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(Winnipeg Centre)
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Cited as: 2024 MBKB 177

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

JOHN BARON,	)	DANIEL W. CHORNOPYSKI
	)	for the plaintiff
plaintiff,	)	
	)	
- and -	)	
	)	
CANADIAN NATIONAL RAILWAY COMPANY, and UNIFOR LOCAL 100,	)	CURRAN P. MCNICOL
	)	for the defendant
	)	Canadian National Railway
defendants.	)	Company
	)	
	)	MATTHEW J. PENA
	)	for the defendant
	)	Unifor Local 100
	)	
	)	Judgment delivered:
	)	December 04, 2024

PERLMUTTER A.C.J.

INTRODUCTION

[1] The defendants Canadian National Railway Company (CN) and Unifor Local 100 (Unifor) move, pursuant to King's Bench Rule 21.01(3)(a), to dismiss or stay the plaintiff's action against them. In doing so, they assert that this court has no jurisdiction over the subject matter of the action as against CN as the plaintiff's claim arises out of a collective

agreement and, in the case of Unifor, the subject matter of the action relates to its duty of fair representation such that it falls within the exclusive jurisdiction of the Canada Industrial Relations Board under the ***Canada Labour Code***, R.S.C., 1985, c. L-2. It is the plaintiff's position that he was not able to functionally advance a grievance through the normal processes due to the nature of the issues and that the nature and gravity of the damages he has suffered are extraordinary. The plaintiff largely relies on the court's residual inherent jurisdiction to grant relief that he asserts is otherwise effectively not available.

BACKGROUND

[2] The plaintiff has been employed at CN as a heavy duty mechanic since 2008. He alleges that in the discharge of his work duties, he was exposed to high levels of diesel exhaust and other mechanical fumes within a CN shop and has suffered from various health conditions while working at this shop. When the plaintiff was transferred to another CN facility, he alleges he was the focus of targeted harassment by CN management. Since July 2020, the plaintiff has been off work.

[3] The plaintiff claims that by failing to provide him with a safe workplace and failing to address his concerns regarding work conditions, CN breached its contractual and statutory duties, such that he has suffered injuries and corresponding damages.

[4] The plaintiff's position has been governed by the terms and conditions of a series of collective agreements between CN and Unifor (collectively referred to simply as the "collective agreement"). Since 2008, the plaintiff has been a member of Unifor, which is the bargaining agent for a unit of CN employees. The plaintiff alleges that Unifor failed

to appropriately represent his interests regarding his allegations of unsafe work conditions.

LAW

[5] Based on the leading case of ***Weber v. Ontario Hydro***, 1995 CanLII 108 (SCC), [1995] 2 SCR 929, and with reference to ***Bisaillon v. Concordia University***, 2006 SCC 19, in ***Giesbrecht v. McNeilly et al.***, 2008 MBCA 22, the Manitoba Court of Appeal set out the following process to determine whether a dispute arises out of a collective agreement, such that the court lacks jurisdiction to hear and resolve the dispute (paras. 30-31, 55).

a) First, the essential character of the dispute must be identified, taking into account all the facts surrounding the dispute between the parties.

b) Second, it must be determined whether, having examined the factual context of the dispute, its essential character concerns a subject matter that is covered by the collective agreement. If the essential character of the dispute arises either explicitly, or implicitly, from the interpretation, application, administration, or violation of the collective agreement, the dispute is within the sole jurisdiction of an arbitrator to decide.

c) If it is determined that the dispute arises out of the collective agreement, then a further factor to consider is whether the collective agreement's mechanisms provide the claimant with an effective remedy. It might occur that a remedy is required which the arbitrator is not empowered to grant. In such a case, the court may take jurisdiction.

[6] In ***Tomchuk v. University of Winnipeg Faculty Association***, 2008 MBQB 168, at paras. 27-33, Beard J. (as she then was) concluded that the process outlined in ***Giesbrecht*** applies to determine whether the dispute is within the jurisdiction of the labour board[1].

ANALYSIS

Essential character of the dispute?

[7] In considering the essential character of the dispute, it is the facts, and the factual context, that command the focus of the court's attention. How a particular claim is framed or put forward is not significant. (***Giesbrecht***, para. 32)

[8] The alleged facts advanced by the plaintiff amount to CN exposing him to unsafe working conditions, which CN failed to address or deliberately refrained from addressing when he brought these concerns to CN management, and that he was the subject of targeted harassment by CN management. As against Unifor, the plaintiff alleges that it failed to represent his interests despite knowing that his work conditions were unsafe, failed to advocate and/or negotiate with CN for safer working conditions, and failed to address foundational flaws in an air quality test by CN despite the plaintiff raising concerns about this test. As a result, the plaintiff suffered significant, permanent, and serious injuries and corresponding loss and damage.

[9] I find that the essential character of the dispute involves CN exposing the plaintiff to unsafe working conditions that it refused to address or dismissed and which caused

[1] Although ***Tomchuk*** dealt with the Manitoba Labour Board under ***The Labour Relations Act***, R.S.M. 1987, c. L10 (and not the Canada Industrial Relations Board under the ***Canada Labour Code***), for the purpose of the adjudication at hand, there is no practical difference.

him injuries and damages; mistreatment of the plaintiff through harassment by CN management at work, and a failure by Unifor to appropriately represent the plaintiff with respect to unsafe working conditions.

Ambit of the Collective Agreement

[10] Pertinent to the case at hand, the collective agreement provides:

- CN and Unifor are committed to creating and maintaining a safe and healthy place to work (Rule 35.1);
- "In shops not now equipped to exhaust fumes from engines, arrangements will be made to equip them so that fumes from locomotives will not be blown off inside the shop. All engines will be placed under exhaust hoods where practicable." (Rule 42.1);
- There shall be no discrimination or harassment towards an employee based on the listed grounds, which include disability (Rule 43.1(a)); and
- Final and binding arbitration of a grievance concerning the interpretation or alleged violation of the collective agreement (Rule 28.1).

[11] The foregoing rules of the collective agreement engage obligations to create and maintain a safe and healthy workplace, including regarding fumes. They also cover the plaintiff's complaint of harassment by CN management. The plaintiff alleges he was targeted by CN management and mistreated specifically because of his medical condition and disability. While not determinative, the plaintiff's allegations of harassment as raised in his statement of claim were, in fact, the subject matter of a grievance by Unifor that

was not accepted by CN and did not advance to Step II of the grievance procedure outlined in the collective agreement.

[12] Based on these circumstances, it is my view that the essential character of the dispute as against CN arises either explicitly or implicitly from the interpretation, application, administration or violation of the collective agreement.

[13] These circumstances are analogous to those in ***Gillan v. Mount Saint Vincent University***, 2008 NSCA 55. In ***Gillan***, the plaintiff, whose employment was governed by a collective agreement, alleged that her fall and injury in the course of her employment were caused by the defendant employer's failure to take reasonable care, including its failure to provide safe working conditions. The Nova Scotia Court of Appeal accepted that the essence of her claim, as set out in her statement of claim, was that her employer failed to provide safe working conditions, which caused her to fall and injure herself. The collective agreement declared that the safety of employees was a primary concern of the employer and required it to provide a safe work environment. In upholding the finding of the lower court judge that the essential character of the dispute arose from the collective agreement, the Court of Appeal noted that "the relationship between the parties, the [plaintiff]'s injury at her workplace and during the course of her employment, and the [employer]'s obligation to provide a safe workplace are clearly integral to the dispute" (para. 36).

[14] In the case at hand, it is my view that it is even clearer than in ***Gillan*** that the essential character of the dispute arises either explicitly or implicitly from the interpretation, application, administration or violation of the collective agreement given

that the allegations expressly include an allegation of breach of contract. I agree with CN's counsel that the only contract that could be allegedly breached is the collective agreement because it is the only contractual document that outlines the terms and conditions of the plaintiff's employment with CN as a member of the collective bargaining unit. That is, the plaintiff is specifically advancing a claim for alleged injuries suffered while performing work for CN in the course of discharging his employment duties in circumstances where the alleged violations relate expressly to breaches of the collective agreement with respect to health, safety, and harassment.

[15] When the plaintiff attempted to grieve his concerns about unsafe and unhealthy working conditions due to the presence and accumulation of diesel exhaust and his personal symptoms, he was told by a Unifor representative that such a complaint was not the subject matter for a grievance. The plaintiff persisted to advocate for safer working conditions, which included correspondence with Unifor, but alleges that Unifor both failed to represent his interests and/or failed to advocate or negotiate with CN for safer working conditions.

[16] It is my view that these allegations against Unifor amount to a claim that Unifor failed in its duty of fair representation of the plaintiff in connection with his rights (as outlined above) under the collective agreement (***Giesbrecht***, para. 61). Framed as such, the court lacks jurisdiction over this complaint as it would be subject to the exclusive jurisdiction of the Canada Industrial Relations Board (***Boyko et al. v. Canadian Pacific Railway et al.***, 2011 MBQB 25, paras. 36, 47, 58).

Does the Collective Agreement Provide an Effective Remedy?

[17] In ***Weber***, the Supreme Court of Canada explained the following regarding the residual inherent jurisdiction (para. 57):

> It might occur that a remedy is required which the arbitrator is not empowered to grant. In such a case, the courts of inherent jurisdiction in each province may take jurisdiction. This Court in *St. Anne Nackawic* confirmed that the New Brunswick Act did not oust the residual inherent jurisdiction of the superior courts to grant injunctions in labour matters (at p. 724). Similarly, the Court of Appeal of British Columbia in *Moore v. British Columbia* (1988), 1988 CanLII 184 (BC CA), 50 D.L.R. (4th) 29, at p. 38, accepted that the court's residual jurisdiction to grant a declaration was not ousted by the British Columbia labour legislation, although it declined to exercise that jurisdiction on the ground that the powers of the arbitrator were sufficient to remedy the wrong and that deference was owed to the labour tribunal. What must be avoided, to use the language of Estey J. in *St. Anne Nackawic* (at p. 723), is a "real deprivation of ultimate remedy".
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> [Emphasis added]

[18] It is the plaintiff's position that this case is an uncommon "outlier", distinguishable from all case law that has considered similar issues and concluded that the court lacked jurisdiction to hear and resolve the dispute. In support of this position, the plaintiff's counsel submits that this case is not a "one-off event" like a slip and fall by an employee in the workplace (as in ***Gillan***). Rather, the plaintiff's action is grounded in his repeated unsuccessful attempts over years to have CN and Unifor address the unsafe working conditions involving diesel fumes.

[19] As discussed, when the plaintiff attempted to grieve his concerns through Unifor about the unsafe and unhealthy working conditions due to the presence and accumulation of diesel exhaust and his personal symptoms, he was told by a Unifor representative that such a complaint was not the subject matter for a grievance. While this may have been incorrect (in light of my analysis above), the plaintiff submits that the fact that no grievance was filed respecting his concerns about unsafe working conditions, despite him

repeatedly bringing them to the attention of Unifor, demonstrates that he cannot obtain an effective remedy under the collective agreement. The plaintiff's counsel submits that Unifor was not acting in good faith and that if he does not have the ability to proceed with this action, he will have no process to advance his claim.

[20] An analogous argument was advanced in ***Giesbrecht***, where the plaintiff argued he could not have filed a grievance under the collective agreement because his complaint arose out of policies that were not part of the collective agreement; the union declined to consider the plaintiff's complaint as grievable; the plaintiff was considerably out of time to file a grievance; and he had no confidence that an arbitrator would extend time. Freedman J.A. in ***Giesbrecht*** concluded that "the court cannot acquire jurisdiction over a claim that properly falls within the ambit of the collective agreement simply because the [plaintiff], for whatever reason, has not promptly prosecuted his claim in the proper forum" (para. 61).

[21] Similarly, in ***Gillan***, the Nova Scotia Court of Appeal rejected the plaintiff's argument that she could not obtain effective redress under the collective agreement as neither she nor the union on her behalf filed a grievance respecting her injury or the alleged unsafe working conditions within the time periods stipulated in the collective agreement (para. 44). The Nova Scotia Court of Appeal found that there was no need for the court to exercise its residual jurisdiction as the plaintiff was not without recourse or remedies for her injury because she could have sought effective remedies under the collective agreement (paras. 45, 46).

[22] To the extent that the plaintiff alleges intentional harm and a lack of good faith, these allegations are analogous to those advanced in ***Weber***. Mr. Weber was employed by Ontario Hydro. As a result of back problems, he took an extended leave of absence. Hydro paid him the sick benefits stipulated by the collective agreement. As time passed, Hydro began to suspect that Mr. Weber was malingering. It hired private investigators to investigate its concerns. The investigators came on Mr. Weber's property. Pretending they were someone else, they gained entry to his home. As a result of the information it obtained, Hydro suspended Mr. Weber for abusing his sick leave benefits. Mr. Weber commenced a court action based on tort and breach of his ***Charter*** rights, claiming damages for the surveillance. The torts alleged were trespass, nuisance, deceit, and invasion of privacy.

[23] Similarly, in ***Giesbrecht***, the plaintiff alleged that the behaviour and actions, or inaction, of his employer amounted to an intentional or negligent infliction of mental suffering.

[24] As noted, in both ***Weber*** and ***Giesbrecht***, the court concluded that the essential character of the dispute arose out of a collective agreement, such that the court lacked jurisdiction to hear and resolve the dispute.

[25] Arbitrators have broad jurisdiction to remedy breaches of collective agreements. In ***Giesbrecht***, Freedman J.A. wrote as follows (paras. 55, 59):

> …as was held in Weber: "It might occur that a remedy is required which the arbitrator is not empowered to grant. In such a case, the courts of inherent jurisdiction in each province may take jurisdiction. …" (at para. 57). As Steel J.A. said in *Phillips*: "…What is important is that the scheme provide a solution to the problem" (at para. 80).
>
> …

> An arbitrator might award a different remedy than a court, but that does not mean that such a remedy is not "effective". This was considered in *Giorno* where Goudge J.A. said (at paras. 19-20):
>
> > It is of no moment that arbitrators may not always have approached the awarding of damages in the same way that courts have awarded damages in tort. ….
> >
> > What is important is that the arbitrator is empowered to remedy the wrong. If that is so, then where the essential character of the dispute is covered by the collective agreement, to require that it be arbitrated, not litigated in the courts, causes no "real deprivation of ultimate remedy." ….

[26] Similarly, where the Canada Industrial Relations Board finds a contravention of the duty of fair representation, it may require the union to take and carry on on behalf of the affected employee such action or proceeding as the Board considers that the union ought to have taken and carried on on the employee's behalf (s. 99(1)(b) of the ***Canada Labour Code***).

[27] In sum, the plaintiff could have sought effective remedies under the collective agreement or pursued remedies through the process of the Canada Industrial Relations Board regarding Unifor's duty of fair representation. Accordingly, I find that there is no basis to exercise the court's residual inherent jurisdiction.

CONCLUSION

[28] In conclusion, I am dismissing this action because this court has no jurisdiction over the subject matter of the action.

[29] If costs cannot be agreed upon, I will receive written submissions.

_____ A.C.J.