SUPREME COURT OF YUKON

Citation: *Krafta v. Densmore*, 2013 YKSC 119

Date: 20131129
S.C. No. 12-A0021
Registry: Whitehorse

Between:

Linda Krafta

Plaintiff

And

Jenelle Densmore, John Doe, Yukon Hospital Corporation carrying on business as Whitehorse General Hospital

Defendants

Before: Mr. Justice R.S. Veale

Appearances:

Brent Olthuis	Counsel for the Plaintiff
Larry R. Jackie	Counsel for the Defendants Jenelle Densmore and Yukon Hospital Corporation carrying on business as Whitehorse General Hospital

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is a summary trial application by the defendants for an order that Ms. Krafta's claim for invasion of privacy be dismissed on the ground that the claim arose in the workplace in the context of a collective agreement and should be resolved under that collective agreement rather than in this Court.

[2] Ms. Krafta claims that her confidential health records were accessed by Ms. Densmore on Ms. Densmore's computer or by another person accessing the information on Ms. Densmore's unattended computer.

[3] The Court must determine the essential nature of the dispute and whether it expressly or inferentially arises out of the provisions of the Collective Agreement.

[4] The matter is set for a five-day trial.

BACKGROUND

[5] There is no disagreement about the general factual context in which the dispute arose although Ms. Densmore denies that she accessed Ms. Krafta's confidential health records at any time.

[6] At all relevant times, Ms. Krafta and Ms. Densmore were employees of the Yukon Hospital Corporation (the "Hospital"). They were employed as operating room booking clerks and shared a one-room office in the Hospital. The office is not publicly accessible and the office door is locked outside office hours and over the lunch hour. Both Ms. Krafta and Ms. Densmore have keys to the office door.

[7] Employees of the Hospital, including Ms. Krafta and Ms. Densmore, sign the Whitehorse General Hospital ("WGH") Statement of Confidentiality Agreement which includes the following:

…

> 2. At all times, I shall respect the privacy and dignity of patients, employees and all associated individuals.
>
> 3. I shall treat all WGH hospital information, in any form (electronic, paper documents, verbal), as confidential, and will protect it to ensure full confidentiality. I shall not access, alter, copy, interfere with, destroy, take or discuss hospital information unless it is for the sole purpose of performing the duties of my position or except as authorized in hospital policy or legislation. I will ensure that I will only access and utilize hospital information for hospital purposes.

4. I understand that the WGH Information System is monitored and audit trails are conducted periodically to ensure that WGH users are compliant with this agreement. I understand that unauthorized access to information is strictly forbidden and will result in disciplinary action.

5. I have been provided with a copy of the ***Appropriate Use of WGH Information Systems*** policy. I will keep my USER ID and PASSWORD confidential. If I have reason to believe that the confidentiality of my password has been violated, I will contact the Information Systems (IS) department immediately for reassignment of a new password.

6. When logged on to a WGH computer, I will never leave the computer unattended, as other parties may then access confidential information using my access privileges.

7. I understand and agree to:

   (a) abide by the conditions outlined in this agreement; and
   (b) that confidentiality is a condition of my employment/service/association. I also understand that should any of these conditions be breached, I may be subject to corrective action such as loss of privileges up to and including termination of employment/service/association in addition to legal action by the Hospital and/or others.

8. Prior to releasing any information to any person or entity I will ensure that a properly signed consent form to release information has been provided. If no such consent form has been provided I will not release any information without specific written authorization from my Department Head.

[8] Ms. Krafta saw her doctor about a suspected pregnancy on September 8, 2011.

The doctor gave her a “dating ultrasound” to determine if she was pregnant.

[9] Ms. Krafta was very concerned about her privacy with respect to the possible pregnancy. She states that Ms. Densmore saw her at medical imaging where the dating ultrasound was performed.

[10] Ms. Krafta states that on or about September 16, 2011, Ms. Densmore asked her if she was pregnant. Ms. Krafta was taken aback and denied that she was.

[11] Ms. Krafta states that Ms. Densmore used Ms. Densmore's computer to access the confidential health records of Ms. Krafta or, in the alternative, left her computer unattended and a third person used Ms. Densmore's computer and informed Ms. Densmore about Ms. Krafta's confidential health records and the fact that Ms. Krafta was seeing health professionals about a pregnancy.

[12] Ms. Krafta also states that Ms. Densmore told other hospital employees about her possible pregnancy.

[13] On October 6, 2011, Ms. Krafta made a written complaint to "WGH HR" setting out her specific allegations.

[14] The Hospital conducted an investigation of Ms. Krafta's complaint pursuant to Article 26 of the Collective Agreement. She contacted her union representative in December 2011, complaining about the delay in reaching a decision on "the investigation regarding a possible confidentiality breech (sic)".

[15] By letter dated January 18, 2012, Ms. Densmore was informed that Ms. Krafta's personal health records were accessed from Ms. Densmore's computer which had been left unattended. This letter stated that the evidence did not support that Ms. Densmore had accessed Ms. Krafta's records but she was advised to ensure that her computer was not left unattended and the letter was placed on her employee file.

[16] Ms. Krafta received a letter on the same date confirming that her personal health records had been accessed from Ms. Densmore's computer on September 16 and 19, 2011, but there was not enough evidence to establish that the records were accessed by Ms. Densmore or any other employee. The letter concluded that "the allegation of a breach of confidentiality could not be substantiated."

[17] Ms. Krafta has always maintained that her complaint is a patient complaint and a violation of her privacy rather than a workplace dispute. Ms. Krafta and Ms. Densmore have not worked together since September 22, 2011.

[18] On January 23, 2012, Ms. Densmore filed a formal complaint against Ms. Krafta alleging that she had been the subject of harassment from Ms. Krafta since 2009. On May 23, 2012, Ms. Krafta was informed that some of her behaviour towards Ms. Densmore was "inappropriate and unprofessional."

THE LAW

[19] In *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 ("*Weber*"), and *New Brunswick v. O'Leary*, [1995] 2 S.C.R. 967 ("*O'Leary*"), the Supreme Court of Canada set out the test to determine when parties who have agreed to settle their differences by arbitration under a collective agreement may sue in court. The test is commonly referred to as the Weber analysis. In *Weber*, the Court considered the concurrent, the overlapping, and the exclusive jurisdiction models. The Court settled on the exclusive jurisdiction model, stating that if a dispute arises from the collective agreement, the claim must proceed by arbitration and the courts have no power to entertain an action in respect of that dispute (paras. 50 and 58), subject to a residual discretion.

[20] The Weber analysis is two-fold and is set at para. 52:

1. What is the essential character of the dispute, not the legal framework in which the dispute is framed?
2. Does the dispute, in its essential character, arise from the interpretation, application, administration or violation of the collective agreement?

[21] In *O'Leary*, McLachlin J., as she then was, stated, at para. 3, that the courts lack jurisdiction to entertain a dispute between parties which arises out of a collective agreement, subject to a residual discretionary jurisdiction in courts of inherent jurisdiction to grant relief not available under the statutory arbitration scheme.

[22] Weber was an employee of Ontario Hydro who was on an extended leave of absence and receiving sick benefits. The employer thought he was malingering and sent investigators who, through false pretences, gained entry into his home. As a result of information obtained, Weber was suspended. Weber grieved and his claim was settled. He then filed a court action based on torts which included trespass, nuisance, deceit, invasion of privacy and a breach of his *Charter* rights.

[23] The Court decided that although the conduct complained of might fall outside the scope of employer – employee relations, the collective agreement expressly referred to the sick leave benefits and Article 2.2 extended the grievance procedure to "unfair treatment or any dispute arising out of the content of this Agreement …" Thus, Hydro's actions were expressly subject to the grievance procedure (para. 73) and the court action was dismissed.

[24] In the companion case, *O'Leary*, an employee, was sued in court by the New Brunswick Government for damages arising out of driving their leased vehicle with a flat tire. The court found that the essence of the dispute concerned the preservation of the

employer's property and equipment which was required by the collective agreement. Thus, the Court concluded that the employer was inferentially empowered to claim for breaches under the agreement. The employer's court action was struck but the employer was entitled to grieve its damages under the collective agreement.

[25] In the subsequent case of *Regina Police Association Inc*. v. *Regina (City) Board of Police Commissioners*, 2000 SCC 14, a police officer resigned rather than face disciplinary action. He later withdrew his resignation and the Chief of Police refused to accept the withdrawal. The police officer grieved, but the arbitrator concluded she did not have jurisdiction because discipline and dismissal matters were governed by the *Saskatchewan Police Act,* S.S. 1990-91, c. P-15.01.

[26] The Court concluded that the factual basis of the dispute was a matter of discipline which was not governed by the collective agreement but inferentially by the *Police Act*. Accordingly, jurisdiction to decide the dispute lay with the Saskatchewan Police Commissioner and not the arbitrator.

THE ISSUES

[27] The issues to be determined are:

1. Is this issue of jurisdiction of the court suitable for determination by summary trial?
2. What is the essential character of the dispute?
3. Does the dispute expressly or inferentially arise from the interpretation, application, administration or violation of the Collective Agreement?

ANALYSIS

Issue 1: Is this issue of jurisdiction of the court suitable for determination by summary trial?

[28] The summary trial procedure sets out in Rule 19(12) that the court can grant judgment in favour of any party unless the court is unable to find the necessary facts or that it would be unjust to decide the issue.

[29] Counsel for Ms. Krafta acknowledges that the necessary facts are available but submits that the summary trial adds unnecessary cost to the litigation and is a species of "litigation in slices" which hinders the hearing of the matter in a just, speedy and inexpensive way. *Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Ltd.*, 2002 BCCA 138, is an example of a summary trial on questions of law that are not suitable for summary disposition.

[30] On the other hand, *Speckling v. Communications, Energy and Paperworkers' Union of Canada,* 2005 BCSC 349, addressed the question of whether the court or the Board had jurisdiction over the claims in summary trial. In that case, Gerow J. found that it was appropriate to do a Weber analysis (para. 30) as it would resolve the threshold issue of whether the court had jurisdiction before proceeding to assess the merits of the claim.

[31] I conclude that this issue is appropriate for summary trial as it will determine whether a trial on the merits is necessary at all. In the event that a trial is necessary, the summary trial will dispose of an issue that would no longer need to be addressed at trial.

Issue 2: What is the essential character of the dispute?

[32] In the case at bar, both Ms. Krafta and Ms. Densmore are employees of the Hospital, and are bound by the same Confidentiality Agreement required to be signed by their employer. At the time in question, they worked in the same office. All the anguish and distress alleged by Ms. Krafta arose from incidents in the workplace.

[33] Ms. Krafta brought a complaint to the Hospital which was addressed by a letter of reprimand being placed on Ms. Densmore's file. The letter stated that the evidence did not support Ms. Krafta's complaint that Ms. Densmore had accessed Ms. Krafta's confidential health records although it indicated that Ms. Densmore had improperly left her computer on and unattended.

[34] Ms. Krafta did attempt to cast the matter as a patient's confidentiality of health records. Nevertheless, I find that the essential character of the dispute is a workplace dispute. The focus is on the use of a computer owned by the Hospital and used by an employee allegedly to access confidential health records about another employee. The Confidentiality Agreement, prepared by the Hospital and signed by the employees, is a workplace document under the Collective Agreement. The legal characterization of the dispute as an invasion of privacy does not change what is in all the factual circumstances a workplace dispute.

Issue 3: Does the dispute expressly or inferentially arise from the interpretation, application, administration or violation of the Collective Agreement?

[35] Article 28.06 of the Collective Agreement specifies that an arbitrator has all the power and authority conferred by the *Canada Labour Code*, R.S.C. 1985, c.-L 2.

[36] The *Canada Labour Code* sets out a comprehensive scheme for the resolution of disputes between employers and employees bound by a collective agreement:

> *Provision for final settlement without stoppage of work*
>
> 57. (1) Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or employees bound by the collective agreement, concerning its interpretation, application, administration or alleged contravention.
>
> …
>
> *Decisions not to be reviewed by court*
>
> 58. (1) Every order or decision of an arbitrator or arbitration board is final and shall not be questioned or reviewed in any court.

[37] The Collective Agreement between the Hospital and its workers contains a comprehensive code governing the relationship between the employer and employees whose purpose is set out as follows:

> **ARTICLE 1 PURPOSE OF AGREEMENT**
>
> 1.01 The purpose of this Collective Agreement is to maintain harmonious and mutually beneficial relationships between the Employer, the employees, and the Union, to set forth certain terms and conditions of employment relating to pay, hours of work, employee benefits, and general working conditions affecting employees covered by the Collective Agreement and to ensure that all reasonable measures are provided for the safety and occupational health of the employees. (my emphasis)
>
> …

[38] The Collective Agreement has specific sections dealing with Discipline and Grievances:

ARTICLE 26 DISCIPLINE

26.01 The parties agree that the Employer has the right to discipline and discharge for just cause. The purpose of discipline is corrective as opposed to punitive.

26.02 (a) When an employee is disciplined, the Employer will meet with the employee to explain the reasons for the disciplinary action, before imposing the discipline. In cases where the Employer intends to impose on the employee a written reprimand, suspension, or discharge, the Employer will provide written reasons for the disciplinary action.

…

[39] The investigation of Ms. Krafta's complaint followed the procedure set out in Article 26.

[40] Although Ms. Krafta did not pursue the filing of a grievance, that procedure is provided for in Articles 27 and 28 as follows:

ARTICLE 27 PROCESSING OF GRIEVANCES

27.04 (a) Subject to (b) following, an employee who feels that he/she has been treated unjustly or considers himself/herself aggrieved by any action or lack of action by the Employer, is entitled to present a grievance in the manner prescribed in Clause 27.02.

(b) Where there is an alternative administrative or statutory process through which the employee is entitled to pursue a complaint, then the employee may choose between that alternative process and this grievance procedure. The employee is not entitled to a duplication of process.

…

27.18 Where an employee has presented a grievance up to and including Level 2 in the grievance procedure, and the grievance has not been dealt with to the employee's satisfaction, he/she may refer the

grievance to arbitration in accordance with the arbitration procedure specified in this Agreement.

…

ARTICLE 28 ARBITRATION PROCEDURE

…

28.06 The arbitrator shall have the authority and powers conferred by the Canada Labour Code, including the authority to determine whether a matter is arbitrable under this Agreement. The arbitrator shall not have the authority to change, modify or alter any of the terms of this Agreement. This does not preclude the arbitrator from substituting a lesser penalty in discipline matters, or reinstating a discharged employee.

28.07 The award of the arbitrator is final and binding upon the parties.

…

[41] The courts have long recognized that labour relations is a field of specialized expertise and gives deference to labour arbitrators. See *Vaughan v. Canada,* 2005 SCC 11. However, the wording of Article 27.04 (a) referring to “any action or lack of action by the Employer” is broad. I will return to the interpretation of Article 27.04(b) below.

[42] The Collective Agreement also contains Articles related to Harassment and Safety and Health.

ARTICLE 13 HARASSMENT

13.01 (a) The Employer, the employees and the Union recognize the right of all persons employed at the hospital to work in an environment free from unwanted personal harassment, sexual harassment or abuse of authority, and agree that any of the

aforementioned actions will not be tolerated in the workplace.

(b) Cases of proven personal harassment, sexual harassment or abuse of authority by a person employed in the hospital is (sic) considered a disciplinary infraction and will be dealt with as such.

13.02 (a) Personal harassment means any improper behavior by a person employed in the hospital that is directed at and offensive to another person employed in the hospital, and which the first person knew or ought reasonably to have known would be unwelcome. Personal harassment comprises objectionable conduct, comment or display that demeans, belittles or causes personal humiliation, or embarrassment to the recipient. This includes harassment as described in Section 14 of the Yukon Human Rights Act.

…

ARTICLE 29 SAFETY AND HEALTH

29.01 The Employer shall continue to make all reasonable provisions for the occupational safety and health of employees. The Employer will welcome suggestions on the subject from the Union and the parties, and undertake to consult with a view to adopting and expeditiously implementing reasonable procedures and techniques designed or intended to reduce the risk of employment injury. Employees shall make every reasonable effort to reduce and obviate risk of employment injury.

…

[43] In my view, the wording of the Collective Agreement, and particularly the Harassment Article, while not expressly referring to invasion of privacy, does inferentially include the actions of Ms. Densmore and others in commenting in the workplace on Ms. Krafta's apparent pregnancy. The conduct complained of is included

in the wording “unwanted personal harassment” which includes comments that cause “embarrassment”.

[44] In *Ferreira v. Richmond (City)*, 2007 BCCA 131, the employee complained that he had been harassed in many abhorrent ways on the job, became ill and could not work. The harassment was apparently in retaliation for whistleblowing. Despite the fact that the collective agreement made no provision for whistleblowing or that the employer should provide a harassment-free work environment, the court held that the dispute fell inferentially within the ambit of the collective agreement (para. 67).

[45] Similarly, in *Giesbrecht v. McNeilly,* 2008 MBCA 22, Giesbrecht alleged that his co-workers and managers harassed him to the point of intentional or negligent infliction of mental suffering. In that case, the court found that a provision of the collective agreement “to make provision for the safe and healthful working conditions of employees” was broad enough to encompass a grievance for the complaints (para. 54).

[46] I now turn to the question of whether Article 27.04(b) can be invoked by Ms. Krafta to include this court action as an “alternative administrative or statutory process” permitting the employee to choose between this court and the grievance procedure. This issue was not addressed in the initial written submissions of counsel but was addressed orally by counsel for Ms. Krafta. As a result, I permitted further written submissions on the issue.

[47] Again, Article 27.04(b) states:

> (b) Where there is an alternative administrative or statutory process through which the employee is entitled to pursue a complaint, then the employee may choose between that alternative process and this grievance procedure. The employee is not entitled to a duplication of process.

[48] Counsel for the plaintiff submits that Article 27.04(b) must be interpreted as being part of the Collective Agreement and relevant to whether the essential character of the dispute falls within the ambit of this particular Collective Agreement.

[49] Secondly, counsel for the plaintiff submits that Article 27.04(b) creates a non-exclusive grievance procedure that permits the plaintiff to choose an alternative administrative or statutory process.

[50] Thirdly, counsel for the plaintiff submits that the Supreme Court of Yukon is a statutory creature to the extent that there is a *Supreme Court Act,* R.S.Y. 2002, c. 211, which discusses the jurisdiction of the court as a superior court of record. Counsel further submits that "statutory process" encompasses any claim brought pursuant to a statutory authority such as defamation under the *Defamation Act*, R.S.Y. 2002, c. 52.

[51] I agree with the submission that Article 27.04(b) must be considered in the determination of whether this dispute is within the ambit of this particular Collective Agreement. I also am of the view that the Weber analysis did not purport to completely preclude the jurisdiction of the courts but rather determined that, when the essential character of a dispute arises expressly or inferentially out of the interpretation, application, administration or violation of a collective agreement, deference should be given to the collective agreement process. However, courts of inherent jurisdiction have a residual discretionary jurisdiction to grant relief not available under the statutory arbitration scheme (*O'Leary*, para. 3).

[52] In my view, the reference to "alternative administrative or statutory process" does not mean a superior court of record but refers to any other administrative tribunal with the jurisdiction to hear disputes specifically assigned to it by the statute. It refers to

human rights or workers' compensation legislation which creates an administrative and adjudicative process to hear disputes that come within the particular statutory mandate.

[53] Article 27.04(b) states that the employee must be "entitled" to choose between that alternative process and the grievance procedure. That entitlement can only be based on the existence of an "alternative administrative process" or some other "statutory process", in other words, a statute that confers administrative responsibilities. In any event, the Supreme Court of Yukon is a superior court of inherent jurisdiction and not one that operates only with respect to delegated administrative or statutory processes.

[54] I agree with the submission of counsel for the defendants that Article 27.04(b) provides an alternative procedure to the Collective Agreement where the statutory body has concurrent jurisdiction.

[55] The Weber analysis ousts the jurisdiction of the courts in this labour dispute but it does not oust the jurisdiction of statutorily created tribunals.

CONCLUSION

[56] I conclude that the dispute between the plaintiff and defendants is, in its essential character, a workplace dispute within the ambit of this Collective Agreement.

[57] The Supreme Court of Yukon has no jurisdiction to decide this particular dispute.

[58] Costs may be spoken to in case management, if necessary.

VEALE J.