CITATION NO.: Kolacz v. Labourers International Union of North America Local 837, 2024 ONSC 6391
COURT FILE NO.: CV-23-14635
DATE: 2024-11-18

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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Patrick Kolacz, Plaintiff

-and-

Labourers International Union of North America Local 837, Defendant

BEFORE: MacNeil J.

COUNSEL: Patrick Kolacz – Self-represented for the Plaintiff/Responding Party

David Rosenfeld – Lawyer for the Defendant/Moving Party

HEARD: August 8, 2024

REASONS FOR DECISION

INTRODUCTION

[1] The moving party, the defendant, Labourers' International Union of North America, Local 837 ("the Defendant"), makes this motion seeking to dismiss the within action on the basis that the court has no jurisdiction to determine the issues raised by the plaintiff, Patrick Kolacz ("the Plaintiff"). The Defendant contends that, pursuant to the applicable collective agreement, it is the Ontario Labour Relations Board ("the OLRB" or "the Board") and a labour arbitrator that have the exclusive jurisdiction to determine the issues raised in the statement of claim.

[2] The responding party, the Plaintiff, alleges that ECMI LP/ECMI GP Inc. ("Empire Homes" or the "Employer") improperly terminated his employment and that the Defendant failed in its duty to represent him with respect to that layoff/termination. His position is that the action should not be dismissed because, in his statement of claim, he pleads causes of action like coercion, defamation and breach of his human rights and the OLRB has no jurisdiction over such issues.

BACKGROUND

[3] The Defendant is a construction trade union within the meaning of sections 1 and 126 of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A ("the Act").

[4] At the material time, the Defendant was the certified bargaining agent for construction labourers engaged in home building for Empire Homes in and around the City of Hamilton and the Niagara Region. The Defendant was party to a collective agreement with Empire Homes for those employees.

[5] The Plaintiff was a member of the Defendant working for Empire Homes pursuant to the collective agreement. The Plaintiff was not employed by the Defendant.

[6] Until his layoff/termination, the Plaintiff worked for the Employer at the Calderwood jobsite in Thorold.

[7] In early January 2022, the Employer advised the parties that there was no further work on the Calderwood jobsite that met the Plaintiff's functional abilities based on his medical condition and that it would be transferring the Plaintiff to a different work location, being the Avalon jobsite, where there was indoor work; otherwise, it would have to lay off the Plaintiff due to a lack of work.

[8] The Defendant's evidence is that it understood that the Plaintiff had a medical condition that prevented him from working outdoors during the winter months. The Employer knew of this condition. Accordingly, the Plaintiff was provided with indoor work by the Employer at the Calderwood jobsite during the winter months.

[9] The Plaintiff's evidence is that he had been working for years without accommodation, both inside and, at times, outside during winter months. It was only upon hearing of the Employer's intention to transfer him to Avalon that the Plaintiff requested accommodation due to his disabilities/medical conditions.

[10] In discussing the feasibility of the proposed transfer, the Plaintiff advised the Defendant and the Employer that he had a second medical condition that precluded him from driving, so he would not be able to drive himself to the Avalon jobsite. This condition had not been previously disclosed by the Plaintiff. It was suggested to the Plaintiff by the Defendant that he could obtain a ride with his brother, who was a foreman at the Avalon jobsite. The evidence of the Defendant is that the Plaintiff advised that he did not want to do so, for personal reasons. The Plaintiff's evidence is that, when he asked his "brother" (who is not a biological relative) for a ride, the response he received was, "don't take this wrong but I don't want to get involved," and this is the person the Defendant wanted him to get a daily ride from.

[11] The Plaintiff did not attend the Avalon jobsite for work. The Employer laid off the Plaintiff on January 10, 2022.

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[12] On February 9, 2022, the Plaintiff applied to the OLRB, pursuant to s. 96 of the *Labour Relations Act*, alleging that the Defendant had breached its duty of fair representation under s. 74 of the Act by failing to initiate a grievance on his behalf with respect to his layoff/termination of employment by Empire Homes ("the Duty of Fair Representation Application").

[13] In response, the Defendant submitted that the Applicant had not pleaded a *prima facie* case for a s. 74 violation. It requested that the OLRB summarily dismiss the application pursuant to s. 96 of the *Labour Relations Act* and Rule 39.1 of the OLRB's Rules of Procedure. Before the OLRB, the Defendant submitted that it had considered the basis for and merits of a grievance relating to the layoff on behalf of the Plaintiff, pursuant to the collective agreement. It determined not to pursue a grievance as: (i) there was no work on the Calderwood jobsite that fell within the Plaintiff's functional abilities; (ii) the only work available that would meet his functional abilities was at the Avalon jobsite, which the Applicant either refused to do and/or was unable to do because of his medical driving restriction; and (iii) the collective agreement permitted the Employer to transfer employees to various jobsites within the geographical jurisdiction of the collective agreement.

[14] On May 6, 2022, the Board directed the Plaintiff to serve and file his response to the summary dismissal request by May 20, 2022. He did so. Both the Plaintiff's application and his written submissions in response to the request to dismiss were considered by the OLRB.

[15] On September 21, 2022, the OLRB exercised its discretion and dismissed the Plaintiff's application for failing to raise a *prima facie* case. At paragraph 7 of its decision, the OLRB referenced its decision in *Kenneth Edward Homer*, [1993] OLRB Rep. May 433, citing paragraphs 5 through 8, which outline the principles relevant to a s. 74 determination as follows:

> 5. In *Canadian Merchant Service Guild v. G. Gagnon*, 1984 CanLII 18 (SCC), [1984] 1 SCR 509 at page 527, the Supreme Court of Canada reviewed the principles applicable to a trade union's duty of fair representation as follows:
>
> 1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.
>
> 2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.

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3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of the consequences for the employee on the one hand and the legitimate interest of the union on the other.

4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.

5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.

This is both a useful general guideline for assessing a trade union's representation and is consistent with the Board's approach to fair representation complaints.

6. Honest mistakes, innocent misunderstandings, simple negligence, or errors in judgement will not, of themselves, constitute "arbitrary" conduct within the meaning of section 69 [now 74]. In other words, a trade union has a kind of "right to be wrong". Terms like "implausible", "so reckless as to be unworthy of protection", "unreasonable", "capricious", "negligent", and "demonstrative of a non-caring attitude" have been used to describe conduct found to be arbitrary within the meaning of section 69 [now 74] … Such strong words are applicable to the more obvious cases but may not accurately describe the entire spectrum of conduct which could be considered to be arbitrary. As the jurisprudence demonstrates, whether particular conduct will be considered to be arbitrary will depend on the circumstances.

7. The term "discriminatory" in section 69 [now 74] has been interpreted broadly to include all cases in which a trade union distinguishes between or treats members differently without a cogent reason for doing so (see, for example, *The Municipality of Metropolitan Toronto*, [1978] OLRB Rep. Feb. 143, *Douglas Aircraft Co. of Canada Ltd.*, [1976] OLRB Rep. Dec. 779).

8. Actions or decisions motivated by hostility, ill-will or other improper considerations constitute "bad faith" within the meaning of section 69 [now 74] (see, for example, *Chrysler Canada Ltd.*, [1979] OLRB Rep. July 618, *John Farrugia*, [1978] OLRB Rep. Feb. 152, *Leonard Murphy*, [1977] OLRB Rep. March 146, *Canadian Union of Public Employees Local 1000 - Ontario Hydro Employees Union* (sometimes cited as *Walter Princessdomu*), [1975] OLRB Rep. May 444).

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[16] In dismissing the Duty of Fair Representation Application, the OLRB wrote (at para. 13 of its decision):

> The Board's case law is clear that the right to pursue a grievance is reserved for to [*sic*] the relevant union. As long as its decision-making is not arbitrary, discriminatory or in bad faith, it is entitled to determine which grievances it ought to pursue. In the instant case, the Union's uncontradicted material facts establish that it participated in the relevant meeting with Mr. Kolacz and the Employer, gathered the relevant information from Mr. Kolacz and from the Employer, conducted "a thorough study" of Mr. Kolacz's situation, and concluded that it would not pursue a grievance on his behalf. While Mr. Kolacz clearly does not agree with the Union's ultimate conclusion, it arrived at this conclusion in a manner that fulfilled its obligations under section 74 of the Act. Therefore, when considering the material facts that Mr. Kolacz has pleaded, along with the uncontradicted facts of this case, Mr. Kolacz has not established that the Union's representation of him was arbitrary, discriminatory or in bad faith.

[17] The Plaintiff did not seek to judicially review the decision of the OLRB.

[18] The Plaintiff commenced the within action on November 22, 2023.

[19] By its Notice of Motion, dated January 24, 2024, the Defendant seeks a dismissal of the action.

POSITION OF THE DEFENDANT

[20] It is the position of the Defendant that the essential character of the Plaintiff's claims, made in the statement of claim, are the same allegations of unfair representation as he made in the Duty of Fair Representation Application that was dismissed by the OLRB, that is, that he was unlawfully laid off from his job and that the Defendant failed to properly represent him. Claims about the Plaintiff's workplace are within the exclusive jurisdiction of the labour arbitrator appointed pursuant to the collective agreement. Claims about the fairness of the Defendant's representation are within the exclusive jurisdiction of the OLRB. Accordingly, this proceeding should be dismissed pursuant to Rule 21.01(3)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, on the basis that the court has no jurisdiction over the subject matter of the proceeding.

[21] The Defendant alternatively submits that the action should be dismissed pursuant to Rule 21.01(3)(d) as being an abuse of the process of the court since the issues raised by the Plaintiff were determined by the OLRB more than a year ago. In the further alternative, the Defendant

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argues that the statement of claim should be struck under Rule 21.01(1)(b) as it discloses no reasonable cause of action.

POSITION OF THE PLAINTIFF

[22] It is the Plaintiff's position that this is not an employment issue case but, rather, is a case about "a breach of human rights resulting in discrimination" against him. He has disabilities and, when he tried to follow the grievance/arbitration steps to have those disabilities accommodated, the Defendant unfairly and unlawfully refused to properly discuss things with him in order to find out what his actual dispute and concerns were about.

[23] The Plaintiff argues that the only issue before the OLRB was the duty of fair representation and that nothing else was determined by the Board. No discrimination or disability or human rights claims were made in that proceeding. The Plaintiff argues that he has five companion claims to which his human rights claim can attach in this civil action. The Plaintiff stresses that his complaints as set out in the statement of claim do not relate to the grievance but to his breach of contract, coercion, wrongful dismissal and defamation claims against the Defendant.

[24] The Plaintiff submits that he has two disabilities, and his employment was terminated because he had to turn down a transfer to a different jobsite due to his medical restrictions. Both the Defendant and the Employer knew of his disabilities and accompanying medical restrictions preventing his transfer, yet they chose to ignore them by giving him the options they did. Since the Defendant breached the Ontario *Human Rights Code*, the matter is a human rights case and is out of the hands of the OLRB; it is properly before the court.

[25] The Plaintiff submits that the OLRB's handling of the Duty of Fair Representation Application was done in a "discriminatory, arbitrary and … bad faith way" since it "ignor[ed] all medical evidence proving the Plaintiff has not one but two" disabilities. Therefore, he was left with no choice but to turn to the court. The Plaintiff further submits that, in any event, the OLRB does not have the jurisdiction to rule on discrimination and human rights claims. The collective agreement cannot override human rights and the obligations to accommodate employees with disabilities.

[26] The Plaintiff submits that this court must decide if a unionized, disabled worker "in Ontario can be legally terminated for their [disabilities] without human rights and disability rights or the accommodation process being considered or followed if the representing union decides so."

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[27] While the OLRB's decision was released in late September 2022, the Plaintiff did not see it until 2023 because he did not have an internet connection or a residence. By the time he became aware of the decision, he could not have filed a case with the Ontario Human Rights Tribunal because the one-year limitation period had expired.

[28] The Plaintiff submits that he tried to keep his statement of claim pleadings simple and that he expects detailed evidence will come out at the examination for discovery, which evidence will then be used at trial. If the statement of claim pleadings are inadequate, he requested an extension to file an amended statement of claim.

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ISSUES

[29] The issues to be determined on the motion are:

(a) Does the substance of this action fall within the exclusive jurisdiction of the OLRB?
(b) Should this proceeding be dismissed as being an abuse of process?
(c) Should this proceeding be otherwise dismissed for failing to disclose a cause of action properly before this Court?
(d) Should the Plaintiff be granted leave to amend his statement of claim?

ANALYSIS

(a) Does the substance of this action fall within the exclusive jurisdiction of the OLRB?

[30] Section 48(1) of the *Labour Relations Act* provides:

> 48 (1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

[31] In *Weber v. Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 S.C.R. 929, the Supreme Court of Canada considered what is now s. 48(1) of the *Labour Relations Act.* At para. 45 of the decision, McLachlin J. held that the reference to "all differences between the parties" applies to all disputes between the parties, and "makes arbitration the only remedy for such differences." She further stated: "The object of the provision -- and what is thus excluded from the courts -- is all proceedings arising from the difference between the parties, however those proceedings may be framed. Where the dispute falls within the terms of the Act, there is no room for concurrent proceedings." McLachlin J. cautioned, at para. 49, that permitting "innovative pleaders to evade the legislative prohibition on parallel court actions" could undermine the purpose of the legislation and the intention of the parties to the collective agreement.

[32] This means that, where the essence of a claim arises from an employment dispute that is subject to a collective agreement, a party cannot escape the arbitration regime by describing his or her claim as a tort or a contract breach: *Sloan v. York Region District School Board*, 2000 CanLII 15416 (ON CA), 98 A.C.W.S. (3d) 825, at para. 3, leave to appeal to the S.C.C. denied [2000] S.C.C.A. No. 472; and *Bhaduria v. Toronto Board of Education*, 1999 CanLII 4745 (ON CA), 117 O.A.C. 356 (Ont. C.A.), at para. 4, leave to appeal to the S.C.C. denied [1999] S.C.C.A. No. 212.

[33] It must be determined whether the principle in *Weber* applies to the dispute between the parties in the within proceeding. This requires the court to define the essential character of the dispute and identify if it arises from the interpretation, application, administration or violation of the collective agreement, in which case the court is precluded from taking jurisdiction.

[34] In *Ortiz v. Patrk* (1998), 26 C.P.C. (4th) 56 (Ont. Gen. Div.), the plaintiff was a member of a union. It was alleged that, following a "long history of friction" between the plaintiff and his supervisor, Patrk, there was a culminating incident of the plaintiff using abusive language and threatening remarks to Patrk. Those threatening remarks were reported to the police and the plaintiff was arrested and charged, although the Crown ultimately withdrew the charges. The plaintiff was terminated for cause. That termination was grieved and referred to arbitration. The plaintiff commenced an action against his supervisor, plant manager and employer claiming, among other things, damages for malicious prosecution, abuse of process, libel and slander, negligence, injurious falsehood, special damages for loss of income, loss of pension, loss of health plan and other employment benefits, and punitive and aggravated damages. The employer made a motion seeking the dismissal of the action on the grounds that the court had no jurisdiction over the action's subject matter and that grievance proceedings were pending. The court noted that the plaintiff had "grown disenchanted with the arbitration regime" and felt that the union was not "assiduously" pursuing his grievance. The court reviewed the statutory and collective bargaining regime and the applicable law, including *Weber*. The court ultimately held that the essential character of the dispute fell within the jurisdiction of an arbitrator under a collective agreement and dismissed the action as against all of the defendants due to the absence of jurisdiction of the court over the subject matters raised in the claim. The court also held that the dispute arising from the complaint made to the police about the workplace incident "stands on the same footing as the dispute arising from the incident itself". As a result, the collective agreement and the *Labour Relations Act* required that all disputes arising out of it be referred to binding arbitration.

[35] In *Bhaduria v. Toronto Board of Education* (1999), 117 O.A.C. 356 (Ont. C.A.), leave to appeal to the S.C.C. denied [1999] S.C.C.A. No. 212, the plaintiff had been terminated from his teaching position with the school board. He commenced a civil action alleging violations of his

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constitutional rights and defamation by various of the school board trustees. The court at first instance struck out the claims for relief made in the statement of claim on the basis that the dispute stemmed from the disciplinary process and therefore the proper forum for adjudication of the complaints was arbitration, but permitted the defamation claim against the school board to continue. On appeal, however, the Ontario Court of Appeal held that all of Mr. Bhaduria's claims, including the defamation claim, were covered under the principle in *Weber* since the essential character of the claims pertained to his termination from his teaching position and arose under the collective agreement. Mr. Bhaduria was therefore precluded from proceeding with a civil action by *Weber* as the allegations fell within the exclusive jurisdiction of the grievance and arbitration process.

[36] In the present case, a review of the Plaintiff's complaint to the OLRB makes it clear that he raised that, among other things, he believed the Defendant improperly denied his grievance for wrongful dismissal/layoff and he alleged discrimination against disabled members on the part of the Defendant because it agreed with the Employer that there was "no adequate work" and that the Defendant tried to force him to move "to another site against restrictions saying that [the Employer] can do it according to contract". The Plaintiff also raised before the OLRB his argument that no contract can go against medical restrictions, and the fact that he believed there was available work for him to perform at the Calderwood jobsite. Ultimately, the OLRB dismissed the Plaintiff's application without a hearing for failing to raise a *prima facie* case. It held that the Defendant fulfilled its s. 74 obligations in arriving at its conclusion not to pursue a grievance on the Plaintiff's behalf against the Employer; and that the Plaintiff had not established that the Defendant's representation of him was arbitrary, discriminatory or in bad faith.

[37] Section 74 of the *Labour Relations Act* codifies a union's duty of fair representation. It reads:

> A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

[38] The duty of fair representation regulates a wide range of union activity, including where unions refuse to pursue grievances or settle grievances against the wishes of grievors. Where such decisions are impacted by (i) arbitrariness, (ii) discrimination, or (iii) bad faith, a union violates s. 74 of the *Labour Relations Act* and its decisions can be set aside by the OLRB: *Themelis v. Toronto*, 2021 ONSC 250 (Div. Ct.), at para. 9.

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[39] Sections 96(4) and 114 of the *Labour Relations Act* provide exclusive jurisdiction to the OLRB to determine complaints about allegations of violations of the duty of fair representation. The Supreme Court of Canada has confirmed that duty of fair representation claims should proceed before a labour board where the legislative scheme provides the procedure for adjudicating an alleged breach of that duty: see *Gendron v. Supply & Services Union of the P.S.A.C., Local 50057*, 1990 CanLII 110 (SCC), [1990] 1 S.C.R. 1298, at paras. 49, and 59-60.

[40] Where it is found that, in substance, a party's pleading can only be characterized as a complaint against the union for breach of the duty of fair representation, it necessarily follows that the claim falls within the exclusive jurisdiction of the OLRB: *Gendron*, at paras. 59-60; *Vernon v. General Motors of Canada Ltd.* (2005), 250 D.L.R. (4th) 259 (Ont. C.A.), at para. 30; and *Themelis*, at para. 15.

[41] In the within statement of claim, the Plaintiff pleads the following causes of action:

(i) discrimination on the basis of disability;
(ii) wrongful dismissal;
(iii) defamation of character/slander;
(iv) unfair representation;
(v) coercion;
(vi) breach of contract;
(vii) conspiracy to commit a crime against a union member;
(viii) compensatory damages; and
(ix) punitive damages.

[42] Fairly, the Plaintiff admits that his claims of discrimination on the basis of disability, wrongful dismissal, unfair representation, conspiracy to commit a crime against a union member, compensatory damages, and punitive damages are all directly related to his employment relationship with the Employer. However, he contends that the remaining causes of action: defamation of character/slander, coercion, and breach of contract are not, and present as stand-alone allegations against the Defendant before the court.

[43] The facts pleaded in support of the Plaintiff's claim for defamation of character/slander are centred on the Defendant purportedly alleging that the Plaintiff's medical note was "forged", and read as follows:

> LIUNA denied that the Plaintiff had or hid the facts that the Plaintiff had medical restrictions which prevented the Plaintiff from taking the transfer. The Defendant also called the Medical Letter presented on January 7, 2022 in which the medical restrictions that prevented the transfer were stated as "Forged" and agreed to by

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> ECMI LP Head of Health and Safety Representative. To this point both the company and this Defendant demanded I get a second doctor's letter and FAF by January 11, 2022 which was complied too [*sic*]. But upon receiving the second doctor's letter and FAF as demanded still chose to ignore the restrictions and stated as such in a legal letter two months later.

[44] The facts pleaded by the Plaintiff in support of his claim for coercion are as follows:

> I was given the choice by the Defendant to either take the transfer ordered by ECMI LP or be terminated knowing there were no other jobs in LIUNA that would be available to the Plaintiff, [r]esulting in the forcefull [*sic*] retirement of the Plaintiff. This left the Plaintiff of [*sic*] a choice of breaking the law or be terminated and Retired.

[45] The facts pleaded by the Plaintiff in support of his claim for breach of contract are as follows:

> No contract under the ESA and OHRC laws can Discriminate Against a [disabled] worker unless Undue Hardship criteria are met. It is understood that in [*sic*] every contract, whether written or not, contains and is bound by Human Rights laws.

[46] In my view, each of these causes of action as pleaded are based on the Defendant's conduct in its representation of the Plaintiff regarding his workplace issues with the Employer. The facts of the dispute between the parties all pertain to the adequacy of the Defendant's representation of the Plaintiff and its response to the Employer's decision to transfer/terminate the Plaintiff. As the Plaintiff's representative vis-à-vis the Employer, the Defendant discussed the situation with the Employer and then decided that it would not proceed with a grievance. The Defendant is entitled to make that decision. If a member does not agree with the union, s/he can file a complaint alleging a breach of the duty of fair representation. The Plaintiff did that. The OLRB received and considered the submissions from both parties and then determined that the Plaintiff had not made a *prima facie* case that the Defendant's representation of him was arbitrary, discriminatory or in bad faith. Such a decision was within the jurisdiction of the OLRB to make. If the Plaintiff was not in agreement with the OLRB's decision, his remedy was to apply for a judicial review of the decision.

[47] It is clear that the Plaintiff is dissatisfied with the OLRB's decision to dismiss his application. There is not a full record of evidence given the stage of this proceeding, so there may be other relevant information existing. However, based on what is before me, it is perhaps not unreasonable why the Plaintiff would question whether his driving restriction was adequately considered by both the Employer and the Defendant, especially in light of the Defendant's

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purported resolution that the Plaintiff get a ride from his brother to the Avalon jobsite. However, it is not open to the Plaintiff to seek to displace or disturb the OLRB's ruling by prosecuting the within action. The Plaintiff's complaints have been processed in the manner contemplated by the collective agreement and the *Labour Relations Act.* It is not appropriate for the court to intervene in that process.

[48] The Plaintiff's complaints focus on his allegation that he has been discriminated against in the workplace based on disability and that his reputation and position within the Defendant and the Employer have been affected. Complaints of discrimination come within the scope of the collective agreement as do complaints relating to the unlawful dismissal of employees. On the basis of *Ortiz* and *Bhaduria*, the Plaintiff's complaints about defamation, coercion and breach of contract by the Defendant also come within the scope of the labour relations relationship since the facts supporting those allegations all centre around the Defendant's response to and handling of the Plaintiff's medical restrictions and the Employer's transfer decision.

[49] This dispute is well within the usual scope of employer-employee relations. The Plaintiff was an employee at the material time. The dispute arose directly from that relationship and the rights and obligations set out in the applicable collective agreement. The alleged wrongdoing occurred at the workplace in the course of the Defendant handling of the Plaintiff's complaint against the Employer. The essential character of the dispute between the parties arises out of the interpretation, application, administration or violation of the collective agreement and the fairness of the Defendant's representation of a union member. The *Labour Relations Act* provides for the exclusive jurisdiction of a labour arbitrator to resolve workplace disputes pursuant to a collective agreement and for the OLRB to adjudicate complaints about a union allegedly failing in its duty of fair representation.

[50] I do not accept the Plaintiff's arguments that the OLRB has no jurisdiction to consider claims of discrimination based on disability. By virtue of s. 48(12)(j) of the *Labour Relations Act*, an arbitrator has the express power "to interpret and apply human rights and other employment-related statutes, despite any conflict between those statutes and the terms of the collective agreement". Section 54 of the *Labour Relations Act* provides that a collective agreement cannot discriminate against any person if the discrimination is contrary to the *Human Rights Code* or the *Canadian Charter of Rights and Freedoms*. More significantly to this case, the focus of s. 74 of the Act is whether or not a union has been discriminatory, arbitrary or has acted in bad faith in the representation of one of its members. In considering that issue, the OLRB clearly has the discretion to consider human rights issues.

[51] For the foregoing reasons, I conclude that the court lacks jurisdiction to deal with the claims made by the Plaintiff in this proceeding and so the action must be dismissed.

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(b) Should this proceeding be dismissed as being an abuse of process?

[52] In the circumstances, I do not need to deal with the Defendant's alternative arguments. However, in the event I am wrong on the jurisdiction issue, I will address the issue of whether this proceeding should be dismissed as being an abuse of process.

[53] In the Supreme Court of Canada's decision in *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, at paras. 40-41, LeBel J., for a unanimous court, wrote as follows respecting abuse of process:

> 40 The doctrine of abuse of process is characterized by its flexibility. Unlike the concepts of *res judicata* and issue estoppel, abuse of process is unencumbered by specific requirements. In *Canam Enterprises Inc. v. Coles* (2000), 2000 CanLII 8514 (ON CA), 51 O.R. (3d) 481 (C.A.), Goudge J.A., who was dissenting, but whose reasons this Court subsequently approved (2002 SCC 63, [2002] 3 S.C.R. 307), stated at paras. 55-56 that the doctrine of abuse of process
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>> engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 [(C.A.)], at p. 358 . . . .
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>> One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. See *Solomon v. Smith, supra*. It is on that basis that Nordheimer J. found that this third party claim ought to be terminated as an abuse of process. [Emphasis in original.]
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> 41 As can be seen from the case law, the administration of justice and fairness are at the heart of the doctrine of abuse of process. In *Canam Enterprises* and in *C.U.P.E.*, the doctrine was used to preclude relitigation of an issue in circumstances in which the requirements for issue estoppel were not met. But it is not limited to preventing relitigation. For example, in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, the Court held that an unreasonable delay that causes serious prejudice could amount to an abuse of process (paras. 101-21). The doctrine of abuse of process is flexible, and it exists to ensure that the administration of justice is not brought into disrepute.

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[54] As noted by the Supreme Court of Canada in *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 (CanLII), [2013] 2 S.C.R. 125, at para. 28:

> Relitigation of an issue wastes resources, makes it risky for parties to rely on the results of their prior litigation, unfairly exposes parties to additional costs, raises the spectre of inconsistent adjudicative determinations and, where the initial decision maker is in the administrative law field, may undermine the legislature's intent in setting up the administrative scheme. For these reasons, the law has adopted a number of doctrines to limit relitigation.

[55] The Plaintiff's claim challenges the integrity, consistency and finality of the OLRB's adjudicative process. It is clear that the Plaintiff is seeking to relitigate issues properly raised and determined in the Duty of Fair Representation Application.

[56] The Duty of Fair Representation Application and the OLRB's decision therein involved essentially the same issues raised in the statement of claim, being the adequacy of the Defendant's representation of the Plaintiff. The Plaintiff was the complainant in the Duty of Fair Representation Application and the Defendant was the respondent. The Plaintiff had the opportunity at that time to advance his claims and argue his case. His claims were dismissed by the OLRB. He did not judicially review the Board's decision. To allow the Plaintiff to advance the same claims now in this civil action and require the Defendant to defend itself again from those claims would not promote judicial economy, consistency or finality.

[57] I am satisfied that the statement of claim amounts to an abuse of process as it is clearly an attempt by the plaintiff to re-litigate a decision of the OLRB in another forum. As the Ontario Court of Appeal held in *Total Mechanical Systems Limited v. Sheet Metal Workers' International Association, Local 30*, 2017 ONCA 559, at para. 14, "while not all re-litigation is necessarily abusive, permitting a collateral challenge in a court action on an issue within the exclusive jurisdiction of the OLRB … is damaging to the integrity of the administration of justice." Such a claim is "vexatious and violate[s] the fundamental principles of justice underlying the community's sense of fair play and decency." (See also *Toronto (City) v. C.U.P.E., Local 79*, 2003 CarswellOnt 4328 (S.C.C.), at para. 35.)

[58] Here, the viability of the Plaintiff's complaint of unfair representation by the Defendant has already been adjudicated upon by the OLRB which properly had jurisdiction over this matter pursuant to s. 74 of the Act and because the "essential character" of the claim arises from the collective agreement. The OLRB has exclusive jurisdiction to deal with the issues that form the basis of the Plaintiff's claims in this action, and it has made a determination dismissing the Duty of Fair Representation Application. The doctrine of abuse of process is designed to preclude this

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type of action from proceeding and is, in my view, applicable in this case to grant the relief requested by the Defendant.

[59] Accordingly, I dismiss the within proceeding as being an abuse of the process of the court.

(c) Should this proceeding be otherwise dismissed for failing to disclose a cause of action properly before this Court?

[60] It is not necessary for me to address the issue of whether this proceeding should be dismissed for failing to disclose a cause of action properly before this court, given my earlier rulings found above.

(d) Should the Plaintiff be granted leave to amend his statement of claim?

[61] In my view, it is plain and obvious that the matters alleged against the Defendant by the Plaintiff arise expressly or inferentially out of circumstances captured by the interpretation and administration of the collective agreement which governed his employment, and from the Defendant's duties and obligations, primarily the duty of fair representation, imposed by the operation of the *Labour Relations Act*. I have concluded that the authorities such as *Weber* and *Gendron* apply in the circumstances.

[62] I am not prepared to exercise my jurisdiction to allow the Plaintiff to amend his statement of claim. The entirety of the Plaintiff's allegations and the nature of his claims stem from his employment and the Defendant's representation of him in light of the applicable collective agreement. Given this, there are no amendments which the Plaintiff could plead that would bring the allegations set out in the statement of claim within the jurisdiction of the court: *Dominion Trust Co. v. Kesmark Ltd.*, 1981 CanLII 2912 (ON SC), (1981) 129 D.L.R. (3d) 357, at para. 14.

[63] Accordingly, I decline to grant the Plaintiff's request for leave to amend the statement of claim.

DISPOSITION

[64] For all of these reasons, the Plaintiff's action against the Defendant is dismissed by reason of the absence of jurisdiction of this court over the subject matter in the claim, and by reason of the action constituting an abuse of the process of the court.

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COSTS

[65] I would urge the parties to agree on costs. If they are unable to do so, then costs submissions may be made as follows:

(a) By December 9, 2024, the Defendant shall serve and file its written costs submissions, not to exceed three pages, double-spaced, together with a draft bill of costs and copies of any pertinent offers; and

(b) The Plaintiff shall serve and file his responding costs submissions of no more than three pages, double-spaced, together with a draft bill of costs and copies of any pertinent offers, by December 23, 2024; and

(c) the Defendant's reply submissions, if any, are to be served and filed by December 30, 2024 and are not to exceed two pages.

(d) If no submissions are received by December 30, 2024, the parties will be deemed to have resolved the issue of the costs and costs will not be determined by me.

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MacNeil J.

Released: November 18, 2024

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CITATION: Kolacz v. Labourers International Union of North America Local 837, 2024 ONSC 6391

COURT FILE NO.: CV-23-14635

DATE: 2024-11-18

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Patrick Kolacz

Plaintiff

- and -

Labourers International Union of North America Local 837

Defendant

REASONS FOR DECISION

MacNeil, J.

Released: November 18, 2024