CITATION: De Facendis v. Toronto Parking Authority, 2021 ONSC 1695
COURT FILE NO.: CV-18-600206
DATE: 20210308

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
AMANDA CHRISTINA DE FACENDIS	)	*Asher Honickman* and *Joseph Sidiropoulos,* for the Plaintiff
Plaintiff	)	
	)	
– and –	)	
	)	
TORONTO PARKING AUTHORITY and VITO DITTA	)	*Edward J. O'Dwyer,* for the Defendant, Toronto Parking Authority
Defendants	)	
	)	*Belinda Bain*, for the Defendant, Vito Ditta
	)	
	)	
	)	
	)	**HEARD:** November 17, 2020
	)	

M. D. FAIETA J.

REASONS FOR DECISION

INTRODUCTION

[1] The plaintiff brings this tort action for damages in relation to allegations of sexual assault and sexual harassment by a co-worker, the defendant Vito Ditta, during the course of her employment with the defendant Toronto Parking Authority ("TPA") as a parking lot attendant. The plaintiff alleges various intentional torts against Ditta. The plaintiff alleges that the TPA is liable in negligence, and alternatively, is vicariously liable for Ditta's actions. The defendants bring this motion to dismiss this action on the basis that this court does not have the jurisdiction to hear this action given that s. 48 of the *Labour Relations Act*, S.O. 1995, c. 1, Sched. A. ("the Act") provides that all disputes that arise in the workplace are within the exclusive jurisdiction of a labour arbitrator. Amongst other things, the plaintiff submits that s. 48 of the Act should be construed to allow sexual assault claims to proceed before this court.

[2] For reasons that follow, I grant the defendants' motion and dismiss this action.

BACKGROUND

[3] The plaintiff was a 19-year-old student attending university when she was hired as a student parking lot attendant by the TPA in June 2013. Once hired, the plaintiff states that she worked at various remote and isolated Green P parking lots operated by the TPA.

[4] The plaintiff was a member of the Part-Time/Students bargaining unit. As a result, the terms of her employment were governed by the Part-Time/Students Collective Agreement between Toronto Civic Employees' Union Local 416, CUPE ("CUPE") and the TPA (the "Part-Time Collective Agreement").

[5] The defendant Vito Ditta worked as a maintenance worker for the TPA since about 1998. In that capacity, Ditta was responsible for repairing parking meters, pay & display machines and parking gates at various Green P parking lot locations.

[6] Ditta was a member of the Full-Time bargaining unit at the Toronto Parking Authority. As a result, the terms of his employment were governed by the Full-Time Collective Agreement between CUPE and the Toronto Parking Authority (the "Full-Time Agreement").

[7] The plaintiff states that Ditta sexually assaulted and sexually harassed her on numerous occasions in 2013. Particulars of these incidents including the following:

- "He would show up at locations where I was working and offer to purchase me food or coffee and insist that I accept these items. He once brought food to the Yonge and Castlefield parking lot where I was working, and stated that "you don't have to pay me with money..." left the unsolicited food purchases at my booth, and insisted I take them."

- "On another occasion in June of 2013, he entered the small attendant's booth where I was working and squeezed by face, told me I was "sexy", and said he "wanted to kiss those lips". I told him to stop and then he said that he "wanted to grab that ass" and made other comments. I was 19 years old at this time, alone in a remote parking lot booth, being assaulted by a strange older man; I was utterly terrified by these events."

- "Over the course of my employment, the defendant Ditta proceeded to stalk me and show up at various locations where I was working alone. I developed paranoia and became horrified at the prospect of him showing up. I came to realize he was stalking me via the video monitoring station at Yonge and St. Clair, where centralized video monitors display all the Green P parking lots. In his email of November 4, 2013, he admits to using this monitoring station to find out where I was working. ..."

- "On another occasion at the Yonge and St. Clair parking lot, which is isolated and located underground, I was sexually assaulted by the defendant Ditta. On that occasion he grabbed and squeezed my buttocks, said "you are so hot, so sexy", told me he wanted to go dancing with me, and told me his wife doesn't mind him cheating on her."

- "On another occasion in July or August of 2013, I was stationed alone in an underground parking lot booth at Yonge and Dundas. The defendant Ditta showed up at the location

whereupon, in fear, I locked the door of the facility from the inside and hid under a desk. The defendant proceeded to bang on the door violently and aggressively demanding to be let in. I was hiding under the desk terrified that he might get in and assault me again. There was no way to escape or leave; I was trapped. I was a 19 year old girl working for the City, trapped in a room hiding under a desk, shaking in fear of being assaulted yet again."

- "On yet another occasion, the defendant touched my face three times, touched my shoulder, and my buttocks. He would constantly show up and stare at me. He would often park his van in the parking lot I worked at to just stare at me menacingly from inside of his vehicle. I was constantly terrified of being assaulted again, or raped. My heart would race during these instances. It was like time would stand still, and I would be terrified and panicked."

[8] The plaintiff also alleges that the TPA is vicariously liable for the harm caused by Ditta and that TPA is also liable in negligence in that it failed to provide a "reasonably safe work environment".

[9] In October, 2013 the plaintiff complained about Ditta's conduct to the TPA. The TPA retained an external investigator on November 15, 2013. Both the plaintiff and Ditta provided signed written statements to the investigator. Ditta denied the majority of the allegations. The plaintiff's allegations of sexual assault and harassment were narrower than she has asserted in this action.

[10] The investigator's report, dated February 28, 2014, concluded that the plaintiff's complaint was substantiated on a balance of probabilities, and he found that:

A. On one or more occasions in or around early August 2013, Ditta approached De Facendis while she was working in Area 39 and made the following unwelcome comments:

   i. Ditta told De Facendis more than once that she was sexy.

   ii. Ditta asked De Facendis to go dancing with him after work.

   iii. Ditta told De Facendis that his wife did not mind if he cheated on her.

   iv. Ditta purchased tea from David's Tea for De Facendis and then told her that she did not have to pay him back "with money".

   v. Ditta told De Facendis more than once that he "just want[ed] to kiss those lips".

B. On one occasion in or around early August, 2013, Ditta squeezed De Facendis' face tightly with his hand to the point of hurting her and told De Facendis that he "just wanted to kiss those lips".

C. In or around late August 2013, De Facendis had a shift in Area 161. At one point during the shift, De Facendis was speaking on the phone to Ebanks, a TPA pay

station attendant, in respect of a work issue. During the call, De Facendis heard Ditta on the line remarking "Did you see how good-looking that girl is?" and then, to her, "Why are you talking to this boy, you need a man in your life".

D. On the same day in or around late August 2013, Ditta parked his work van in Area 161 and approached De Facendix in the booth. Ditta said to her, "You have a nice ass" and made other comments about her physical appearance. De Facendis told Ditta to stop and commented "You can't say those things to me". Ditta did not respond other than to look at De Facendis in a hostile manner.

E. On November 24, 2013, while De Facendis was working in Area 34, Ditta attended at the area to repair a broken machine. While there, he looked at De Facendis in a hostile manner.

[11] Following its investigation, the TPA terminated Ditta's employment. He grieved this decision using the process under the Collective Agreement. Ditta settled with the TPA and his employment ended on April 10, 2014.

[12] The plaintiff states that for about one year following these incidents she developed post-traumatic stress disorder and suffered panic attacks whenever she saw a white van or Green P vehicle, thinking that she was being stalked by Ditta. The plaintiff states that she has developed general paranoia and panic attacks that permeate her daily life such as being afraid to walk in public or use public transportation. She has sought psychological treatment and has been prescribed medication for anxiety. As a result of the effects of these incidents, the plaintiff states that she waited "until 2017 or 2018 to seek legal advice and take action".

[13] On June 21, 2018, the plaintiff commenced this action.

[14] On December 21, 2018 the plaintiff attended the offices of Local 416. At that meeting the plaintiff asked the Local 416 to grieve on her behalf in respect of these incidents of sexual assault and sexual harassment. The union representatives told her that it was too late to grieve given that 15 days from the date of the occurrence had passed and that refused her request. She also states that the union representatives told her that "... this sexual assault law suit had no place in grievance arbitration."

[15] In response to a letter from counsel for the plaintiff, a letter dated March 13, 2019 from counsel for Local 416 states:

1. *Will the union grieve on Amanda's behalf against the employer with respect to the sexual assault she suffered while employed at the TPA?*

The Union will not file a grievance against the Employer with respect to the sexual assault she suffered while employed at the TPA as such a grievance would be untimely. The timelines for the grievance procedure between the Union and the Employer are outlined in Article 10.8 to 10.10 of the Collective Agreement and state the following:

10.8 STEP 1: It is understood that before a grievance is reduced to writing and filed, the grievor's immediate manager/supervisor will have an opportunity to discuss and resolve the complaitn within five (5) working days of it being brought to his attention, pursuant to Article 10.1 above. An employee's grievance which is not settled by the immediate supervisor shall be reduced to writing in triplicate on forms provided by Local 416 and approved by the Authority, signed by the employee involved and submitted by the said employee to the Authority's Vice President of Operations or designee in the presence of Local 416's representative. The Vice President of Operations or designee shall deal with the grievance and render his decision thereon in writing, not later than the fifth (5) working day following the day on which he received the grievance.

10.9 STEP 2: If the decision of the Vice President of Operations or his designee is not satisfactory to the employee concerned, and if an appeal therefrom is to be made, such appeal must be reduced to writing in triplicate on forms provided by Local 416 and approved by the Authority, signed by the employee involved and lodged with the Authority's President, through Local 416's representative, within five (5) working days of the Vice President of Operations' or local designee's decision. The President or his designee shall forthwith confer with the Local 416 representative and shall advice Local 416 of his decision within five (5) working days of said conference.

10.10 STEP 3: After exhausting the grievance procedure herein, either party may request by notice in writing addressed to the other party within twenty (20) working days after the grievance has been dealt with in Step 2 that the grievance be submitted to arbitration. Within five (5) working days thereafter, both parties shall designate an Arbitrator. The two (2) Arbitrators so designated shall within five (5) working days select a third person who shall be the Chairman. If they are unable to agree upon a Chairman within the time limit, the Minister of Labour for Ontario shall designate a Chairman. The decision of the Arbitration Board shall be final and binding upon both parties.

2. *Does the union believe that Amanda is out of time with respect to filing a grievance in this matter? If so, what, in the Union opinion, are the time limits within which to grieve for such matters as per the collective agreement?*

   Please refer to our answer to number 1 above.

3. *Is it the union's opinion that the sexual assault allegations made by my client in her statement of claim are matters that fall outside of the scope of the collective agreement between the Toronto Parking Authority and Local 416?*

   Local 416 has not reviewed your client's statement of claim and is therefore not in a position to answer this question.

4. *In the union's opinion, does the TPA's Policy Resolution 4-22 "Workplace Harassment & Violence Policy [sic] form part of the Collective Agreement between Local 416 and the TPA?*

   The answer to this question is a legal conclusion. We encourage you to review the collective agreement between Local 416 and the TPA and advise your client accordingly.

5. *What information if any was provided to new unionized employees at the TPA about their rights under the collective agreement?*

   This question is hypothetical, and the Union is not prepared to answer questions that do not relate specifically to your client and the facts surrounding her case.

6. *What contact information was provided to new unionized employees about how to contact the union with respect to their right to grieve pursuant to the collective agreement?*

   Please refer to our answer number 5 above.

7. *Please provide details or any other information in the union's possession with respect to this matter.*

   The union is not in possession of any further information with respect to this matter.

ANALYSIS

[16] At the hearing of this motion the defendants advised that they rely solely on Rule 21.03(3)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 ("*Rules*") which states that a defendant may move before a judge to have an action stayed or dismissed on the ground that the court has no jurisdiction over the subject matter of the action.

[17] Evidence is admissible on a motion to determine jurisdiction. However, a motion judge's fact-finding powers is limited to those facts necessary to decide jurisdiction. As a result, a judge may make findings on "jurisdictional facts" so long as no findings are made on disputed central questions of fact: *Sveshnikov v. World Anti-Doping Agency*, 2018 ONSC 7245, para. 8.

[18] Each party adduced affidavit evidence regarding the particulars of the employment relationship of the plaintiff and Ditta, including their respective collective agreements as well as particulars of the alleged incidents of sexual harassment and sexual assault and the events that followed.

The Collective Agreement and the TPA's Workplace Harassment & Violence Policy

[19] There are various collective agreements applicable in this case. The plaintiff was subject to a Part-Time Collective Agreement and Ditta was subject to a Full-Time Collective Agreement. All of these collective agreements recognize that the TPA has the authority to manage its operations and undertakings and to maintain order, discipline and efficiency. They also require

that the TPA establish a Health and Safety Committee as required under the *Occupational Health and Safety Act* and that the TPA and Union agree to co-operate in maintaining and improving practices in the workplace to provide a safe and healthful environment in which to work.

[20] Subsection 32.0.1 (1) of the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, ("the *OHSA*") states:

> An employer shall,
>
> (a) prepare a policy with respect to workplace violence;
>
> (b) prepare a policy with respect to workplace harassment; and
>
> (c) review the policies as often as is necessary, but at least annually.

[21] Although the *OHSA* does not define "workplace violence", the Ministry of Labour's guideline on Workplace Violence and Harassment: Understanding the Law, September 2016, states that "workplace violence" under the *OHSA* includes sexual violence. On the other hand, s. 1(1) of the *OHSA* specifically states that "workplace harassment" includes workplace sexual harassment.

[22] The TPA has adopted workplace policies that address workplace harassment and violence. Policy Resolution 4-22 is the TPA's Workplace Harassment & Violence Policy. Amongst other things, it provides for a complaint procedure, investigation, corrective action and discipline as well as complaint resolution alternatives. Sections 11, 12 and 15 of the Policy states:

> **11. Investigation**
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> 1. Upon receipt of a complaint of workplace harassment/violence, the Director of Human Resources will investigate and advise the Complainant of the steps that will be taken. For unionized employees, collective agreement requirements will be complied with if it is determined that discipline may result in the circumstances. The Director of Human Resources may assign an internal or external person to investigate. The Director of Human Resources may suggest that the police be notified.
>
> 2. The investigation by management:
>
> a) will ensure that unionized employees are dealt with as required by the collective agreement;
>
> b) will act cooperatively with police and take their direction if the police become involved;
>
> c) will be as discreet as possible in its investigation given the nature and substance of the complaint;

d) will gather information in a thorough fashion;

e) will advise all directly concerned about the results of the investigation.

3. The investigator may make a finding of

a) sufficient evidence to support a finding of violation of this policy;

b) insufficient evidence to support a finding of violation of this policy;

c) no violation of this policy.

4. The investigator will investigate the incident expeditiously and report his/her findings to the Complainant and to senior management within 30 working days of the commencement of the investigation or as soon as reasonably possible thereafter. For unionized employees, any decision respecting discipline will be dealt with in accordance with the collective agreement. For non-unionized staff, the Complainant and the person(s) who are the subject of the investigation will be advised and the severity of the discipline, if any, will be discussed prior to a final decision being made.

12. Corrective Action and Discipline

1. If the results of the investigation result in discipline, the following factors will be considered in determining the appropriate corrective action:

a) the impact of the incident on the Complainant;

b) the nature of the incident;

c) the degree of aggressiveness and physical contact;

d) the period of time and frequency of the incidents;

e) the vulnerability of the Complainant;

f) whether there was an admission of responsibility;

g) whether there was an expression of remorse;

h) whether the person who is being disciplined has a disciplinary record; and

i) whether the person who is being disciplined has sincerely apologized to the Complainant.

2. The following corrective actions may be considered depending on the particular incident and the factors in the previous paragraph:

a) training;

b) referral to an assistance program;

c) reassignment or relocation;

d) formal reprimand;

e) suspension;

f) discharge; and/or

g) legal action.

15. Complaint Resolution Alternatives

In addition to reporting workplace harassment/violence incidents to management, unionized employees may file a human rights grievance under the collective agreement. Non-unionized employees may file a complaint under the Human Rights Code or seek legal course in the courts.

All employees may file a safety-related workplace violence complaint under the *Occupational Health and Safety Act.*

All employees may call the police about an incident. [Emphasis added]

[23] Paragraph 15 of the Policy provides that in addition to reporting workplace harassment/violence incidents to management, unionized employees may file a human rights grievance under the collective agreement.

Jurisprudence

[24] Section 48(1) of the Act states that:

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.

[25] Whether a dispute is within the exclusive jurisdiction of a labour arbitrator under s. 48 of the Act requires an examination of the nature of the dispute and the ambit of the collective agreement.

[26] In *Allen v. Alberta,* [2003] 1 S.C.R. 128, at para. 15, the Supreme Court of Canada stated:

It acknowledged that labour arbitrators have been granted broad jurisdiction over labour disputes. Nevertheless, only disputes which explicitly or inferentially arise out of a collective agreement are foreclosed to the courts (*City of Regina*, at para. 22, per Bastarache J.). In order to ascertain whether the dispute arises out of the collective

agreement, the essential nature of the dispute must be identified. At the same time, it is necessary to consider the ambit of the agreement and whether it covers the facts of the dispute:

> Simply, the decision-maker must determine whether, having examined the factual context of the dispute, its essential character concerns a subject matter that is covered by the collective agreement. Upon determining the essential character of the dispute, the decision-maker must examine the provisions of the collective agreement to determine whether it contemplates such factual situations. It is clear that the collective agreement need not provide for the subject matter of the dispute explicitly. 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. [*City of Regina*, at para. 25.]

What is the Essential Nature of the Dispute?

[27] The plaintiff submits that the essential nature of this dispute concerns sexual assault in the workplace. The defendants submit that the essential nature of the dispute concerns violence and harassment in the workplace and includes sexual harassment and sexual assault. In my view, the defendant's position better characterizes the essential nature of this dispute.

Does the Dispute Come within the Ambit of the Collective Agreement?

[28] If the essential character of the dispute arises either explicitly or implicitly, from the interpretation, application, administration or violation of the collective agreement, then it falls exclusively to the be determined by an arbitrator.

[29] In *Weber*, at para. 43, the Supreme Court of Canada stated that:

> … the analysis of whether a matter falls within the exclusive arbitration clause must proceed on the basis of the facts surrounding the dispute between the parties, not on the basis of the legal issues which may be framed. The issue is not whether the action, defined legally, is independent of the collective agreement, but rather whether the dispute is one "arising under [the] collective agreement." Where the dispute, regardless of how it may be characterized legally, arises under the collective agreement, then the jurisdiction to resolve it lies exclusively with the labour tribunal, and the courts cannot try it. [Emphasis added]

[30] The plaintiff acknowledges that a labour arbitrator has jurisdiction to hear a claim dealing with sexual harassment but not a sexual assault claim as it submits that neither the Collective Agreement nor the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended, speak to sexual assault.

[31] As noted earlier, the TPA's Workplace Harassment & Violence Policy, was implemented by the TPA in order to comply with its statutory obligation under the *OHSA* to prepare a policy with respect to workplace harassment and workplace violence. The Policy states that "in addition to reporting workplace harassment/violence incidents to management, unionized employees may

file a human rights grievance under the collective agreement". It is self-evident that sexual harassment and sexual assault that occur in the workplace are forms of "workplace harassment/violence"

[32] Given this context, I find that the plaintiff's claims of workplace sexual harassment and workplace sexual assault against the TPA comes within the ambit of the collective agreement.

[33] Further, even though Ditta are not parties to the same collective agreement, the plaintiff's claim against Ditta arises from their employment relationship. As a result, the plaintiff's claim for workplace sexual harassment and workplace sexual assault arises out of the collective agreement and is within the exclusive jurisdiction of an arbitrator: see *Soulos v. Leitch*, 2005 CanLII 13790, at paras. 7-8.

Does the Court have Jursidiction to Hear the Plaintiff's Claim for Sexual Assault based on Section 15 of the *Charter*?

[34] In *A. (K.) v. Ottawa (City)* (2006), 80 O.R. (3d) 161, the Ontario Court of Appeal dismissed the plaintiffs' claims for sexual harassment and sexual assault against a fellow employee on the grounds that the claim against the employee and the employer was a workplace dispute that was within the jurisdiction of the arbitrator under the collective agreement. The Ontario Court of Appeal found that it was bound by precedent however, at para. 24, it expressed sympathy for the plaintiff's position:

> I have considerable sympathy for the result reached by the motion judge and for the respondents' assertion that they should be permitted to pursue their claims for sexual assault in the courts. The claims arise from allegations of criminal misconduct that affront the respondents' personal dignity and physical integrity, yet they are compelled to pursue them under the collective agreement's arbitration procedure, where they will not have personal carriage of the proceedings. However, *Weber* and its progeny deprive them of the right to prosecute their claim in the courts and we must give effect to the jurisprudence that is binding on this court.

[35] The plaintiff submits that A.(K.) should not be followed on the basis that it would be contrary to s. 15(1) of the *Charter* or, alternatively, because there has been a significant development in the law or a change in circumstances that fundamentally shifts the parameters of the debate".

Section 15 of the *Charter*

[36] The plaintiff submits that section 48(1) of the Act should be interpreted in a manner that is consistent with section 15 of the Charter or, alternatively, in a manner that reflects the "changing dialogue and legal landscape" related to sexual assault claims.

[37] The plaintiff states:

> Section 15 of the Charter will be implicated whenever a law has a disproportionate impact on an individual due [to] an enumerated or analogous ground, including sex. It is uncontroversial that sexual assault overwhelmingly and disproportionately affects

> women. It is equally clear that sexual assault often generates in the victim a confused mixture of shame, fear, anger, shock, inhibition and pain, which may result in the victim being unwilling to disclose the assault. It is for this reason that the Ontario legislature has abolished any limitation period for sexual assault-related claims. And yet, if TPA workers are forced to grieve and arbitrate claims for sexual assault, they will face an unconscionably stringent limitation period of just 15 working days. The real-world consequence of this profound disparity will be that unionized sexual assault victims, the vast majority of whom are female, will be practically barred from seeking compensation in any forum. This is prima facie discrimination on the basis of sex. …
>
> In sum, Ms. De Facendis submits that there is nothing in the text or purpose of s. 48(1) conferring exclusive jurisdiction upon arbitrators to decide cases for sexual assault. However, to the extent there is ambiguity on this issue, it must be resolved in favour of a Charter-complaint interpretation, which mandates, at the very least, concurrent jurisdiction.

[38] There is a two-part test for assessing a claim for discrimination under section 15 of the *Charter*:

> (1) Does the law create a distinction based on an enumerated or analogous ground?
>
> (2) If yes, does the distinction create a disadvantage by perpetuating prejudice or stereotyping? See *Withier v. Canada (Attorney General),* [2011] 1 S.C.R. 396, at para. 30.

[39] I agree with the defendants' submission that the plaintiff has not established that she is being subject to differential treatment on the basis of her sex. The distinction in treatment is based on employment status (unionized versus non-unionized employees) which is not an enumerated or analogous ground under section 15 of the *Charter*. Further, even if the distinction in treatment was based on sex, the plaintiff led no evidence that s. 48(1) creates a disadvantage by perpetuating prejudice or stereotyping.

Significant Development in the Law or a Fundamental Change in Circumstances

[40] The plaintiff submits:

> In the 1993 decision, *R. v. Thurlow*, the Court acknowledged that "as a society we are just beginning to understand the profound and often permanent trauma experienced by victims of sexual assault". Fortunately, that understanding has expanded greatly in recent years. Issues surrounding sexual assault have come to the fore over the last several years, as exemplified by the #metoo and "times up" movements. This increased awareness resulted in new legal protections being enacted in the Province of Ontario under the *Sexual Violence* and *Harassment Action Plan Act* (Supporting Survivors and Challenging Sexual Violence and Harassment), 2016, which, as noted above, abolished limitation periods for sexual assault claims. In the last few years, Parliament has also passed Bill C-51, and the House of Commons has passed Bill C-337 (still being debated in the Senate), which amend the *Criminal Code* and the Judges Act so as to provide sexual assault victims with greater protections.

This changing dialogue and legal landscape will help ensure that victims such as Amanda Christine De Facendis receive justice. This Court must not allow labour law in the Province of Ontario to fall behind the important advances that have been made in tort and criminal law, to say nothing of societal attitudes generally. Ms. De Facendis is alleging that Mr. Ditta assaulted her on multiple occasions and acted so aggressively that she became terrified of being raped. The uncontroverted evidence is that her Union was dismissive of her complaints, caused her further distress, and subsequently took the position that she was out of time to grieve. This is not how sexual assault complaints ought to be dealt with in the Province of Ontario in [2021].

[41] In *R. v. Comeau*, 2018 SCC 15, the Supreme Court of Canada stated

> 26 Common law courts are bound by authoritative precedent. This principle — *stare decisis* — is fundamental for guaranteeing certainty in the law. Subject to extraordinary exceptions, a lower court must apply the decisions of higher courts to the facts before it. This is called vertical *stare decisis*. Without this foundation, the law would be ever in flux — subject to shifting judicial whims or the introduction of new esoteric evidence by litigants dissatisfied by the *status quo*. ...
>
> 29 In *Bedford,* this Court held that a legal precedent "may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate": para. 42. The trial judge, relying on the evidence-based exception identified in that excerpt from *Bedford*, held that the historical and opinion evidence he accepted "fundamentally shifts the parameters of the debate" over the correct interpretation of s. 121, referring to this Court's treatment of the question in Gold Seal.
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> 30 The new evidence exception to vertical *stare decisis* is narrow: *Bedford*, at para. 44; *Carter v. Canada (Attorney General),* 2015 SCC 5, [2015] 1 S.C.R. 331 (S.C.C.), at para. 44. We noted in *Bedford*, at para. 44, that a lower court is not entitled to ignore binding precedent, and the threshold for revisiting a matter is not an easy one to reach. ... This balances the need for finality and stability with the recognition that when an appropriate case arises for revisiting precedent, a lower court must be able to perform its full role.
>
> 31 Not only is the exception narrow — the evidence must "fundamentally shif[t] the parameters of the debate" — it is not a general invitation to reconsider binding authority on the basis of any type of evidence. As alluded to in *Bedford* and *Carter*, evidence of a significant evolution in the foundational legislative and social facts — "facts about society at large" — is one type of evidence that can fundamentally shift the parameters of the relevant legal debate: *Bedford*, at paras. 48-49; *Carter*, at para. 47. That is, the exception has been found to be engaged where the underlying social context that framed the original legal debate is profoundly altered.
>
> 32 In *Carter*, for example, new evidence about the harms associated with prohibiting assisted death, public attitudes toward assisted death, and measures that can be put in place to limit risk was relevant. This evidence was unknowable or not pertinent, given the

> existing legal framework, when *Rodriguez v. British Columbia (Attorney General),* [1993] 3 S.C.R. 519 (S.C.C.), was decided. These new legislative and social facts did not simply provide an alternate answer to the question posed in *Rodriguez*. Instead, the new evidence fundamentally shifted how the Court could assess the nature of the competing interests at issue.
>
> 33 This focus on shifting legislative and social facts is conceptually linked to Lord Sankey's famous "living tree" metaphor, which acknowledges that interpretations of the *Constitution Act, 1867* evolve over time, given shifts in the relevant legislative and social context: *Edwards v. Canada (Attorney General)* (1929), [1930] 1 D.L.R. 98 (Jud. Com. of Privy Coun.), at pp. 106-7. In *Edwards*, both legal and social changes that had opened the door to women's increased integration into public life after Confederation confirmed that it was no longer appropriate to read the term "person" in the impugned constitutional provision as anything other than its plain gender-neutral meaning: pp. 110-12.
>
> 34 To reiterate: departing from vertical *stare decisis* on the basis of new evidence is not a question of disagreement or interpretation. For a binding precedent from a higher court to be cast aside on the basis of new evidence, the new evidence must "fundamentally shif[t]" how jurists understand the legal question at issue. It is not enough to find that an alternate perspective on existing evidence might change how jurists would answer the same legal question. [Emphasis added]

[42] In my view the plaintiff has not met the high threshold to justify this court's departure from the binding precedent of the Ontario Court of Appeal's decision in *A.(K.)*. The plaintiff filed no expert evidence that describes how the underlying social context that framed the public interest in providing for exclusive jurisdiction of labour arbitrators in Ontario under the Act has been "profoundly altered". The few articles adduced by the plaintiff from news outlets in the U.S.A. that were published online do not meet the required evidentiary standard.

Is there a remedial gap?

[43] The plaintiff submits that there is a remedial gap that justifies the exercise of the court's jurisdiction for two reasons: (1) a labour arbitrator lacks the ability to award punitive damages; (2) the plaintiff is now six years out of time to grieve her claim and it is unlikely that a labour arbitrator would agree to hear her claim.

[44] In *Weber*, at para. 67, the Supreme Court of Canada stated that an arbitrator's exclusive jurisdiction is subject to the residual discretionary power of courts of inherent jurisdiction to grant remedies not possessed by the statutory tribunal.

[45] In dismissing the submission that there was a remedial gap because the plaintiffs may receive a lower damages award, the Ontario Court of Appeal in *A. (K.)* stated at para. 19-21:

> 19 In some cases, lack of an effective remedy may justify the exercise of the court's jurisdiction. In *Weber*, McLachlin J. noted, at para. 57, that even in cases where an arbitrator has exclusive jurisdiction over the dispute, the court may exercise its inherent remedial jurisdiction where the arbitrator does not have the power to grant a required remedy. In *Weber*, McLachlin J. adopted Estey J.'s statement from *St. Anne Nackawic*

> *Pulp & Paper Co. v. C.P.U., Local 219*, [1986] 1 S.C.R. 704 (S.C.C.) at p. 723 that: "[w]hat must be avoided, to use the language of Estey J. ... is a 'real deprivation of ultimate remedy'". The examples of a remedial gap amounting to the deprivation of a remedy given by McLachlin J. were the lack of jurisdiction to award injunctions or make declarations.
>
> 20 In my view, the potential difference in the quantum of damages that could be awarded in an arbitration in the present case does not amount to a remedial gap sufficient to justify the exercise of the Superior Court's jurisdiction. In *Giorno*, at pp. 630-631, this court held that an arbitrator's damage award will not be viewed as an insufficient remedy simply because it differs from the award a court could grant:
>
>> 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. In *Weber*, at p. 958 S.C.R., p. 603 D.L.R., McLachlin J. made clear that arbitrators are to apply the same law as the courts. Laskin J.A. put it this way in *Piko* at para. 22:
>>
>> I do not rest my decision on any differences between the power of courts and the power of arbitrators to award damages for a tort, such as the tort of malicious prosecution. I recognize that arbitrators may apply common law principles in awarding damages, and, more importantly, the breadth of an arbitrator's power to award damages does not necessarily determine whether *Weber* applies.
>>
>> 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". . .The individual is able to pursue an appropriate remedy through the specialized vehicle of arbitration. He or she is not left without a way to seek relief.
>
> 21 Accordingly, even if the damages the respondents would recover by way of arbitration could be less than the amount they would recover in an action, the arbitrator is still empowered to remedy the wrong and there is no remedial gap amounting to the effective deprivation of remedy sufficient to justify the assumption of jurisdiction by the court.

[46] A remedial gap is not created merely because an arbitrator cannot award the same relief as a court: *De Montigny v. Roy*, 2018 ONCA 88, para. 2. An arbitrator's inability to award punitive damages does not create a "real deprivation of the ultimate remedy" as the plaintiff can ask an arbitrator to remedy the wrong by the award of damages and other relief.

[47] Further, the fact that the plaintiff may be out of time to grieve her claim does not change the essential character of the dispute or give this court jurisdiction over her claim: *De Montigny v. Roy*, 2018 ONSC 858, paras. 45-50; aff'd 2018 ONCA 884 (C.A.). Finally, I make two observations. First, the plaintiff could have filed a duty of fair representation complaint against her union in order to obtain an order from the Labour Relations Board requiring that a grievance be filed by the union in respect of the plaintiff's claim. There is no evidence that she did so. To

find a remedial gap in such circumstances would allow the plaintiff to circumvent and undermine the labour arbitration scheme. Second, under s. 48(16) of the Act, an arbitrator has jurisdiction to extend time limits where there are "reasonable grounds for the extensions" and where the opposing party "will not be substantially prejudiced by the extension". See *Toronto (City) and IAFF (Wilson), Re*, 2017 CarswellOnt 11573 and the cases referred to therein, where an arbitrator extended back many years the time limit for seeking a remedy in respect of harassment.

CONCLUSIONS

[48] For the reasons given, I grant the defendants' motion. This action is dismissed. I encourage the parties to come to an agreement on the question of costs, failing which the defendants shall provide their costs submissions within two weeks, the plaintiffs shall provide their responding cost submissions within three weeks and the plaintiffs shall provide any reply submissions within four weeks. Each submission shall be a maximum of three pages in addition to their Outline of Costs and any Offers to Settle.

Mr. Justice M. D. Faieta

Released: March 8, 2021

CITATION: De Facendis v. Toronto Parking Authority, 2021 ONSC 1695
COURT FILE NO.: CV-18-600206
DATE: 20210308

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

AMANDA CHRISTINA DE FACENDIS

Plaintiff

– and –

TORONTO PARKING AUTHORITY and VITO DITTA

Defendants

REASONS FOR DECISION

Mr. Justice M. D. Faieta

Released: March 8, 2021