CITATION: Andrew Scott v. Community Living Temiskaming South 2021 ONSC 5402
COURT FILE NO.: CV-19-00000017-0000
DATE: 202120210813

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Andrew Scott Plaintiff/Responding Party	Andre Bourdon, for the Plaintiff/Responding Party
– and –	
Community Living Temiskaming South Defendant/Moving Party	Edward J. O'Dwyer, for the Defendant/Moving Party
	Heard: May 20, 2021

REASONS FOR JUDGMENT

KOKE J.

The Motion

[1] The plaintiff, Andrew Scott, was a long-term employee of the defendant, Community Living Temiskaming South ("Community Living") when he received a notice of indefinite layoff from his employer on April 25, 2017. Almost two years later, on April 4, 2019, he commenced this action for wrongful dismissal against his former employer.

[2] Community Living brings this motion claiming the following relief:

a) An order dismissing this action pursuant to Rule 21.01(3)(a) of the *Rules of Civil Procedure* on the basis that the court does not have jurisdiction to hear this action;

b) In the alternative, an order dismissing the action pursuant to Rule 20 on the basis that the action is barred by the two-year limitations period in Section 4 of the *Limitations Act*, 2002.

Background

[3] The plaintiff commenced his employment with Community Living on September 1, 1981, where he held the position of Instructor within the Adult Rehabilitative Centre ("ARC").

[4] From the time he commenced his employment until March of 2015 Mr. Scott was a member of the Ontario Public Service Employees Union, Local 6465 ("OPSEU') bargaining unit and paid union dues. The terms and conditions of his employment were governed by a collective agreement between Community Living and OPSEU.

[5] In early March of 2015 Community Living required an employee to fill a position of Supervisor of ARC Industries. This was a not a bargaining unit position. This position was offered to the plaintiff in a letter addressed to him on March 2, 2015, in which it was described as a "temporary position". Mr. Scott accepted it two days later.

[6] The plaintiff held this non-unionized position for approximately two (2) years. On March 21, 2017 Mr. Scott was informed in writing that Community Living was in the process of implementing a number of changes related to the ARC program and that effective March 27, 2017, his temporary position as supervisor of the ARC program would no longer be required. Accordingly, he would be required to return to the bargaining unit and assume his previous position of Instructor effective March 27, 2017.

[7] On March 27, 2017 Mr. Scott returned to his previous position and once again began paying monthly union dues.

[8] On April 25, 2017, Community Living informed the plaintiff that as a result of a decision by the Ministry of Community and Social Services, the ARC program would be discontinued. As a result, his position as Instructor would be eliminated effective July 1, 2017, following which he would be on indefinite layoff.

[9] Upon being provided with this notice the plaintiff was provided with three options which were available to him as a union employee:

a) He could exercise his bumping rights in displacing another employee;

b) He could accept a severance package, or;

c) He could remain on an indefinite layoff.

[10] The plaintiff did not select option a) or b). As such he remained on an indefinite layoff. His last day of work was June 30, 2017.

[11] On April 4, 2019, the plaintiff commenced this action against Community Living. In his statement of claim he alleged that he was wrongfully dismissed on July 1, 2017, and he claimed punitive and exemplary damages in relation to the dismissal.

[12] On August 26, 2019 Community Living served and filed a notice of motion for a determination of an issue, pursuant to Rule 21.01 (3) (a) of the *Rules of Civil Procedure*. In its motion material it asked the court for an order dismissing the wrongful dismissal action on the basis that the court lacked jurisdiction to decide a wrongful dismissal action involving a unionized employee.

[13] On October 9, 2019, the plaintiff asked for an adjournment of the motion so that he could conduct a cross-examination. Community Living consented to the plaintiff's request.

[14] The plaintiff did not schedule cross-examinations but on January 13, 2020 he filed an amended statement of claim, to allege, for the first time, that he was *constructively* dismissed from his non-union position on March 21, 2017, when Community Living notified him that he was being transferred from his non-unionized role back to his former bargaining unit position.

The Issues

[15] There are two issues to be decided on this motion:

a) Is the plaintiff's claim for constructive dismissal from his management position untimely and statute barred?

alternatively,

b) Does this court have jurisdiction to hear Mr. Scott's claim for wrongful dismissal from his unionized position?

Analysis

1. The Constructive Dismissal Issue (Rule 20):

[16] The defendant submits that there is no genuine issue requiring a trial because the plaintiff's constructive dismissal claim is statute-barred by the two-year limitation period set out in the *Limitations Act, 2002.*

[17] The plaintiff submits that the issues and disputed facts are not the proper subject of a summary judgment motion. According to the plaintiff, the facts governing this matter are in serious dispute and discoveries have not yet been held.

[18] With respect to the limitation period issue, the plaintiff argues that July 1, 2017 (the first day of his indefinite layoff) is the appropriate commencement date (or "discoverability" date) to use in calculating the two-year limitation period. Accordingly, the limitation period for the claim did not expire until July 1, 2019. Since the statement of claim was issued on April 4, 2019, the plaintiff's constructive dismissal claim does not fall outside of the two-year limitation period.

[19] In support of its position the plaintiff submits that "the definition of constructive dismissal is when an employee *resigns* because of a breach of their employment contract by their employer." [emphasis added]: See paragraph 12 of the plaintiffs responding factum.

[20] The defendant argues that the commencement date for the limitation period of the constructive dismissal claim is March 27, 2017. This is the date that Mr. Scott resumed his former unionized position.

[21] The defendant further argues that since the plaintiff did not amend his statement of claim to include the claim for constructive dismissal until January 13, 2020, the action to enforce the constructive dismissal claim was commenced more than 9 months after the expiry of the limitation period, which had expired on March 27, 2019. In any event, the original unamended statement of claim was issued on April 4, 2019 and therefore the original claim was also issued more than 2 years after the commencement date of the constructive dismissal claim.

[22] In response to the employer's argument that the date the statement of claim was amended marks the date the action for constructive dismissal was commenced, Mr. Scott submits that the amendment adding the constructive dismissal claim did not constitute a new and discrete cause of action and did not alter the nature of the claim but arose from the core factual nexus of the wrongful dismissal matter. Also, the amendment falls squarely within the contemplated amendments permitted routinely pursuant to Rule 26 of the *Rules of Civil Procedure*, and the amendments were made before the plaintiff had filed its statement of defence.

Discussion

The Test on a Motion for Summary Judgment

[23] In *Hryniak v. Mauldin*, 2014 SCC 7 ("*Hryniak*").the Supreme Court of Canada ruled on the proper interpretation of the new summary judgment rule, which came into force in 2010. The Court confirmed that the new rule makes summary judgment appropriate in a wide number of cases, and granted a motion judge the ability to use new powers to weigh evidence, evaluate credibility and draw reasonable inferences. The Supreme Court noted that such a "shift in culture" is needed to recognize summary judgment as a significant alternative model of adjudication.

[24] The court in *Hryniak* held that on a motion for summary judgment, the motion judge must first determine if there is a genuine issue requiring a trial based only on the evidence before the judge and without using the judge's new fact-finding powers. There will be no genuine issue requiring trial if the summary judgment process provides the motion judge with the evidence required to fairly adjudicate the dispute and is a timely, affordable and proportionate procedure within the meaning of Rule 20.04(2)(a). If there appears to be a genuine issue requiring trial, the judge then may determine whether the need for a trial can be avoided using the new powers. (*Hryniak* at para. 66)

[25] I find that this is not a case in which the court needs to exercise its new powers in the second step of the test. The facts on which the parties rely do not raise serious concerns of credibility, inferences to be drawn or evidence to be weighed. The question at issue on this motion simply requires the Court to determine whether the plaintiff's claim of constructive dismissal is timely. The evidence in support of this issue is uncontradicted and available in the documents provided by the parties, as well as in their supporting affidavits. I find therefore that this is an appropriate case for adjudication of the limitation issue by applying Rule 20.

Is the Plaintiff's Claim Statute-Barred by the Limitations Act?

[26] The *Limitations Act, 2002* sets out the basic two-year limitation period: See Section 4, *Limitations Act 2002,* S.O. 2002, c. 24, Sched. B.

[27] With respect to the issue of when a limitation period begins to run in a constructive dismissal action, the decision of this court in *Bagnulo v. Complex Services Inc.,* 2011 ONSC 5506 at para. 44 ("*Bagnulo*") is authority for the proposition that when a constructive dismissal arises from a change of position, the limitations period starts to run from the *date of the change in position*. [emphasis added]

[28] I accept the analysis and conclusion of the court in *Bagnulo* and in my mind it applies to the circumstances of this case.

[29] Mr. Scott was given notification on March 21, 2017 that he was to be transferred out of his temporary position and back into the bargaining unit, effective March 27, 2017. This transfer constituted a change in position. I find therefore that based on the dicta of Matheson J. in *Bagnulo*, the limitation period for Mr. Scott's claim for constructive dismissal began to run on March 27, 2017 when the change went into effect.

[30] In the context of a claim for constructive dismissal, the limitation period may also begin to run from when the plaintiff accepts that the employment contract was repudiated by the employer: See *Bambury v. Royal Bank of Canada,* 2011 ONSC 2840 at paras 32 and 36; *Penteliuk v. CIBC World Markets, Inc,* 2014 ONSC 2105 at para 261.

[31] There can be little doubt as to when the plaintiff accepted that his employment contract was repudiated. Repeatedly, in the sworn evidence which he provided in response to this motion he indicated that he considered himself to have been constructively dismissed when he was transferred back into the bargaining unit in March of 2017.

[32] Not only did the plaintiff swear that he was constructively dismissed in March of 2017, he also swore that he took actions to mitigate his damages in response to the alleged constructive dismissal. This reinforces the conclusion that he accepted that his employment contract was repudiated by Community Living. In his affidavits, he swore:

> It was always my intention to commence an action in Superior Court for Ontario against CLTS for the dismissal from supervisor of ARC. I continued working because the law of wrongful dismissal in Ontario is that one must mitigate loss of income damages after a wrongful dismissal: affidavit of Andrew Scott, motion record of the responding party, Tab 1 at para 23.
>
> In March and April 2017, I did object to the termination of my position as Supervisor. I continued to work for the defendant in order to mitigate my damages: See affidavit of Andrew Scott, supplemental motion record of the responding party, tab 1 at para 6.

[33] With respect to the plaintiff's efforts to mitigate his losses arising from the alleged constructive dismissal, mitigation cannot toll the limitation period. There is no bar to the plaintiff to taking steps to limit his losses and commencing an action at the same time. Actions

taken by the plaintiff to mitigate his losses are therefore entirely irrelevant to when he discovered his losses and when the limitation period began to run: See *Webb v. TD*, 2016 ONSC 7153 at para 154; *Devincenzo v. Moir*, 2017 ONSC 5122 at para 37.

[34] In summary, the efforts by the plaintiff to mitigate his alleged losses are only relevant to the extent that they confirm that he was aware of his claimed losses in March of 2017.

[35] I note that in his amended statement of claim the plaintiff also admits he was terminated in March 2017. He does not raise any discoverability arguments. He states:

> 7. On or about March 2, 2015, the plaintiff was promoted to a management position. The defendant advised the plaintiff that the position was permanent.
>
> 8. On or about March 21, 2017, the defendant constructively dismissed the plaintiff from the management position referred to in paragraph 7 above.
>
> 9. In order to mitigate his damages, as of March 21, 2017, the plaintiff continued to work for the defendant at a lesser wage: see motion record of Community Living, tab 3 at paras 8-9.

[36] In conclusion, I find that it is abundantly clear, by virtue of his own sworn evidence, that Mr. Scott *discovered* that he was allegedly constructively dismissed in March of 2017. Not only was he aware that he was allegedly constructively dismissed at that time, his evidence is that he objected and took actions in response to the alleged constructive dismissal to mitigate his losses by accepting the bargaining unit position effective March 27, 2017.

[37] With respect to the plaintiff's argument that the January 13, 2020 amendments were not advancing a new and discrete cause of action but arose from the core factual nexus of the wrongful dismissal matter I disagree.

[38] I note that there is no reference in the original statement of claim to the following facts.

a) That on March 2, 2015 Mr. Scott was promoted to a management position;

b) That on March 21, 2017 he received a written notice that effective March 27, his non-union management position would end and that he was being transferred to his former unionized position as an instructor effective March 27, 2017.

c) That effective March 27, 2017 his pay would be reduced.

d) That effective March 27, 2017 he accepted his employer's transfer and commenced working in his former position.

[39] In my view these facts are essential and material to a finding of constructive dismissal in the circumstances of this case. The only reference in the original statement of claim pertaining to Mr. Scott's termination are set out in paragraph 7 of the original statement of claim which states:

> 7. The defendant terminated the plaintiff's employment without notice or cause on July 1, 2017.

[40] In summary, I find that the substantive facts necessary to advance the plaintiff's claim for constructive dismissal were absent in the original statement of claim. These facts were discoverable at the time this claim was issued. The amendments therefore comprised a new and discrete cause of action, which was brought more than 2 years and nine months after the facts giving rise to the constructive dismissal action were available to the plaintiff.

[41] In conclusion, I find that if the plaintiff was constructively dismissed, he discovered this on March 27, 2019 when the change to his employment status went in effect. The two-year limitation period governing this claim therefore expired prior to both the date the original statement of claim was issued (April 4, 2019) and prior to the date the statement of claim was amended to include the claim for constructive dismissal (January 13, 2020).

The Jurisdictional Issue (Rule 21.01(3) (a))

[42] Mr. Scott received a letter from his employer on April 25, 2017 informing him that his position as Instructor would be eliminated effective July 1. 2017. He was a dues paying member of OPSEU at the time.

[43] In determining whether the court has jurisdiction to hear the wrongful dismissal claim, the intention of the legislation governing the parties must be considered.

[44] The Ontario *Labour Relations Act* S.O. 1995, c. 1, Sched. A, ("*LRA*") expressly provides for the resolution of disputes arising under a collective agreement through arbitration. Section 48(1) of the *LRA* states:

> 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.

[45] This exclusive jurisdiction model is also reinforced by the language of the *Rights of Labour Act*, R.S.O. 1990, c. R. 33, specifically section 3(3), which states:

> 3(3) A collective bargaining agreement shall not be the subject of any action in any Court unless it may be the subject of such action irrespective of this Act or the Labour Relations Act.

[46] The combined effect of these sections is to preclude court actions relating to claims arising under the collective agreement and restrict the remedies available in these cases to those found in the collective agreement or the LRA.

[47] As Valin J. noted in *Thorne v. Mutual Life of Canada and Ontario Hospital Association,* [2004] OJ No 3971 (QL) at para. 14:

> I conclude from the statutory provisions referred to in these reasons [s. 48(1) LRA and s. 3(3) Rights of Labour Act] that this court has no jurisdiction to interpret a

> collective agreement. In addition, there is an abundance of jurisprudence which clearly establishes the proposition that, where an issue arises between an employee covered by a collective agreement and an employer also covered by that agreement, the employee must resort to the grievance process under the collective agreement and has no recourse to the courts.

[48] The applicable legislation provides that disputes arising *out of the interpretation, application or violation* of a collective agreement are within the exclusive jurisdiction of arbitrators. [emphasis added]

[49] The Supreme Court of Canada noted the following in *Weber v. Ontario Hydro,* [1995] 2SCR 929 at para. 58 ("*Weber*"):

> 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]

[50] The Supreme Court of Canada confirmed this test and its underlying principles, in *Allen v. Alberta*, [2003] 1 SCR 128, at para. 15, as follows:

> 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.

[51] In summary, the *essential character* of the dispute is the key consideration for the determination of whether a labour arbitrator has exclusive jurisdiction over a dispute. The court has no jurisdiction to consider claims arising out of the rights created by a collective agreement. Nor does the court have "overlapping" or "concurrent" jurisdiction. See: *Weber supra* at para. 43, 45 and 58; *Brown v. University of Windsor*, 2016 ONCA 431 (CanLII) at paras. 45 and 48. [emphasis added]

[52] In my view, the plaintiff's wrongful dismissal claim arising from the notice he received on April 25, 2017 is entirely connected with his employment with Community Living - the terms and conditions of which are governed by a comprehensive collective agreement. Accordingly, I accept the employer's position that in this case, the substance and essential character of the dispute brings this claim within the exclusive jurisdiction of an arbitrator.

[53] Also, I find that in the circumstances of this case all of the damages claimed by the plaintiff are directly related to either his allegation of wrongful dismissal, or his untimely allegations of constructive dismissal which are discussed above. In his amended statement of claim, the plaintiff specifically alleges at paragraph 14:

> 14. In or around the time of his wrongful dismissal, the defendant behaved in a cold, calculating, callous and unreasonable manner towards the plaintiff. The defendant intentionally inflicted psychological harm on the plaintiff. As a direct result of the defendant's actions towards the plaintiff he suffered from depression, anxiety, stress, low self-esteem and his family life has been greatly affected. In addition to damages for emotional suffering, such actions by the defendant also call for punitive and exemplary damages.

[54] Jurisdiction is not conferred on the courts by virtue the particular heads of damages claimed, but rather the essential nature of the dispute. As noted by Justice Pomerance in *Coleman v. Demers*, 2007 ONSC 7526 at para 22 *("Coleman").*

> 22. In this case, the claims against the employer and trade union are broadly framed and include allegations of constructive dismissal, intentional infliction of mental suffering, and conspiracy. However, jurisdiction does not depend on the semantics of the debate. The analysis must hinge on the "essential character" of the claim. Creative language cannot confer jurisdiction. Labels aside, the core question is whether, on an objective analysis of the facts, the dispute arises either expressly or inferentially out of the terms of the collective agreement.

[55] It is further irrelevant whether the plaintiff was consulted, or even aware, about the terms of his return to the bargaining unit. Rather, so long as the position of the plaintiff fell within the scope clause of the collective agreement, the Plaintiff was bound by the collective agreement. See: *University of Toronto v. C.U.P.E., Local 3902*, [2009] O.L.A.A. No. 44 at paras 29-30.

[56] The scope clause of the Community Living Collective Agreement reads:

> The Employer recognizes the Ontario Public Service Employees Union as the sole and exclusive bargaining agency for employees of the Community Living Temiskaming South, save and except Supervisors, persons above the rank of Supervisor, Administrative Assistant and Supervisor/General Administration.

[57] In this case, the Plaintiff was temporarily placed outside of the scope clause of the collective agreement when he held a temporary, non-unionized managerial position from March of 2015 to March 27, 2017. As soon as the Plaintiff lost his supervisory status (which occurred on March 27, 2017), he once again fell within the ambit of the collective agreement scope clause and was a member of the bargaining unit.

[58] I note that even if there is a valid dispute as to whether the essential nature of the dispute in this case falls within the scope clause of the collective agreement, a labour arbitrator, and not the courts, has jurisdiction to decide whether the Plaintiff is bound by the collective agreement. See: *Claxton v. BML Multi Trades Group Ltd.* [2003] O.J. No. 3882 (ON CA) at paras 15-16.

[59] In conclusion, I find that the essential character of the wrongful dismissal dispute arising from the notice informing the plaintiff that his position would be terminated effective July 1, 2017 arises squarely from the collective agreement and therefore this Court does not have jurisdiction to hear this action.

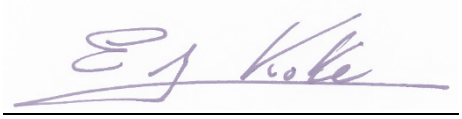
Decision

[60] The plaintiff initially brought a claim against the defendant in the Superior Court for wrongful dismissal. The alleged dismissal occurred while he was employed in a unionized position with his employer. I have found that the court has no jurisdiction to hear that claim. The plaintiff then proceeded to amend his claim by alleging that he was constructively dismissed at an earlier time, while employed with the defendant in a non-union position. I have found that this claim was brought outside of the 2-year limitation period which governs such claims.

[61] In view of the above findings I am ordering that this action be dismissed since there are no further issues which require a trial.

Costs

[62] In the event the parties cannot agree on costs, they can file written submissions with this court within 14 days. Such submissions are to be no longer than 4 pages in length, exclusive of attachments. Following the delivery of the submissions, they have 7 days to respond to each other's submissions by filing reply submissions, to be no longer than one page.



Justice E.J. Koke

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