Federal Court Cour fédérale

Date: 20240122

Docket: T-2011-22

Citation: 2024 FC 96

Toronto, Ontario, January 22, 2024

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

ANATOLIY KONTEFT

Plaintiff

and

LOWER LAKES TOWING LTD.

Defendant

REASONS AND ORDER

I. INTRODUCTION

[1] By a statement of claim issued on October 3, 2022, Mr. Anatoliy Konteft (the "Plaintiff") commenced an action against Lower Lakes Towing Ltd. (the "Defendant"), seeking the following relief:

a) Damages of $250,000.00 for wrongful dismissal;

b) Signing bonus of $15,000;

c) Severance pay of $13,661.48;

d) Unjust termination wage of $9,758.20;

c) prejudgment interest as a head of damages under Canadian Maritime Law, or alternatively under the *Interest Act* RSC 1985 c. I -18;

d) post judgment interest under the *Federal Courts Act*;

e) Costs of this action, plus HST,; and

f) such other and further relief as this Honourable Court may deem just.

[2] By a notice of motion filed on January 16, 2023, the Defendant now seeks to stay this action with prejudice.

[3] The Defendant filed an amended notice of motion on February 9, 2023, seeking to strike the Plaintiff's statement of claim without leave to amend as an alternative form of relief:

a) an order staying this action, with prejudice, as this Honourable Court does not have jurisdiction in respect of this matter;

b) in the alternative, an order staying this action, with prejudice, as this action was commenced outside of the applicable limitation period;

c) in the further alternative, an order staying this action, with prejudice, as the parties agreed to the adjudication of any dispute in respect of these matters in another forum;

d) in the further alternative, an order striking the Statement of Claim, without leave to amend, as this Honourable Court does not have jurisdiction in respect of this matter and/or the parties agreed to the adjudication of any dispute in respect of these matters in another forum;

e) costs of this motion on a substantial indemnity basis; and,

> f) such further or other order as to this Honourable Court may seem just.

[4] In support of its motion, the Defendant filed the affidavit of its Director of Human Resources, Mr. Kyle Richardson.

[5] The Plaintiff filed a responding motion record, including his affidavit, sworn on February 15, 2023.

[6] The following facts and details are taken from the statement of claim and the affidavits filed upon the Defendant's motion.

[7] The Plaintiff is a marine engineer. He was employed by the Defendant from April 18, 2012 to April 3, 2020, as Chief Engineer of the ship "TECUMSEH". By letter dated April 3, 2020, the Defendant dismissed the Plaintiff, alleging cause.

II. SUBMISSIONS

A. *The Defendant's Submissions*

[8] The Defendant argues that the Federal Court lacks jurisdiction over the action since the Plaintiff seeks damages flowing from the breach of his employment contract. The Defendant relies upon the decision of the Supreme Court of Canada in *Matthews v. Ocean Nutrition Canada Ltd.*, [2020] 3 S.C.R. 64 (S.C.C.) in support of its submissions.

[9] The Defendant also contends that the action is statute-barred since it was not commenced within the two-year period required by section 4 of the *Limitations Act, 2002*, S.O. c. 24, Sch. B.

[10] Finally, the Defendant argues that the "choice of forum" clause in the employment contract assigns jurisdiction over any claim in respect of that contract to the "Courts of Ontario".

B. *The Plaintiff's Submissions*

[11] In reply, the Plaintiff pleads that his claim properly lies within the jurisdiction of this Court, pursuant to the terms of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

[12] He further submits that his action was commenced within the three-year time limit set out in section 140 of the *Marine Liability Act*, S.C. 2001, c. 6.

[13] Further, the Plaintiff argues that the choice of forum clause is ambiguous and therefore, unenforceable against him.

[14] Finally, the Plaintiff submits that the choice of forum clause is unfair and unreasonable because the Defendant did not disclose the potential consequences of this clause during negotiations, demonstrating an "unequal power relationship" between the parties. He submits that the deprivation of remedies by the operation of the choice of venue clause is contrary to the public policy of access to redress.

III. DISCUSSION AND DISPOSITION

[15] The Defendant seeks either a permanent stay of the within action, on a “with prejudice” basis, or an Order striking out the Plaintiff’s statement of claim, without leave to amend. According to the written submissions contained in the Defendant’s motion record that was filed on January 16, 2023, three grounds are advanced, that is a lack of jurisdiction, a time bar and reliance upon a forum selection clause in the employment contract.

[16] The challenges to the statement of claim are raised in respect of either a stay order or an order striking the statement of claim, and the discussion will proceed accordingly.

[17] The decision in *International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752 (S.C.C.) remains an important decision about the jurisdiction of the Federal Court. In the *International Terminal Operators Ltd., supra* decision, the Supreme Court identified three requirements for establishing the jurisdiction of the Federal Court over a particular matter. At page 766, the Court said as follows:

> The question of the Federal Court's jurisdiction arises in this case in the context of Miida's claim against ITO, a claim involving the negligence of a stevedore-terminal operator in the post-discharge storage of the consignee's goods. The general extent of the jurisdiction of the Federal Court has been the subject of much judicial consideration in recent years. In *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.*, [1977] 2 S.C.R. 1054, and in *McNamara Construction (Western) Ltd. v. The Queen*, [1977] 2 S.C.R. 654, the essential requirements to support a finding of jurisdiction in the Federal Court were established. They are:
>
> 1. There must be a statutory grant of jurisdiction by the federal Parliament.

2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.

3. The law on which the case is based must be "a law of Canada" as the phrase is used in s. 101 of the *Constitution Act*, 1867.

[18] In this case, the Plaintiff relies on paragraph 22(2)(o) of the *Federal Courts Act*, *supra* as the statutory grant of jurisdiction:

Maritime jurisdiction	**Compétence maritime**
(2) Without limiting the generality of subsection (1), for greater certainty, the Federal Court has jurisdiction with respect to all of the following:	**(2)** Il demeure entendu que, sans préjudice de la portée générale du paragraphe (1), elle a compétence dans les cas suivants :
…	…
(o) any claim by a master, officer or member of the crew of a ship for wages, money, property or other remuneration or benefits arising out of his or her employment;	**o)** une demande formulée par un capitaine, un officier ou un autre membre de l'équipage d'un navire relativement au salaire, à l'argent, aux biens ou à toute autre forme de rémunération ou de prestations découlant de son engagement;

[19] The Plaintiff relies on the *Canada Shipping Act, 2001*, S.C. 2001, c. 26 and the *Canada Labour Code*, R.S.C. 1985, c. L-2 as federal statutes nourishing the statutory grant of jurisdiction.

[20] There is a body of Canadian jurisprudence that addresses aspects of employment in the maritime context, including *Barthe v. Le Navire S/S Florida et al.*, [1969] 1 Ex. C.R. 299, *Sarafi*

v. Iran Afzal (the) (T.D.), [1996] 2 F.C. 954 and *Ballantrae Holdings Inc. v. Phoenix Sun (Ship)*, 2016 FC 570.

[21] I also refer to the decision of this Court in *Canadian Imperial Bank of Commerce v. Le Chêne No. 1 (The) (F.C.)*, [2004] 1 F.C. 120.

[22] In my opinion, there is no conflict between *Matthews, supra* and the decision in *Canadian Imperial Bank of Commerce*, *supra*. The Defendant cites *Matthews* for the principle that damages in lieu of notice are distinct from the wages the Plaintiff earned on the ship.

[23] However, even accepting that the Plaintiff's claim for damages is not for wages, money or property arising out of his employment as contemplated in paragraph 22(2)(o) of the *Federal Courts Act*, *supra*, *Matthews* does not address the question of whether these damages are included in "other remuneration or benefits". In *Canadian Imperial Bank of Commerce*, *supra*, this question is answered in the affirmative.

[24] In my opinion, the Plaintiff's claim meets the three essential requirements set out in the *International Terminal Operators Ltd., supra* decision, to ground jurisdiction in the Federal Court. Therefore, I am satisfied that this Court has jurisdiction over the Plaintiff's claim for damages.

[25] Subsection 39(1) of the *Federal Courts Act*, *supra* addresses limitation periods as follows:

Prescription and limitation on proceedings	**Prescription — Fait survenu dans une province**
39 (1) Except as expressly provided by any other Act, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings in the Federal Court of Appeal or the Federal Court in respect of any cause of action arising in that province.	**39 (1)** Sauf disposition contraire d'une autre loi, les règles de droit en matière de prescription qui, dans une province, régissent les rapports entre particuliers s'appliquent à toute instance devant la Cour d'appel fédérale ou la Cour fédérale dont le fait générateur est survenu dans cette province.

[26] The Defendant relies on section 4 of the *Limitations Act, 2002, supra* of Ontario to argue that the Plaintiff's action is prescribed. Section 4 provides as follows:

Basic limitation period	**Délai de prescription de base**
4 Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered. 2002, c. 24, Sched. B, s. 4.	**4** Sauf disposition contraire de la présente loi, aucune instance relative à une réclamation ne peut être introduite après le deuxième anniversaire du jour où sont découverts les faits qui ont donné naissance à la réclamation. 2002, chap. 24, annexe B, art. 4.

[27] I refer to section 140 of the *Marine Liability Act, supra* which provides as follows:

Limitation Period	**Prescription**
Proceedings under maritime law	**Action se rapportant au droit maritime**
140 Except as otherwise provided in this Act or in any other Act of Parliament, no	**140** Sauf disposition contraire de la présente loi ou de toute autre loi fédérale, toute action

proceedings under Canadian maritime law in relation to any matter coming within the class of navigation and shipping may be commenced later than three years after the day on which the cause of action arises.	se rapportant au droit maritime canadien relativement à la navigation et la marine marchande se prescrit par trois ans à compter du fait générateur du litige.

[28] The parties agree that should I find jurisdiction in this Court, that the three-year limitation period in the *Marine Liability Act*, *supra* would apply.

[29] I agree. Given my finding that this Court has jurisdiction over the Plaintiff's claim, I am satisfied that the Plaintiff commenced his action within the applicable limitation period.

[30] I agree with the submissions of the Plaintiff that the choice of forum clause is ambiguous. That clause provides as follows:

> Jurisdiction
>
> This Agreement is made and shall be construed in accordance with the applicable federal laws of Canada and the laws of Ontario. Officer agrees that all disputes and hearings and procedures related to this Agreement or Employee's employment will, subject only to the requirements of any administrative tribunal, be heard or resolved in Ontario including before the Courts of Ontario.

[31] In my opinion, the words "Courts of Ontario" refer to the Ontario Court of Justice, the Ontario Superior Court of Justice and the Ontario Court of Appeal. The clause does not assign exclusive jurisdiction to those Courts. On a literal reading, the words "Courts of Ontario" include the Federal Court which sits throughout Canada, including Ontario.

[32] The clause provides that disputes and hearings will take place “in” Ontario, “including before the Courts of Ontario”. In my opinion, the word “including” indicates that jurisdiction is not limited to the Courts of Ontario. A sitting of the Federal Court in Toronto satisfies the requirement that a hearing take place “in” Ontario.

[33] Finally, I turn to the Plaintiff’s arguments that the employment contract is unconscionable, insofar as it purports to limit his rights to choose his forum.

[34] The employment contract was drafted by the Defendant, presumably to protect its interests. The affidavit of Mr. Richardson, which constitutes the evidence of the Defendant upon this motion, does not speak to the involvement, if any, of the Plaintiff in the drafting of the contract.

[35] The Plaintiff deposed in his affidavit, filed in response to the Defendant’s motion, that he met with employment managers of the Defendant in the early months of the year from 2012 up to 2020 to discuss the annual employment contract. He deposed that there was nothing said in those discussions about the choice of forum clause.

[36] In my view, there can be little doubt that the Defendant, as the employer, holds greater bargaining power in its relationship with the Plaintiff.

[37] Insofar as the choice of forum clause was drafted by the Defendant, it is subject to the *contra proferentem* principle. In *Manulife Bank of Canada v. Conlin*, [1996] 3 S.C.R. 415

(S.C.C.), the Supreme Court of Canada addressed the rule and at page 425 quoted the following from G.H.L. Fridman, *The Law of Contract in Canada* (3rd ed. 1994) at pp. 470-71:

> […]
>
> Where the contract is ambiguous, the application of the *contra proferentem* rule ensures that the meaning least favourable to the author of the document prevails.

[38] In my view, there is sufficient ambiguity in the choice of forum clause to invite the application of the *contra proferentem* rule against the Defendant. I find that the choice of forum clause is not binding and does not preclude pursuit of the Plaintiff's action in the Federal Court.

[39] The Defendant seeks to either stay the Plaintiff's action or to strike his statement of claim.

[40] According to the decision in *Viterra Inc. v. Grain Workers' Union (International Longshoreman's Warehousemen's Union, Local 333)*, 2021 FCA 41, when a stay is sought of the Court's own proceedings, the test for a stay is less demanding than the test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.). The "reduced" test requires the Court to ask if, in all the circumstances, the interests of justice support a stay.

[41] Considering the guidance from the decision in *Viterra Inc., supra*, I am satisfied that a stay of this action, with prejudice, is not in the interests of justice. I am not satisfied that the Defendant has shown that the Court lacks jurisdiction to adjudicate the action, that the action is time-barred, or that the forum selection clause in the employment contract is enforceable.

[42] Generally, a motion to strike a statement of claim will be based upon Rule 221 which provides as follows:

Motion to strike	**Requête en radiation**
221 (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it	**221 (1)** À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :
(a) discloses no reasonable cause of action or defence, as the case may be,	**a)** qu'il ne révèle aucune cause d'action ou de défense valable;
(b) is immaterial or redundant,	**b)** qu'il n'est pas pertinent ou qu'il est redondant;
(c) is scandalous, frivolous or vexatious,	**c)** qu'il est scandaleux, frivole ou vexatoire;
(d) may prejudice or delay the fair trial of the action,	**d)** qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;
(e) constitutes a departure from a previous pleading, or	**e)** qu'il diverge d'un acte de procédure antérieur;
(f) is otherwise an abuse of the process of the Court,	**f)** qu'il constitue autrement un abus de procédure.
and may order the action be dismissed or judgment entered accordingly.	Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.
Evidence	**Preuve**
(2) No evidence shall be heard on a motion for an order under paragraph (1)(a).	**(2)** Aucune preuve n'est admissible dans le cadre d'une requête invoquant le motif visé à l'alinéa (1)a).

[43] As for the Defendant's request for an Order striking the Plaintiff's statement of claim, I refer to the decision in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 (S.C.C.). In that decision, the Supreme Court of Canada said the test upon a motion to strike a pleading is whether it is plain and obvious that the pleading discloses no reasonable cause of action.

[44] A successful challenge to jurisdiction, to a limitation period or choice of forum clause will often meet the test that a pleading discloses no reasonable cause of action. I have found that none of these grounds have been established in this motion. The test for striking the statement of claim has not been met.

[45] For the reasons above, I am not persuaded that the Plaintiff's action should be stayed or that the statement of claim should be struck. The Defendant's motion will be dismissed with costs to the Plaintiff and a Direction will issue in that regard.

ORDER IN T-2011-22

THIS COURT'S ORDER is that the motion is dismissed, with costs to the Plaintiff. A Direction will issue in that regard.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2011-22
STYLE OF CAUSE:	ANATOLIY KONTEFT v. LOWER LAKES TOWING LTD.
PLACE OF HEARING:	TORONTO, ONTARIO
DATES OF HEARING:	MAY 31, JULY 19, JULY 21, AND JULY 26, 2023
REASONS AND ORDER:	HENEGHAN J.
DATED:	JANUARY 22, 2024

APPEARANCES:

Anumeet Toor Robin Squires	FOR THE PLAINTIFF
Matthew Urback	FOR THE DEFENDANT

SOLICITORS OF RECORD:

ROUTE Transport & Trade Law Toronto, Ontario	FOR THE PLAINTIFF
Shibley Righton LLP Toronto, Ontario	FOR THE DEFENDANT