SUPREME COURT OF NOVA SCOTIA

Citation: *Unisys Canada Inc. v. Pineau-Pandya*, 2023 NSSC 328

Date: 20231026
Docket: 473125
Registry: Halifax

Between:

Unisys Canada Inc.

Plaintiff

v.

Andrea Pineau-Pandya, Matthew Watts, Karen Caldwell, Shiliang Lu, Fang Gao, Qiushi Li, Natasha Squires, and Meraki IT Consulting Incorporated

Defendants

Decision

Judge:	The Honourable Justice Glen G. McDougall
Heard:	May 16, 2023, in Halifax, Nova Scotia
Counsel:	Mark Tector and Richard Jordan, for the Plaintiff Colin D. Bryson, K.C., for the Defendants

By the Court:

Facts and Background

[1] The Plaintiff, Unisys Canada, has started an action against the Defendant, Andrea Pineau-Pandya, claiming that the Defendant breached post-employment duties she owed to the Plaintiff, including a fiduciary duty. There are other defendants listed in the statement of claim. However, this dispute relates solely to Ms. Pineau-Pandya, so I will be referring to her as "the Defendant" throughout this decision.

[2] The Defendant made a motion for summary judgment which was adjourned to address a dispute between the parties respecting settlement privilege relating to the Defendant's wrongful dismissal allegation against the Plaintiff. This claim was settled by the parties in February 2017 when they executed a settlement agreement (the Settlement Agreement).

[3] In November 2022, I released a decision on privilege over the settlement negotiations. I found that it was reasonable for the Defendant to disclose that the Plaintiff never advised her, during settlement negotiations, that it considered her to be a fiduciary of the company, and that if she had known that Unisys regarded her as a fiduciary it would have impacted the negotiations. I held that the Defendant could rely on this statement during the summary judgment motion.

[4] During that motion, there was ample evidence presented by the Defendant that would support an argument that the Plaintiff should be estopped from claiming for a breach of fiduciary duty. However, the Statement of Defence does not include a pleading for estoppel nor has the Defendant set out the material facts to support an estoppel argument. I informed the Defendant that she would need to seek an amendment to plead estoppel.

[5] The Defendant has made a motion to amend her Statement of Defence to plead estoppel. She also seeks an amendment to claim that she was wrongfully dismissed from her employment with the Plaintiff.

[6] In light of my February 2022 decision, the Plaintiff has consented to the proposed amendment on estoppel. However, the Plaintiff does not consent to the proposed wrongful dismissal defence, claiming that this amendment is being requested in bad faith and would amount to an abuse of process. The Plaintiff says the parties have fully and finally disposed of the wrongful dismissal issue when they executed the Settlement Agreement.

Positions of the Parties

The Defendant

[7] As noted above, the Defendant seeks an amendment to add an estoppel defence and to allege that she was wrongfully dismissed. The proposed amendments to the Statement of Defence that are disputed are as follows:

> 16. Pineau states that this termination of her employment was without just cause.
>
> 84A. In the further alternative, Pineau states that Unisys's termination of her employment without just cause ended any fiduciary duties that Pineau may have owed to Unisys.
>
> 84B. In the further alternative, Pineau states that in the context of the negotiation of Pineau's claim for damages for the termination of her employment without just cause, including but not limited to Unisys' suspicions that Pineau intended to compete with Unisys, Unisys owed a duty to Pineau to disclose to her its position that Pineau was a fiduciary and owed fiduciary obligations to Unisys, in particular a duty to not solicit or compete for Unisys' customers for a reasonable period of time…

[8] The Defendant relies on *Global Petroleum Corp. v. Point Tupper Terminals Co.*, 1998 NSCA 174, [1998] NSJ No 408, and *Lamey v. Wentworth Valley Developments Ltd.*, 1999 NSCA 69, [1999] NSJ No 122. In these cases, the Court of Appeal held that the test to amend pleadings starts from the presumption that an amendment that raises a justiciable issue will be granted unless the party opposing the amendment can demonstrate that:

1. The applicant is acting in bad faith; or

2. That if the amendment is allowed that the opposing party will suffer prejudice that cannot be compensated by costs.

[9] This approach was affirmed in *Annapolis Group Inc. v. Halifax Regional Municipality,* 2021 NSSC 344 [2021] NSJ No 445, at para. 12.

[10] The Defendant notes that the Plaintiff objects to the defence being raised at all, not simply to the timing of the amendment. This, the Defendant argues, means that the bad faith relied on by the plaintiff in *Annapolis Group* is distinguishable, as the issue in that case was an objection to the late filing of the amendment after a Date Assignment Conference was held where the parties agreed that the pleadings did not require any amendments.

The Plaintiff

[11] The Plaintiff consents to the Defendant's proposed amendments to plead estoppel in paragraphs 17, 17A, and 84B of the proposed amended statement of defence. However, the Plaintiff objects to the proposed amendment in paragraph 16, paragraph 84A, and to the reference to a dismissal "without just cause" in paragraph 84B.

[12] The Plaintiff claims that the Defendant was dismissed for cause on October 24, 2016. It further argues that the Settlement Agreement fully and finally determined any disputes arising from the Defendant's termination. The Plaintiff claims that the Defendant pleading wrongful dismissal is an attempt to relitigate the settlement amount and to open up the settlement agreement.

[13] The Plaintiff agrees with the Defendant that a determination of bad faith is discretionary and context-specific. The Plaintiff argues that the Defendant is acting in bad faith by attempting to renege on the Settlement Agreement after six years. The parties agreed to the dismissal of any claims the Defendant had against the Plaintiff in the 2017 Settlement Agreement and, the Plaintiff submits that it "would constitute bad faith to allow her to reopen the Settlement Agreement to plead that she was wrongfully dismissed without cause" (Plaintiff's Brief, para. 40).

[14] The Plaintiff argues that the overriding public interest in settlement is paramount and that the "administration of justice would be prejudiced" if settlement agreements were "disregarded absent compelling reasons" (para. 33).

[15] The Plaintiff further argues that if the amendment is allowed it will suffer two types of prejudice that cannot be compensated by costs: assumed prejudice based on the length of time that passed between filing the defence and the proposed amendment, and actual prejudice, where there is evidence that the responding party has lost an opportunity that cannot be compensated by costs (*1588444 Ontario Ltd. (cob Alfredo's) v. State Farm Fire and Casualty Company*, 2017 ONCA 42, [2017] OJ No 241, at para. 25). The Plaintiff states that the Defendant has been on notice since 2018 of their allegations of breach of fiduciary duties. Only after the issue of estoppel was raised during the summary judgment motion did the Defendant seek this amendment.

Issue

1. Should the Defendant be allowed to amend her Statement of Defence to claim that she was wrongfully dismissed by the Plaintiff?

Law

[16] A pleading can be amended in accordance with Civil Procedure Rule 83:

> **83.01 Scope of Rule 83**
>
> **(1)** This Rule allows a party to amend certain documents the party files.
>
> **(2)** This Rule requires a party who wishes to amend a court document to obtain permission from the other parties or a judge, except documents may be amended without permission early in an action.
>
> **(3)** A party may amend a court document filed by the party, in accordance with this Rule.
>
> **83.02 Amendment of notice in an action**
>
> **(1)** A party to an action may amend the notice by which the action is started, a notice of defence, counterclaim, or crossclaim, or a third party notice.
>
> **(2)** The amendment must be made no later than ten days after the day when all parties claimed against have filed a notice of defence or a demand of notice, unless the other parties agree or a judge permits otherwise.
>
> **(3)** A pleading respecting an undefended claim in an action may be amended at any time, but the party claimed against is entitled to receive notice of the amended pleading in the manner provided in Rule 31 - Notice for notice of an originating document.

[17] The pleadings have long since closed in this action, and the Plaintiff does not agree to the proposed amendment to add the wrongful dismissal claim, so the amendment may only be granted through judicial discretion under rule 83.02(2).

[18] In Nova Scotia, judges should allow amendments unless the amendment is sought in bad faith or the amendment would cause prejudice to the other party that cannot be compensated by costs (*Garth v. Halifax (Regional Municipality)*, 2006 NSCA 89, at para. 30; *Martin v MacIntosh*, 2022 NSSC 360, at para. 43).

Bad faith

[19] Bad faith was discussed by Bateman JA. In *Global Petroleum Corp.*, where she held that the determination of bad faith is a discretionary decision based on the circumstances of the case (at para. 25).

[20] Bad faith is established if an amendment is motivated by an improper purpose. Improper purposes can include delaying or obstructing the proceeding, or to subvert justice (*Nova Scotia (Community Services) v. Hopkins*, 2011 NSSC 382, at para. 13; *Mitsui & Co. (Point Aconi) Ltd. v. Jones Power* Co. Ltd., 2001 NSSC 178, [2001] NSJ No 510).

[21] In *M5 Marketing Communications Inc. v. Ross (cob Ross Built Home),* 2011 NSSC 32, [2011] NSJ No 43, I held that "the burden of establishing bad faith is on the party raising it. It is a serious allegation and there would have to be strong and compelling evidence in support of it" (at para. 31). I held that mere suspicion was not enough to establish bad faith (at para. 35). This premise has been cited with approval in *Thorburne v. Sun Life Assurance Company of Canada*, 2020 NSSC 240.

Prejudice that cannot be compensated by costs

[22] The Court in *Annapolis Group* outlined the jurisprudence on prejudice in relation to amended pleadings:

> [15] In *Altschuler v. Bayswater Construction Limited*, 2019 NSSC 197 Justice Bodurtha touched on the principles that guide whether an amended pleading creates prejudice at paras. 16 -- 18:
>
> > [16] In *Thornton v. RBC General Insurance Company*, 2014 NSSC 215, at para. 33, Justice Wood (as he then was), described prejudice that cannot be compensated in costs:
> >
> > > [33] ... That type of prejudice is typically evidentiary in nature, which requires a consideration of whether documents and witnesses have been lost due to the passage of time.
> >
> > [17] In *1588444 Ontario Ltd. (c.o.b. Alfredo's) v. State Farm Fire and Casualty Co.*, 2017 ONCA 42, [2017] O.J. No. 241, the Ontario Court of Appeal said the following about non-compensable prejudice at para. 25:
> >
> > > *There must be a causal connection between the non-compensable prejudice and the amendment. In other words, the prejudice must flow from the amendments and not from some other source: Iroquois, at paras. 20-21, and *Mazzuca v. Silvercreek Pharmacy Ltd*. (2001), 56 O.R. (3d) 768 (C.A.), at para. 65.
> > >
> > > *The non-compensable prejudice may be actual prejudice, i.e. evidence that the responding party has lost an opportunity in the litigation that cannot be compensated as a consequence of the amendment. Where such prejudice is alleged, specific details must be provided: *King's Gate Developments Inc. v. Drake* (1994), 17 O.R. (3d) 841 (C.A.), at paras. 5-7, and *Transamerica Life*

> *Insurance Co. of Canada v. Canada Life Assurance Co.* (1995), 25 O.R. (3d) 106 (Gen. Div.), at para. 9.
>
> **Non-compensable prejudice does not include prejudice resulting from the potential success of the plea or the fact that the amended plea may increase the length or complexity of the trial: *Hanlan v. Sernesky* (1996), 95 O.A.C. 297 (C.A.), at para. 2, and Andersen Consulting, at paras. 36-37.
>
> *At some point the delay in seeking an amendment will be so lengthy and the justification so inadequate, that prejudice to the responding party will be presumed: *Family Delicatessen Ltd. v. London (City)*, 2006 CanLII 5135 (Ont. C.A.), at para. 6.
>
> *The onus to prove actual prejudice lies with the responding party: *Haikola v. Arasenau* (1996), 27 O.R. (3d) 576 (C.A.), at paras. 3-4, and Plante v. Industrial Alliance Life Insurance Co. (2003), 66 O.R. (3d) 74 (Master), at para. 21.

[18] In *Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co. Ltd*., 2001 NSSC 178, the defendant asserted prejudice of a similar nature to that claimed by the defendant in this case. Justice Wright concluded that the defendant had failed to demonstrate prejudice that could not be compensated in costs:

> [32] The demonstration of prejudice alone, however, does not satisfy the legal test to be applied on this application. The burden is on *Mitsui* to further demonstrate that the prejudice caused cannot be compensated in costs. Undoubtedly these amendments, if permitted, will necessitate further discovery and the re-instruction of experts which inevitably will result in more cost and some measure of delay. There has not as yet been any discovery of experts, however, and although there is always a risk of fading memories, any lay witnesses who do need to be re-examined will at least have the benefit of the transcripts of their earlier discovery evidence in a situation where the factual underpinning of the case has not changed.

[23] Therefore, to establish the type of prejudice that will preclude an amendment, the party challenging the amendment must prove:

1. That they will suffer serious, *actual* prejudice that flows directly from the amendment; and
2. The prejudice they will suffer cannot be compensated by costs.

Analysis

[24] I will conduct my analysis by considering whether the proposed amendment;

1. Raises a justiciable issue;
2. Is raised in bad faith; or

3. Would cause the Plaintiff serious prejudice that could not be compensated by costs.

[25] I will parenthetically note that the court in *Martin v. MacIntosh*, 2022 NSSC 360, held that a court should exercise caution when being asked to strike out claims on preliminary matters, such as motions to amend (at para 62.). I approach my decision in this case with caution, noting that striking out a proposed amendment may deprive the Defendant of a relevant defence, the merits of which have not been examined.

1. Does the amendment raise a justiciable issue?

[26] In *Lamey*, the court discussed justiciability, noting that justiciable issues are ones that are triable, not hypothetical or moot. The court also noted that if a proposed amendment is absolutely unsustainable on its face it should not be allowed (at paras. 14, 15 and 20).

[27] The amendment raises an issue that has already been determined by the parties through negotiation and settlement. Had this type of amendment been sought by the plaintiff in an action it would not raise a justiciable issue, the issue having already been disposed of.

[28] The Plaintiff does not dispute that the proposed amendments raise a justiciable issue. However, the Plaintiff also submits that because the parties have already "fully and finally" settled any claim arising out of the termination of employment, the Defendant cannot now plead she was wrongfully dismissed (at para. 23).

[29] The claim of wrongful dismissal is being advanced for the purpose of defending against the Plaintiff's claims, not to re-litigate the issue. The Defendant's wrongful dismissal allegation serves her defence by advancing the position that her dismissal negated any fiduciary duties she may have owed to the Plaintiff.

[30] The Defendant cites *General Billposting Co. v. Atkinson*, [1909] A.C. 118, for the principle that restrictive covenants are void and unenforceable if the employee was wrongfully dismissed. Though this principle has received conflicting application by Canadian courts, a justice determining whether to grant an amendment should not weigh the merits of the argument, as this is a task for trial (*Lamey*, at paras. 16-18).

Because the wrongful dismissal argument is being used for an entirely different purpose than the Defendant's first allegation, in which she was attempting to

receive compensation, amending the Statement of Defence to include this allegation raises a justiciable issue.

2. Is the amendment brought in bad faith?

[31] The Plaintiff bears the burden of establishing that the Defendant is acting in bad faith (*M5 Marketing* at para. 31). I held in *M5 Marketing* that an allegation of bad faith is "a serious allegation and there would have to be strong and compelling evidence in support of it." Mere suspicion is not enough to support a finding of bad faith (para. 31).

[32] The Plaintiff argues that because the Settlement Agreement fully and finally determined all disputes that the Defendant had with Unisys, she is acting in bad faith by attempting to reopen this issue. The Plaintiff relies on *Williams v. Halifax Regional Municipality*, 2015 NSSC 228, in support of its position on the importance of respecting settlement agreements. *Williams* can be distinguished from the case at bar. In *Williams*, the plaintiffs sought an amendment seeking compensation from the defendant despite having already received compensation for the alleged wrongs. The court held that the amendment would amount to a total repudiation of the agreement. In the case at bar, the Settlement Agreement is not being repudiated and there is no suggestion from the Defendant that she is seeking additional compensation for the alleged wrongful dismissal. Instead, as I have noted above, the claim is being used as a defence to an action against her. The circumstances are not at all analogous.

[33] The Plaintiff submits that the Defendant is inviting this court to open up the Settlement Agreement, but that is not necessarily true. It does not follow that simply because the defendant claims she was wrongfully dismissed that the Settlement Agreement must be revisited. The claim for wrongful dismissal is not a challenge to the settlement amount nor does it relate to the circumstances of the settlement. The proposed amendment is advanced in relation to the effect of the alleged wrongful dismissal on the Defendant's alleged fiduciary duty.

[34] Similarly, in the other cases cited by the Plaintiff, *T.L.B.L. v. T.E.M.*, 2021 ONSC 8235, and *Henderson v. Henderson*, 2022 ONSC 1691, the party seeking to pierce the settlement agreement was attempting to claim additional compensation, or other relief, and was asking the court to disregard the settlement agreement. The offensive (rather than defensive) re-litigation of the issues is distinguishable from the Defendant's intention with her proposed amendment.

[35] The Plaintiff submits that though the Settlement Agreement purported to settle the Defendant's claims against Unisys, it did not settle any claims that

Unisys may have against the Defendant. This argument raises an important consideration. If Unisys retained the right to bring a claim against the Defendant, as it did with this litigation, it seems only fair that Ms. Pineau should be able to defend against the claims that Unisys may have against her. Ms. Pineau's proposed amendment does not do what the Plaintiff alleges, to renege upon the Settlement Agreement; it simply asserts a defence to the specific claim against her made by Unisys.

[36] Though there is a significant public interest in protecting settlement, this protection should not extend to deprive someone of a defence to an action against them. Such an approach may discourage the creation of settlement agreements, contrary to the purpose of settlement privilege as outlined in *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, [2013] SCJ No 37:

> [13] What is said during negotiations, in other words, will be more open, and therefore more fruitful, if the parties know that it cannot be subsequently disclosed.

[37] The same reasoning suggests that settlements will be more fruitful if the parties know that a settlement cannot subsequently be used to limit their legal rights beyond the contents of the agreement.

[38] The secondary argument relied on by the Plaintiff is that the Defendant is acting in bad faith because she waited five years after these allegations came to light to seek an amendment. Though prudent counsel may have recognized this potential defence earlier, these issues arose recently in the context of summary judgment. The wrongful dismissal element may have come to mind as a result of the discussion around the Settlement Agreement in relation to the estoppel argument. As noted in the Affidavit of Paul Oliver at paragraph 11, this issue was briefly addressed during discoveries in 2019 and the parties at that time did not agree on how to resolve the issue or whether this discussion would re-open the Settlement Agreement. This court has no evidence before it to suggest that the delay in raising this defence was part of a litigation strategy to delay the proceedings and cannot make that assumption.

[39] In *Mitsui*, the court addressed a similar issue to the case at bar. One party sought amendments, not to introduce new claims, but to introduce a Memorandum of Understanding (MOU) and the impact of the MOU on the dispute. The court held that the proposed amendment was not put forward in bad faith because the "landscape of the case" had changed in light of other rulings in relation to the MOU, and was not, therefore, "motivated by an improper purpose such as delay or obstruction of the proceeding or to subvert the ends of justice" (at paras. 28-29).

[40] The Plaintiff has not provided any evidence of bad faith beyond a bare assertion. For that reason, its claim that the Defendant is seeking the amendment in bad faith must fail.

3. Would the amendment cause serious prejudice to the Plaintiff that cannot be compensated with costs?

[41] The Plaintiff rightfully points out that the Defendant had knowledge of the claims against her for five years but did not seek to plead this defence until now. The Plaintiff is also correct in noting that the court could presume prejudice as a result of that delay. However, the Plaintiff has not articulated why this prejudice could not be compensated by costs.

[42] In *Annapolis Group*, Chipman J. considered a claim of presumed prejudice based on a delay of 18 months before seeking amendments. He distinguished a case relied on by the plaintiff, *Gillis Construction v. Nova Scotia Power Corp*., [1988] NSJ No 301, (1988) 86 NSR (2d) 167. In *Gillis*, the proposed amendments were not brought for 12 years after the action had begun and the proposed amendment raised new factual claims (at para. 18). The proposed amendments in this case do raise new factual claims that will need to be examined, but, the delay is significantly shorter. Furthermore, in *Gillis*, the proposed amendments were extensive and raised three new grounds for recovery. In this case, the proposed amendment is limited and does not increase the scope of liability.

[43] I am satisfied that I should not use my discretion to presume prejudice based solely on the Defendant's delay in seeking the amendment.

[44] The Plaintiff also alleges that they will suffer actual prejudice if the Defendant is "permitted to reopen the settlement agreement" (at para. 61).

[45] The Settlement Agreement is not being reopened. The issue of wrongful dismissal is being raised as a defence with respect to the effect of termination, i.e., did the termination snuff out the Defendant's (alleged) fiduciary duties? Though some aspects of the Defendant's dismissal would accordingly need to be examined, not every aspect of the Settlement Agreement would be addressed. Furthermore, it is the Defendant who will bear the burden of establishing the defence. The passage of time may impact the evidence available but would not necessarily cause prejudice to the *Plaintiff*.

[46] The Court in *Annapolis Group* found that there was no prejudice that could not be compensated by costs, noting that there was no affidavit evidence to establish sufficient prejudice, such as lost documents or deceased witnesses (at

para. 16). In contrast, the Plaintiff has submitted an affidavit of Paul Oliver who states that the two managers who were involved with the Defendant's dismissal no longer work for the Plaintiff and that the affiant does not know where they are. The affidavit does not outline any attempts to locate the managers nor does it suggest that any other documents or evidence have been lost as a result of the delay in seeking the amendment. In her affidavit, Ms. Pineau, stated that she conducted an internet search and was able to find one of the managers and provided the home address and telephone number of the other (at paras. 13 & 14). This affidavit evidence undermines the Plaintiff's assertion that it will suffer actual prejudice if the amendment is allowed.

[47] Furthermore, the Plaintiff relies on Paul Oliver's inadmissible opinion evidence that the Plaintiff would suffer prejudice as part of their reasons that "amply demonstrate" prejudice (at para. 61). Respectfully, a bald assertion of prejudice falls far short of the Plaintiff's burden to establish prejudice.

Conclusion

[48] It is important to note that this is an amendment to the pleadings not an ultimate determination of the issues. To bar the Defendant from raising a defence may cause *her* serious prejudice. The Defendant has raised a justiciable issue that could provide a defence to the action against her. If this court were to dismiss the motion for amendments and not allow the Defendant to plead wrongful dismissal it would deprive her of a possible defence. The Settlement Agreement proports to resolve all "disputes and claims" arising out of the Defendant's termination (at para. 10). It does not extinguish any defences to a claim not disposed of in the Agreement such as the allegation that she was a fiduciary. To include such a provision in a settlement agreement would be absurd, and to similarly bar a proposed defence would be absurd as well.

[49] The Plaintiff has not satisfied me that the Defendant is seeking these amendments in bad faith, nor has it shown that it will suffer serious prejudice that cannot be compensated by costs if the amendments were granted.

[50] I order that the proposed amendments to the Statement of Defence be allowed.

Costs

[51] I award the Plaintiff costs on this motion for the reasons set out in their brief. The Defendant has occasioned the need for this motion and should bear the burden of the costs associated with it.

[52] I also note that the parties should be able to agree on how to apportion further costs that may arise from the wrongful dismissal amendment such as the cost of tracking down and discovering the managers listed in Paul Oliver's affidavit. The parties have been able agree on the additional discovery costs on the estoppel issue and should be able to come to a similar agreement in relation to this issue.

[53] The parties shall have thirty (30) calendar days from the date of release of this decision to agree on the quantum of costs for this motion. If they cannot agree, I will accept their further written submissions and I will decide the appropriate amount to award.

McDougall, J.