

# Court of King's Bench of Alberta

**Citation: Bailey v Northern Alberta Institute of Technology, 2024 ABKB 563**

**Date:** 20240925  
**Docket:** 1903 09899  
**Registry:** Edmonton

Between:

**Jeffrey Bailey**

Plaintiff/Applicant

- and -

**Northern Alberta Institute of Technology**

Defendant/Respondent

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**Reasons for Decision  
of the  
Honourable Justice Douglas R. Mah**

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## **A. Background**

[1] The Plaintiff, Jeffrey Bailey, applies for a streamlined trial Order under Rule 8.25 in this wrongful dismissal action against his former employer, Northern Alberta Institute of Technology (NAIT). In seeking a one-day streamlined trial, he argues:

- All evidence can be adduced by way of affidavit and supplemented, if necessary, by limited in-person testimony.
- Only a nominal assessment of credibility is required.

- The entirety of the trial relates to a single incident of supposed employee theft and the only factual issue is whether Mr. Bailey’s intent at the time was dishonest or innocent.
- Overall, a streamlined trial is a more proportionate, expeditious and efficient means to achieve a just result in this case.

[2] The Defendant NAIT resists the streamlined trial Order on this basis:

- The factual issues to be determined are not as simple as Mr. Bailey makes out.
- NAIT will need to call 5 or 6 witnesses in order to advance its defence of just cause.
- But for some minor production issues to be resolved, the matter is now ready for trial.
- There is no economy to be gained in a streamlined trial.

### **B. The Two-Part Test: Necessity and Proportionality**

[3] A two-part test governs the exercise of judicial discretion in granting or denying a streamlined trial:

- First, a streamlined trial is necessary for the purpose of the action to be fairly and justly resolved; and
- Second, the streamlined trial must be proportionate to the importance and complexity of the issues, the amounts involved and the resources that can reasonably be allocated to resolving the dispute,

See: Rule 8.25(1); *Arsenault v Big Rock Brewery*, 2024 ABKB 387 at para 16; *Hou v Canadian North Inc*, 2024 ABKB 549 at paras 11-17.

[4] The party that applies for a streamlined trial bears the onus of establishing, on a balance of probabilities, that the streamlined trial is both necessary and proportionate.

[5] Mr. Bailey’s counsel cited *Benke v Loblaw Companies Limited*, 2022 ABQB 461 (at paras 11-20) for the proposition that not every case where credibility is disputed requires a full trial, which case in turn cites Court of Appeal authority supporting the use of summary processes to determine disputed questions of fact that depend on credibility assessments: *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49 at para 212; *Rudichuk v Genesis Land Development Corp*, 2020 ABCA 42 at para 34; and *JN v Kozens*, 2004 ABCA 394 at para 40.

[6] Current Rule 8.25(3) itself provides that the presence of credibility issues, and that some oral evidence and some cross-examination might be required are not bars to a streamlined trial. Further, the Notice to the Profession and Public (NPP) #2023-02, which announced the arrival of the streamlined trial process in Alberta, gives “wrongful dismissal actions” as one example of matters that will often be suitable for a streamlined trial.

[7] Those submissions by Mr. Bailey’s counsel are all correct, but not determinative. The actual criteria of “necessity” for the purpose of the action and “proportionality” must be

established to the required standard. It is not inevitable that wrongful dismissal actions are dealt with by of streamlined trial.

[8] Armstrong J at para 22 of *Arsenault* listed in non-exhaustive fashion some of the characteristics of necessity:

...

1. Where the streamlined trial will create a more efficient process by eliminating unnecessary steps and reducing overall delay in the resolution of the dispute.
2. Where the streamlined trial will result in a more cost-effective process for the parties.
3. Where the streamlined trial will enhance the administration of justice by making more efficient use of court resources and provide litigants with a more accessible and timely dispute resolution process.
4. Where the streamlined trial will result in a more sharply focused process and the elimination of complexities in the form of interim applications that do not bear on the ultimate resolution of the real issues in dispute.
5. Where it would be unjust to require the parties to proceed to a full trial, considering the value and complexity of the dispute.
6. Where the streamlined trial process will simplify the proceeding to make it easier for the parties to assess the strengths and weaknesses of their positions and thereby potentially reach a resolution without the need for a trial.

[9] In *Hou*, Renke J added this gloss at paras 21 & 22:

[21] The necessity standard requires the moving party to show more than that it would be possible for a streamlined trial to achieve a fair and just result or that a streamlined trial would have the potential to achieve the fair and just result. It is true, as NPP#2023-02 states, that streamlined trial “is used when an Action *can* be fairly and justly resolved” by that process (emphasis added), in the sense that if an action could not be fairly and justly resolved by that process the streamlined trial application could not succeed. But the application should not succeed if the moving party shows only that a streamlined trial is *one way* of achieving a fair and just result. The term “necessity” imports exclusivity, the identification of the single means of achieving the fair and just result.

[22] Necessity, I observe, could be established by showing that an action can be fairly and justly resolved by streamlined trial but *not* by the ordinary trial process. Exclusivity can be established by eliminating alternatives.

[10] On the topic of proportionality, *Arsenault* at para 39 applies some of the relevant criteria related to summary trials, stating:

At this stage of the analysis, some of the jurisprudence relating to summary trials can be instructive. When considering whether a streamlined trial is a proportionate process, many of the factors that were considered in relation to the suitability of a summary trial are applicable. These factors include the amount involved, the complexity of the matter, the urgency, any prejudice likely to arise

by reason of delay, the cost of a trial, the course of the proceedings, the need to cross examine witnesses in court, the necessity of questioning for discovery and whether resolution of the matter will depend on findings of credibility: *Manson Insulation Products Ltd. v Crossroads C&I Distributors*, 2013 ABQB 702 at para 23; *Duff v Oshust*, 2005 ABQB 117 at para. 24.

[11] While it might be said that the twin elements of necessity and proportionality in Rule 8.25(1) overlap, as Renke J points out in *Hou* at para 16:

... the proportionality test focuses attention on the scope and complexity of procedure set against the issues and economics of an action and the resources needed to resolve an action, on the identification of the right tool for the particular judicial task.

### C. Affidavits Expressly Not Required for Streamlined Trial Application

[12] As Renke J said in *Hou* at para 19, necessity is established on the “limited and predicative” materials listed in Rule 8.27(1), which does not mention the use of affidavits to support a streamlined trial application. NPP #2023-02, which provides guidance to both bar and judiciary about how to interpret and apply the streamlined trial rules, states:

The Rules do not require that litigants file Affidavits about why the matter is suitable for a Streamlined Trial. That is a matter for argument, based on the Court Record and the submissions of the parties.

[13] See also, in this regard, Armstrong J’s comments at para 14 of *Arsenault*.

[14] For this application, Mr. Bailey filed an extensive affidavit (contained in a 3-inch binder) setting out his side of the merits of the claim and attaching what he believes is the entire trial record needed to dispose of the action. The Affidavit was intended to show how narrow and discrete the factual issue is and how the matter is therefore suitable for a streamlined trial.

[15] There are two problems with Mr. Bailey’s affidavit:

- First, NPP #2023-02, which interprets the streamlined trial Rules, says I do not need to look at affidavits and should base my decision only on pleadings and submissions; and
- Second, the affidavit in any event presents only the picture from Mr. Bailey’s perspective.

[16] I am not concerned with the merits at this point, only the process. But I do need to examine the factual allegations of the claim and the defence as found in the pleadings as part of my determination.

[17] I note here that Mr. Bailey abandoned his claim for aggravated damages prior to the hearing before me.

### D. Questions in Dispute in this Litigation

[18] Mr. Bailey says in his statement of claim that he was at the time an almost 20-year employee and department head at NAIT. He says that one day in 2018 he took home some office chairs from NAIT that he believed were being thrown out and tried to sell them on the internet.

He fully admits to these actions but says he was acting under the belief that the chairs were destined for disposal. Following investigation, he was terminated with cause.

[19] His counsel submits that the only issue for decision in a trial is Mr. Bailey's state of mind at the time of the taking of the chairs.

[20] NAIT says it is more complicated than that. The statement of defence states that:

- Mr. Bailey was in a senior leadership position and therefore in a position of trust.
- Mr. Bailey was both contractually bound and privy to NAIT's policies and procedures, including those related to management of capital assets including furniture.
- He was aware he needed but did not seek permission to remove NAIT property.
- He committed theft for personal gain reasons.
- He showed no remorse for his actions but rather tried to justify them.
- He was untruthful and misleading during the investigation, leading to further erosion of trust.

[21] NAIT says that it was the aggregate of all of these factors that led to the decision to terminate Mr. Bailey's employment for cause. In short, it is not just a question of intent, but also cover-up, minimization and misrepresentation, all of which (says NAIT) conveys a taint of breach of trust.

[22] During argument NAIT's counsel listed the 5-6 persons on NAIT's side that would have to file affidavits in order to get NAIT's version of the events into evidence for a streamlined trial. These include the persons who engaged in or were present at the conversation with Mr. Bailey at the loading dock, NAIT's HR representative who met with Mr. Bailey to discuss the incident and possibly the other NAIT staffer present at the meeting, the third-party investigator, and someone from management to speak to the protocols and the nature of Mr. Bailey's position. Of course, Mr. Bailey would be entitled to question every one of them on their affidavits and may even be behooved to do so due to the pressing credibility issues.

[23] While the presence of just cause or not is the overall looming issue, the pleadings and counsel submissions raise these questions for trial:

- Was there dishonest conduct consisting of the theft of chairs?
- What exactly was said during the conversation at the loading dock? Did Mr. Bailey deceive or attempt to deceive the movers?
- Was there a deliberate breach of NAIT's policies and procedures?
- Did Mr. Bailey attempt to cover-up or downplay his actions? Did he engage in deception or misrepresentation in doing so?
- Is there an element of breach of trust involved?
- Was there a proper investigation?
- Was the decision-making process sound?

- If without cause dismissal is established, what are Mr. Bailey’s damages and did he discharge his duty to mitigate?

[24] All of the foregoing issues can only be decided after assessing the credibility of several witnesses. While a streamlined trial should not be considered a disproportionate process solely because credibility issues exist, here the credibility of the plaintiff and almost all of the defendant’s 5-6 witnesses is put in issue by the nature of the questions that must be decided at the trial.

### **E. Ruling**

[25] I understand Mr. Bailey’s desire to achieve litigation economy. I appreciate (from reading the statement of claim) what Mr. Bailey’s personal circumstances are said to be and I understand the inherent power imbalance that exists when a lone individual seeks to challenge the decision of a large institutional entity. But NAIT is entitled to put forward its defence in this litigation as much as Mr. Bailey is entitled to advance his claim.

[26] In this case, NAIT’s counsel says that, but for some minor production matters that can be easily put to rest, counsel are ready to certify this matter for (full) trial. Against that, if a streamlined trial were ordered, NAIT’s side would have to prepare 5-6 affidavits, followed by questioning and possibly compliance with undertakings. There is not much if any litigation economy to be gained here and even the chance that ordering a streamlined trial will have the opposite effect, of prolonging the process rather than streamlining it.

[27] Further, as it is, there is a 3-inch thick documentary record.

[28] Ordering this matter to a streamlined trial would achieve few, if any, of the objectives listed in para 22 of *Arsenault* and would not meet the “exclusivity” test articulated in para 22 of *Hou*. While the amount at stake suggests that a streamlined trial is a proportionate process, scope and complexity of the case, economics and resource allocation do not.

[29] By this, I am led to conclude that the number of trial questions and the evidential burden required to address those questions mean that a streamlined trial in this case is neither necessary nor proportionate.

[30] I dismiss Mr. Bailey’s application for a streamlined trial.

### **F. Costs**

[31] If counsel wish to address costs of this application, they may do so within 30 days of the date of this decision by way of written submissions in letter form, not to exceed 2 single-spaced pages, excluding exhibits and authorities, and attaching a draft Bill of Costs.

[32] Further, if counsel wish direction from me with regard to a procedural Order to assist in getting this matter to trial efficiently and expeditiously, I will oblige. I appreciate that the original incident occurred over 6 years ago and there must be some finality, and soon, for the sake of both sides.

Heard on the 13<sup>th</sup> day of September, 2024.

**Dated** at the City of Edmonton, Alberta this 25<sup>th</sup> day of September, 2024.

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**Douglas R. Mah**  
**J.C.K.B.A.**

**Appearances:**

Illya Shcherba, Taylor Janis LLP  
for the Applicant/Plaintiff - Jeffery Bailey

Gabriel Joshee-Arnal, Neuman Thompson  
for the Respondent/Defendant  
Northern Alberta Institute of Technology