must do so, or that it adds rhetorical flourish. There is no need to bring a motion to resist a motion. If the court finds the grounds of a motion unpersuasive, it will readily dismiss it. The provincial treasury may be grateful for the additional motion filing fee, but it is wasted. For the sake of completeness, I will treat Rogers' motion and Mr. Elzayat's as two sides of the same coin.

1. Procedure for determining viability of the claim for discrimination

[7] The first point, the court's inability to compensate Mr. Elzayat for discrimination requires the court to determine whether, under the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, clause 21.01(1)(b) applies because the statement of claim discloses no reasonable cause of action, or whether clause 21.01(3)(a) applies because the court lacks jurisdiction.

[8] A common feature of all provincial court rules for dismissal of cases at the pleadings stage is the balance between shielding the court's process from abuse or mootness and the injustice of discarding a case prematurely. In the case of assessing the viability of a claim or defence, such as in clause 21.01(1)(b) of the Ontario *Rules of Civil Procedure*, courts are required to determine whether it is "plain and obvious" that it cannot succeed, assuming

the litigant can prove the facts: *Hunt v. Carey Canada Inc*., [1990] 2 S.C.R. 959, at pp. 968 and 980.

[9] A similarly strict standard applies to statutory privation of court jurisdiction. The court must be satisfied that it lacks power to meet the litigant's request before rejecting the case as unviable. Unlike the inquiry into scope of a cause of action or a defence, clause 21.01(3)(a) specifically grounds a defendant's motion on the court's lack of jurisdiction over subject matter.

[10] The rules applicable to the first issue therefore require certainty whether the court cannot compensate for discrimination or has jurisdiction even to hear the case.

2. Procedure for dismissal of action based on a limitations defence

[11] The limitations issue requires consideration of Mr. Elzayat's evidence of incapacity in support of his position that the limitation period was tolled or suspended. Summary dismissal requiring evidence is governed by the summary judgment procedure in r.20 of the *Rules of Civil Procedure*. Ontario's summary judgment procedure requires the court to determine whether the case presents a genuine issue requiring a trial. If no trial is needed, judgment can be granted for the moving party: *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, at para. 43.

[12] Because the basic limitation period expired in 2017, Mr. Elzayat had to show he was incapable of starting the suit for an interval or intervals totalling five years. If his evidence responding to the motion could not come close to showing that he should be relieved of the limitation period for that duration, there is no need for a trial of the issue.

3. Procedure for applying the final release executed by Mr. Elzayat

[13] The issue arising from the release is governed by clause 21.01(3)(d) of the Ontario *Rules of Civil Procedure*, on the basis that the action is an abuse of process for having already been settled. Since this is based on the interpretation of a standard form contract, the court can construe it in context as a matter of mixed fact and law: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co*., 2016 SCC 37, [2016] 2 S.C.R. 23, at para. 24. If the issue in the statement of claim was not covered by the release, it would not bar the claim.

1. ABSENCE OF TORT AND JURISDICTION

[14] Can this court consider Mr. Elzayat's claim for damages arising from discrimination? The question can be seen in two ways. If an administrative tribunal has exclusive jurisdiction, this court has no jurisdiction: *Yang v. Co-operators General Insurance Company*, 2022 ONCA 178, 21 C.C.L.I. (6th) 1 at para. 4. If the tribunal's jurisdiction is not exclusive, this court can accept jurisdiction, but it can do nothing for the plaintiff if the law provides no remedy. Here, the Superior Court's jurisdiction is not ousted, but in the absence of a recognized tort, the relevant statute affords no path to a finding of liability.

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[15] Canadian law regulates discrimination in a manner that can perplex the lay person. The common law never saw fit to recognize discrimination as an actionable wrong. Indeed, a foundational English torts decision criticized a judge for having granted an injunction "at the instance of a newcomer who is no lover of cricket": *Miller v. Jackson* [1977] Q.B. 966. Although not discrimination based on ethnic or racial grounds, Lord Denning's famous decision employed the word "newcomer" numerous times to emphasize the local cricketeers' right to hit balls into the recent home purchaser's garden – the idea being that if one chooses to come here, one has to put up with the otherwise unlawful nuisance.

[16] Because of the absence of a judge-made law against discrimination, legislators have stepped into the void. Section 15 of the *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11, regulates equal treatment by the state. In private law relationships such as employment and commerce, the absence of a common law tort of discrimination means that human rights legislation governs: *Seneca College of Applied Arts & Technology v. Bhadauria*, [1981] 2 S.C.R. 181, at p. 195, and *Jaffer v. York University*, 2010 ONCA 654, 326 D.L.R. (4th) 148 at paras. 37-38.

[17] The bottom line is that Canadian courts have not developed a private law remedy for compensating victims of discrimination against new Canadians and other minorities. At the time in our country's history when the courts could have been more sensitive to the fact that discrimination was as worthy of sanction as any other type of harm recognized by private law, it did not happen. Because of this legal vacuum, legislators enacted statutes and regulations, either because of social and political change, or to meet Canada's international obligations. Once legislators enter the field, courts refrain from developing judge-made legal remedies. Courts have recognized human rights codes as having quasi-constitutional status. But still, there is no tort of discrimination. Perhaps there is no need.

[18] Canada's federal constitution allocates legislative authority to provincial legislatures and to Parliament. In most instances, provincial human rights statutes apply to businesses because of the "Local Works and Undertakings" mandate of the provinces under s. 92 of the *Constitution Act*, 1867. That mandate, however, excludes "Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province." This means federally regulated companies, such as telecommunications, postal services, and national railways, come within the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (CHRA). Unlike the current Ontario counterpart, the federal legislation does not allow complainants to resort to court actions.

[19] Rogers, as a national telecommunications company, is therefore not subject to the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19. The Ontario Human Rights Tribunal has consistently declined jurisdiction to hear cases involving federally regulated businesses: *Syed v. Rogers Communications*, 2012 HRTO 248, at para. 4, and *Dougan v. Rogers Communications*, 2009 HRTO 1169, at para. 3.

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[20] The Ontario tribunal's lack of jurisdiction does not apply to the Superior Court. The federal Act contains no privative clause ousting the court's jurisdiction under s. 11(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, to consider the dispute. However, it is an empty jurisdiction in that common law does not recognize a tort of discrimination and the federal statute confers no power on the court. The action must therefore be dismissed principally on the basis that it discloses no cause of action in respect of which this court can award damages to Mr. Elzayat against Rogers.

[21] The court still has jurisdiction to consider the procedural questions raised by Rogers, namely the limitations defence and the effect of the final release.

2. THE LIMITATIONS DEFENCE

[22] Mr. Elzayat clearly started the action outside the two-year basic limitation period under ss. 4 and 5 of the *Limitations Act*. The statement of claim clearly states that Mr. Elzayat felt upset and discriminated against after coming out of the 2015 job interview. Discovery of the personal insult and recourse to a legal proceeding, as described in s. 5, cannot be an issue here because he started a Tribunal proceeding in 2019 in respect of the same type of complaint. Instead, his response to the limitation issue was that he was disabled mentally and physically and that his ability to start an action within the two years following the interview was thwarted by a period of homelessness.

[23] Mr. Elzayat filed copies of his Ontario Disability Support Program pay stubs confirming enrolment, part of a clinical report from a psychiatric nurse, as well as a doctor's email note from March 14, 2024, saying he could not participate in a court proceeding. To the extent he chose the medical evidence as his best foot forward, it only stated his self-reported belief that he suffered from low mood, irritation, migraines, difficulty concentrating, and feelings of guilt. He also reported symptoms of a concussion from an accident as well as a hearing disability in one ear.

[24] Section 7 of the *Limitations Act* tolls the limitation period any time the plaintiff is "incapable of commencing a proceeding because of his or her physical, mental or psychological condition." It also presumes the plaintiff is capable "at all times unless the contrary is proved." Generally, a person has the capacity to sue if able to understand the information relevant to the decision to sue, including the foreseeable consequences of the suit or failure to sue: *Carmichael v. GlaxoSmithKline Inc*., 2020 ONCA 447, 151 O.R. (3d) 609, at para 84. Capacity is linked to personal autonomy. The law does not lightly find incapacity. A person is entitled to autonomy to make legal decisions except in cases of dementia, serious psychosis, or physical impediments completely impeding the ability to communicate. If the law will not take away a person's autonomy, it will also assume the ability to start a lawsuit within two years.

[25] Many of the cases dealing with the issue entail a full clinical record including experts in the relevant health disability. Aside from the fact that the evidence filed in no sense reaches

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the lack of personal autonomy required to find Mr. Elzayat incapable during the two years after the 2015 interview, there is no reason to delve into the medical evidence because he pursued the human rights complaint from the 2018 interview. He brought this claim to the appropriate federal tribunal and came out of it with a financial settlement in 2022. Thus, even if he suffered some impediment to bring a suit in 2015 – which the evidence does not establish – his ability to pursue a similar claim for discrimination in the 2018-2022 period meant he had the ability to sue during some two-year period between 2015 and 2022, when he started this action.

[26] Mr. Elzayat was also involved in other litigation in 2016, 2017, and 2019. These consisted of landlord and tenant disputes, appeals from the Landlord and Tenant Board, and Ontario Human Rights Tribunal proceedings arising from interactions with a car rental agency and with the Toronto Police Service. He stated that some of these proceedings were conducted by him with the help of a pro bono legal aid lawyer serving as his agent. Legal Aid Ontario refused to provide a certificate for this action. In all those cases, he participated as an autonomous individual without a litigation guardian.

[27] Finally, it did not escape my notice that Mr. Elzayat's 2018 interview was for a senior position at Rogers and that his application proceeded at least part way through the vetting process. Otherwise, Rogers would not have granted him an interview with one of his potential managers. I will not assess his competency based on his confidence in his ability to fulfil the job posting. However, if he was prepared to work for Rogers in 2018, there must have been at least some reduction in the alleged psychological harm he suffered from the 2015 discrimination.

[28] I appreciate that this cannot go to the merits of his claim because it could invoke a myth or stereotype about victims of discrimination. New Canadians should not have to put up with discrimination as a fact of life and business in this country. The fact that he applied for another job at Rogers did not mean that he did not suffer discrimination in 2015 or that he did not develop psychological symptoms from it. However, for the limited purpose of mental and physical capacity to bring a lawsuit, his willingness to submit to another interview demonstrated at least an understanding of his decision to reapply to Rogers and the consequences of having his application accepted or rejected. He submitted no evidence that the 2015 experience resulted in post-traumatic amnesia, aphasia, or other form of communicative paralysis preventing him from pursuing a claim for discrimination.

[29] The cumulative effect of Mr. Elzayat's various lawsuits, either as applicant or as respondent, all without the assistance of a litigation guardian or committee, is that his assertion of incapacity for the purpose of s. 7 has no merit. The action is clearly barred by the expiry of the two-year limitation period.

3. EFFECT OF THE RELEASE

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[30] Mr. Elzayat settled his discrimination claim before the Canadian Human Rights Tribunal, as resulting from the 2018 interview, for $5,000 on account of pain and suffering. The final release he signed covered all possible claims described as follows (underline mine):

> … arising out of or in any way related to any applications for employment with Releasees, the processing of such applications, any interviews that were given or denied, and the decisions not to hire the Releasor, and any and all claims under the *Canadian Human Rights Act*, to date, that were raised or could have been raised relating to or arising from Canadian Human Rights Complaint No. 20190531 and Canadian Human Rights Tribunal File No. T2753/12921.

[31] The basic law of releases requires words to be construed as limited to the subject matter in the contemplation of the parties at the time the release was given: *White v. Central Trust Co.*, (1984) 54 N.B.R. (2d) 293, at para. 32. Most Canadian decisions have applied this principle as requiring a narrow interpretation, although some have applied it more broadly: Daniele Bertolini, "Releasing the Unknown: Theoretical and Evidentiary Challenges in Interpreting the Release of Unanticipated Claims" (2023) 48:2 Queen's L.J. 61.

[32] The correct way to navigate the case law is to construe the final release to see whether it is anchored in a particular claim or subject matter. If it covers the claim in question, all possible claims arising from it should be considered to have been finally determined. This is the principle of finality against which an attempt to continue litigation would constitute an abuse of process. Because the standard form release is generally signed as a final document formalizing a negotiation and not itself a subject of much deliberation, one must look to the plain and grammatical wording.

[33] While the wording of the first part of the above-cited clause could refer to the 2015 interview, the grammatical meaning of the whole provision restricts the covered claims to those the complaint raised or could have raised in the two listed files. Although the Canadian Human Rights Commission could have exercised discretion to receive a complaint beyond the one-year limitation period under s. 41 of the CHRA, the files were opened further to a complaint lodged in 2019. Mr. Elzayat stated that the Commission declined the complaint because it was out of time. For the same reasons that he was out of time to bring this action, the fact that he did not bring the 2015 events into the 2019 application clearly shows that he would not have been able to raise the 2015 complaint. Otherwise, one has wonder why did not complain about both incidents in the same complaint.

[34] The ostensibly absurd logic is that if Mr. Elzayat could have raised the 2015 events in the 2019 complaint, the release would have barred the claim; and if he could not have raised those events, the release would not have barred it but the expiry of the one-year limitation period would have barred it. It is not illogical, however, because settling parties prepare releases to bar possible or potential claims – there is no need to bar impossible ones. Thus, the release does not bar the claim, but that result does not figure in the result of this motion.

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CONCLUSION AND COSTS

[35] The statement of claim is struck out, and the action is dismissed. The plaintiff's own motion is also dismissed as unnecessary.

[36] Rogers submitted a costs demand ranging from $29,286 on a partial indemnity scale to $38,497 on a substantial indemnity scale. In a practical sense, the quantum is likely irrelevant because Mr. Elzayat's income is not subject to execution, and he is not likely to have significant assets. One day, however, one would hope that he will be able to settle the costs liability, for his sake as well as the corporate defendant. The motion was not complicated. I therefore award costs to Rogers in the amount of $20,000, inclusive of fees, disbursements, and taxes.

[37] The plaintiff's approval of a formal order is hereby dispensed with.

Akazaki J.

Date: August 19, 2024

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