CITATION: Nelson et al. v. Her Majesty the Queen in Right of Ontario et al., 2019 ONSC 5415
COURT FILE NO.: CV-19-00614989-0000
DATE: 2019-09-23

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
HENTROSE NELSON AND JEAN-MARIE DIXON	J.M. Dixon, Self Represented Plaintiff
Plaintiffs	
– and –	
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, ASSOCIATION OF LAW OFFICERS OF THE CROWN and DAVID BLUMER, as a representative of ASSOCIATION OF MANAGEMENT, ADMINISTRATIVE AND PROFESSIONAL CROWN EMPLOYEES	T. Curry and D. Contractor, Counsel for the Defendant, Her Majesty the Queen in Right of Ontario G. Philipupillai, Counsel for the Defendant, Association of Law Officers of the Crown
Defendants	
	HEARD: September 13, 2019

SCHABAS J.

REASONS ON INJUNCTION MOTION

Overview

[1] The plaintiff, Jean-Marie Dixon, moves for an interlocutory injunction requiring the defendant, Her Majesty the Queen in Right of Ontario (the "Crown" or "Ontario"), to reinstate her salary and benefits forthwith, including professional development courses, and to pay all salary and benefits not paid to date in 2019, pending decisions on the merits of her legal proceedings.

[2] Ms. Dixon has been employed as a lawyer by Ontario since 2002. She has had positions in four different legal service branches, most recently as Counsel in the Civil Remedies for Illicit Activities Office ("CRIA") in the Ministry of the Attorney General. She is, as she notes, "a dark-skinned Black woman" who has alleged a long history of anti-black racial discrimination in the Ontario Public Service ("OPS"). She has made a number of complaints over the past several years alleging anti-black racism against her and others in the OPS.

[3] In this action, commenced in February, 2019, she is suing Ontario for damages and declaratory relief arising from her employment in what is alleged to be a racist and toxic workplace, citing breaches of contractual obligations under the Collective Agreement, workplace policies and labour and human rights legislation including the *Human Rights Code*, R.S.O. 1990, c. H. 19, and the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*. She is also suing her union, the Association of Law Officers of the Crown ("ALOC") for breach of contract, breach of statutory and common law duties owed to her, and for violations of the *Human Rights Code*. As a member of ALOC, her employment contract with Ontario is governed by the terms of the Collective Agreement between ALOC and the Crown.

[4] The litigation is at an early stage. Defences have not been filed as the Crown is bringing a motion to dismiss the action, which was scheduled to be heard in November, 2019, but now is postponed to a date to be fixed in early 2020. I was appointed case management judge of this action by Justice Firestone in May, 2019.

[5] This motion arises because, since April 11, 2019, Ms. Dixon has not been receiving salary or income replacement benefits, nor has she received approval and funding for Continuing Professional Development ("CPD") courses necessary to maintain her status as a lawyer with the Law Society of Ontario. She asserts that as a single mother without an income she will become destitute and be unable to advance this action unless her income is reinstated. She submits that she meets the test for injunctive relief set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

[6] For the reasons that follow, I dismiss the motion. In doing so, I stress that this does not mean that Ms. Dixon's case lacks merit – it is too early in the litigation to address or determine that issue. Rather, the motion fails because she has other avenues that should be followed to seek the relief she is asking of the Court. Further, she fails to meet the high test for the mandatory order sought, which is more stringent than the *RJR-MacDonald* test.

Background

[7] Ms. Dixon has been raising concerns about racism in the OPS for many years. In 2010, she brought an application before the Ontario Human Rights Tribunal against the OPS and ALOC alleging, among other things, racial discrimination, including a hostile work environment and the failure of ALOC to represent her interests. However, this application was withdrawn in November, 2011.

[8] In May, 2016, colleagues of Ms. Dixon complained of her conduct, alleging harassment, a poisoned work environment and combative conduct, invoking the Workplace Discrimination Harassment Prevention Policy ("WDHP"). Ms. Dixon was suspended with pay pending the investigation of the WDHP complaints. In June, 2016, ALOC initiated a grievance over Ms. Dixon's right to have union representation at the meeting where she was suspended. Ms. Dixon also initiated her own complaints under the WDHP and an investigation was conducted.

[9] In September, 2017, through ALOC, an agreement was reached that Ms. Dixon would return to work in a different position than the position she had held at CRIA. This effectively ended her administrative suspension. Payment of her salary continued but she did not return to work. In

the meantime, in November, 2016, ALOC had grieved Ms. Dixon's suspension, alleging various deficiencies in the WDHP process. That grievance remains outstanding. Ms. Dixon has also identified a third grievance, dated February 14, 2017, regarding the Crown's denial of approval to attend a CPD human rights course.

[10] In the fall of 2017, the Crown offered Ms. Dixon positions as counsel. Some were not suitable as they were not litigation-focused, and others raised concerns expressed by Ms. Dixon's family physician that they would "aggravate her medical condition" as she "required accommodation" and not be exposed "to further trauma and racial discrimination."

[11] On May 1, 2018, Ms. Dixon was offered a position as Counsel at the Ontario Human Rights Tribunal ("OHRT"). She accepted the offer, but did not return to work citing undisclosed medical issues, and promised to provide details of those issues.

[12] According to the Crown's deponent, in a report dated August 13, 2018, the external investigator who conducted the WDHP investigation concluded that some of the allegations against Ms. Dixon were substantiated, and that her allegations were not supported by the evidence.

[13] Between June and October 2018, the Crown followed up to obtain medical information to justify Ms. Dixon's failure to return to work. Deadlines for receipt of such information were provided to Ms. Dixon and ALOC, and were repeatedly extended by the Crown. In October, 2018, medical reports were provided that stated that Ms. Dixon could return to work some four to six weeks after resolution of her work place conflict; however no specific conflict was identified and it was not clear whether it might be the WDHP process, the ongoing grievance arbitration arising from her earlier suspension, or some other conflict within the workplace. When counsel for the Crown sought to question Ms. Dixon on this in her cross-examination, she refused to answer any questions about it.

[14] Effective October 4, 2018, Ontario placed Ms. Dixon on sick leave under the Short-Term Sickness Plan ("STSP"), which provides that employees unable to work due to illness or injury may take a leave of absence with pay for six working days and an additional 124 working days at 75% of regular salary. She continued to receive benefits. In December, the Crown sent Ms. Dixon information about transitioning from STSP to the Long Term Income Protection Plan ("LTIP"), including the importance of making a timely application for LTIP which, if approved by the insurer that administers the plan, would result in benefits equal to two thirds of her salary, which was approximately $200,000.00. Between January and May, 2019, Ontario wrote Ms. Dixon monthly seeking revised medical information, which was not provided. Following notice, her STSP payments ceased on April 11, 2019 and she has been on an unpaid leave of absence since that date. The Crown has, however, reinstated her group benefits which will continue until, I am told, September 30, 2019.

[15] Ms. Dixon did not apply for LTIP until May 29, 2019. On August 13, the insurer, Great-West Life, denied the application for LTIP. In doing so, it stated the following:

> We acknowledge that you have been diagnosed with a medical condition; however, a medical diagnosis does not necessarily indicate a disability. Great-West Life is assessing your claim to determine whether or not you are able to perform your <u>own</u>

> occupation. Thus, your occupation as a lawyer and/or crown attorney with any employer; not specifically with your current employer.
>
> Upon review of all medical on file, it would also appear that your symptoms are of a direct result with ongoing issues with your current employer. Workplace issues and challenges are outside the scope of the disability plan and long-term benefits cannot be considered for this reason.

[16] I find those reasons troubling. Great-West Life seems to acknowledge that Ms. Dixon has a medical condition which it is still assessing, but purports to deny her claim because her illness is linked to her place of employment. However, Ms. Dixon has not pursued any of the appeal routes available to her to challenge Great-West Life's decision. Further, under the Collective Agreement, she may also seek to arbitrate the denial of coverage, or she can make a request for special or compassionate consideration to the Insurance Appeals Committee. Her explanation for not pursuing these other paths is that she has been too busy to apply, and in argument Ms. Dixon, who represented herself on the motion, indicated that this included being busy preparing for this motion. However, she also made frequent reference to suffering from a disability, which highlights the relevance of, and need to pursue, LTIP.

[17] Ontario takes the position that the job at the OHRT remains open for Ms. Dixon. As counsel for Ontario said, if she goes back to work, she'll be reinstated. Alternatively, if she provides more medical information to Ontario it may be able to accommodate her in a different position. However, she has neither gone back to work or provided information to Ontario justifying her continued absence from the position she accepted at the OHRT or how she could be accommodated, nor, as noted, has she pursued an appeal of the denial of LTIP.

Analysis

Jurisdiction

[18] The Collective Agreement provides, in Article 6.9.3., that an arbitrator shall have jurisdiction over all issues arising from "the interpretation, application, administration, or alleged violation of the Collective Agreement." The issues on this motion, dealing with pay and insurance benefits, are addressed in the Collective Agreement. Article 17.8 provides that all disputes concerning entitlement to benefits, including LTIP, will first be raised by the employee, and are subject to arbitration.

[19] Further, the *Arbitration Act, 1991*, S.O. 1991, c. 17, applies to the Collective Agreement. That legislation limits court intervention to a small set of circumstances in section 6, none of which apply here. Section 8 of the *Arbitration Act, 1991* provides that arbitrators may grant interim relief, including injunctive relief. Accordingly, where there is an established process for obtaining relief under the Collective Agreement, that process should be respected.

[20] In addition, as noted, there is also a process for requesting LTIP based on special or compassionate grounds that can be pursued by Ms. Dixon, as well as the appeal process from the denial of LTIP which should be pursued.

[21] Accordingly, while the Court retains a residual jurisdiction to grant equitable relief in the context of collective agreements (see, e.g., *Canadian Pacific Ltd. v. Brotherhood of Maintenance of Way Employees*, [1996] 2 S.C.R. 495), it should not do so here, where there are existing avenues and alternative remedies available, and which should be pursued by Ms. Dixon. As Robert J. Sharpe has stated in *Injunctions and Specific Performance* (Thomson Reuters, Looseleaf, November 2018) at 3.990, "the courts have quite properly tended to avoid granting injunctions which would pre-empt the exercise of jurisdiction by a specialized board, tribunal or agency unless the administrative remedy will fail to meet the needs of the case." In my view, this includes exhausting insurance appeal rights and the prescribed arbitration process.

[22] In this context, in argument Ms. Dixon made several references to the decisions in *National Ballet of Canada v. Glasco*, 2000 CanLII 22385 (ON SC), and *National Ballet of Canada v. Glasco*, 2000 CanLII 29044 (ON SCDC). While that case did reinstate an employee pending the outcome of a contested termination, the interlocutory order was made by an arbitrator who had jurisdiction to make the order based on the employment agreement between the parties. The case involved somewhat unique facts involving a ballerina nearing the end of her career where it was found that a failure to direct an immediate reinstatement would cause irreparable harm to the employee. These are quite different facts from this case.

[23] My conclusion on this issue is sufficient to dispose of the motion. However, given Ms. Dixon's circumstances and in the event that I am incorrect, I address the other arguments below.

Interim Relief Is Not Available Against the Crown

[24] Section 14 of the *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27 ("PACA"), provides that "the court shall not, as against the Crown, grant an injunction or make an order for specific performance, but in lieu thereof may make an order declaratory of the rights of the parties." Although this Act has now been replaced by the *Crown Liability and Proceedings Act, 2019*, S.O. 2019, c. 7, Sch. 17, PACA applies to this action as it was commenced before the new Act came into force on July 1, 2019.

[25] One exception to the rule against injunctions against the Crown is when there is a deliberate flouting of established law, or Crown employees are acting beyond their jurisdiction. Those exceptions do not apply in this case which involves the application of employment law and policies to an employee. Nor has Ms. Dixon sought relief against any specific individual who is employed by the Crown.

[26] Further, the declaratory relief sought by Ms. Dixon, which seeks the same result as an injunction, cannot be made on an interim basis. As Professor Hogg has stated in *Liability of the Crown*, 2nd ed. (1989), quoted with approval in *Loomis v. Ontario (Ministry of Agriculture & Food)* (1993), 16 OR (3d) 188:

> Can a declaration be obtained in interlocutory proceedings, that is, before the trial of the action, in order to obtain a temporary order holding the defendant to the status quo? The answer is no. A declaration is by its nature final. It is "absurd" for a court "to declare one day in interlocutory proceedings that an applicant has certain rights and upon a later day that he has not". For this reason, courts have nearly always

> refused to grant a temporary declaration before there has been a final determination of the applicable law. In other words, interlocutory (or interim) relief, which is available in the form of an injunction, is not available in the form of a declaration.

[27] One further exception to the rule against injunctions against the Crown that has been recognized in limited circumstances is when the injunction against the Crown is to preserve the *status quo*. This has arisen, for example, when the preservation of property has been in issue: *Couchiching First Nation v. Town of Fort Frances*, 2010 ONSC 2442. However, that is not this case. At this point, the order Ms. Dixon seeks is to require affirmative action by the government to reinstitute her salary, which she has not received for a year. This is not seeking to maintain the *status quo*. Ms. Dixon was on STSD from the fall of 2018 until April 2019. She had warnings of the need to make a timely LTIP application to continue to receive disability benefits and failed to do so. She has options to challenge the denial of LTIP which should be pursued and which would, if successful, more closely reflect and preserve the *status quo*.

The Mandatory Injunction Test Is Not Met

[28] Assuming injunctive relief is available against the Crown, I would not grant it in this case.

[29] Ms. Dixon is seeking a mandatory injunction requiring positive action from the Crown – to reinstate her pay and benefits. Accordingly, she must establish a strong *prima facie* case that she will succeed at trial: *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5 at para. 18; *Loom Away Inc. v. Western Life Assurance Company*, 2018 ONSC 7229 at paras. 1 and 39. This means that the Court must engage in an "extensive review of the merits." As the Supreme Court recently stated at para. 15 of *R. v. Canadian Broadcasting Corp.*:

> A mandatory injunction directs the defendant to undertake a positive course of action, such as taking steps to restore the *status quo*, or to otherwise "put the situation back to what it should be", which is often costly or burdensome for the defendant and which equity has long been reluctant to compel. Such an order is also (generally speaking) difficult to justify at the interlocutory stage, since restorative relief can usually be obtained at trial. Or, as Justice Sharpe (writing extrajudicially) puts it, "the risk of harm to the defendant will [rarely] be less significant than the risk to the plaintiff resulting from the court staying its hand until trial". The potentially severe consequences for a defendant which can result from a mandatory interlocutory injunction, including the effective final determination of the action in favour of the plaintiff, further demand what the Court described in *RJR-Macdonald* as "extensive review of the merits" at the interlocutory stage. [footnotes omitted]

[30] On the record before me, while many causes of action are pleaded, the evidence does not go beyond Ms. Dixon's assertions - allegations of wrongdoing contained in conclusory statements, hearsay and opinions expressed by her, often without the source for her belief stated. As well, I must consider the full record, which informs me that, thus far, Ms. Dixon's complaints have not been substantiated; indeed the WDHP report upheld a complaint against her, although I recognize that there is a grievance outstanding.

[31] In my view there is insufficient evidence on which to find a strong *prima facie* case. Again, as I stated at the outset, that is not to say that Ms. Dixon's case is without merit, but is simply a finding based on the record filed on this motion.

[32] As to the other elements of the test – irreparable harm and the balance of convenience – I find that those too favour dismissing the motion.

[33] Ms. Dixon has not shown that if she succeeds at trial damages will not be adequate compensation for losses she may suffer between now and the conclusion of this proceeding. Ms. Dixon asserts that she has no income, savings or equity in her home, and therefore the irreparable harm will be her ability to proceed with this action. She says she will quickly become destitute if her pay and benefits are not restored. She says that the equity in her house has been used to pay for legal and other costs "resulting from [her] experience of racial discrimination and racial harassment in the workplace."

[34] However, she has provided little evidence to support the assertions of financial hardship. To the contrary, she refused to produce documents relating to her assets and, on cross-examination, Ms. Dixon disclosed that she had recently purchased a property apparently as an investment asset to pay for the cost of this litigation.

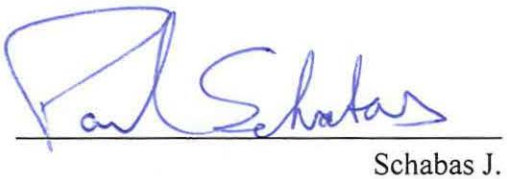
[35] Following the argument of this motion, Ms. Dixon filed with me a Book of Documents that included, among other things, medical records including doctors' letters, correspondence with the Crown and ALOC, excerpts from cases and human rights policies, and some limited financial information. The financial information is incomplete and, as the Crown points out, is untested. It raises more questions than answers. While it confirms that Ms. Dixon did recently refinance her house, the documents provided suggest that she still has considerable equity in her home and significant net worth. The bank statements show some significant recent deposits, but transaction details are redacted. I can give this little weight, and in any event it does not support her assertion that she is about to become destitute. In saying this I do not in any way diminish the challenges Ms Dixon may be facing from currently having no income but, again, she has avenues to appeal the denial of LTIP which should be pursued and, if successful, will provide her with an ongoing income.

[36] As to the balance of convenience, I agree with counsel for the Crown that the integrity of the collective bargaining and labour relations context must be respected. It is not the role of the Court to place an employee on what is effectively an indefinite paid leave of absence when she may have a disability which would entitle her to LTIP benefits which have been contracted for by her union, and when there are procedures in place for the employee to grieve, which she is doing. Granting the order sought would significantly undermine the labour relations regime in place to deal with these issues. It should also be noted that the remedy Ms. Dixon seeks would be greater than the benefit she would receive if she is covered by LTIP. Similar concerns were expressed by an arbitrator in *Ontario Public Service Employees Union (McCormick) v. The Crown in Right of Ontario (Ministry of Transportation),* 2006 CanLII 17534 at pgs. 18 -19.

[37] I recognize that some of Ms. Dixon's options may involve steps to be taken by her union, ALOC, which she is suing in this proceeding. In her reply submissions, Ms. Dixon asserted that she cannot tell ALOC what to do and said that ALOC has refused to advance her grievances. I

have no evidence of what ALOC has or has not done for Ms. Dixon. The Court may not be the proper forum for any complaints she may have regarding ALOC's representation of her, but she has not sought injunctive or other relief against ALOC on this motion, or to my knowledge anywhere else. And although ALOC had counsel present, she made no submissions and ALOC took no position on Ms. Dixon's motion.

[38] The motion is dismissed. If the respondent wishes to seek costs, counsel can advise me at the next case conference.



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REASONS ON INJUNCTION MOTION

Schabas J.

Released: September 23, 2019