Kaufmann v Saskatchewan Government and General Employees' Union, 2012 SKQB 284

2012-07-17

QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2012 SKQB 284**

Date: **2012 07 17**

Docket: Q.B.G. 557/2012

Judicial Centre: Regina

BETWEEN:

AUDREY KAUFMANN

PLAINTIFF

- and -

SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION and SASKATCHEWAN ENVIRONMENT and SASKATCHEWAN PUBLIC SERVICE COMMISSION

DEFENDANTS

Counsel:

Audrey Kaufman self represented

Charita N. Ohashi for the Government of Saskatchewan

Juliana K.J. Saxberg for Saskatchewan General Employees' Union

JUDGMENT KEENE J.

July 17, 2012

I. INTRODUCTION

[1] The plaintiff issued a claim on March 29, 2012. She sued the Saskatchewan Government and General Employees' Union ("SGEU") and, Saskatchewan Environment and Saskatchewan Public Service Commission. The last two defendants will be referred to as "Saskatchewan".

[2] Relying on Rules 173(a), 173(d), 173(e) and Rules 188 and 189 of the *Queen's Bench Rules*, Saskatchewan brings this application to strike out the plaintiff's claim regarding the Province.

[3] The allegations pertaining to Saskatchewan arise out of the plaintiff's past employment with the Province. The claim describes the commencement of her employment with Saskatchewan Environment and Resource Management ("SERM") as 1980 (para. 2 of the claim) and her loss of her employment in 1993 (para. 9 and 14(d) of the claim).

[4] On April 22, 1999, the plaintiff, Saskatchewan Government Employees Union, and the Government of Saskatchewan, Department of Environment and Resource Management all signed a Memorandum of Agreement (Exhibit A- attached to the affidavit of Sandra Burrows, sworn June 4, 2012) that resolved all issues between the plaintiff and the Province pertaining to her employment with Saskatchewan.

[5] The plaintiff has now sued Saskatchewan; seemingly wishing to revisit issues arising out of her past employment with Saskatchewan.

II. RULE 173

[6] Rules 173 reads:

> 173 The Court may at any stage of an action order any pleading or any part thereof to be struck out, with or without leave to amend, on the ground that:
>
> (a) it discloses no reasonable cause of action or defence, as the case may be;
>
> (b) it is immaterial, redundant or unnecessarily prolix;
>
> (c) it is scandalous, frivolous or vexatious;
>
> (d) it may prejudice, embarrass or delay the fair trial of the action;

> (e) it is otherwise an abuse of the process of the Court;
>
> Costs and may order the action to be stayed or dismissed or judgment to be entered accordingly or may grant such order as may be just. Unless otherwise directed, the offending party shall pay double the costs to which the other party would otherwise be entitled.

[7] Counsel for Saskatchewan correctly summarizes the test for the application of Rule 173(a) as set out by our Court of Appeal in *Swift Current (City) v. Saskatchewan Power Corp. et al.*, 2007 SKCA 27 , 2007 SKCA 27, 293 Sask.R. 6 at para. 18:

> 18 ...
>
> (i) The claim should be struck where, assuming the plaintiff proves everything alleged in the claim there is no reasonable chance of success. ...;
>
> (ii) The jurisdiction to strike a claim should only be exercised in plain and obvious cases where the matter is beyond doubt. ...;
>
> (iii) The court may consider only the claim, particulars furnished pursuant to a demand and any document referred to in the claim upon which the plaintiff must rely to establish its case ...;
>
> (iv) The court can strike all, or a portion of the claim ...;
>
> (v) The plaintiff must state sufficient facts to establish the requisite legal elements for a cause of action. ...

[8] Our Court of Appeal commented in *Sagon v. Royal Bank of Canada et al.* reflex, (1992), 105 Sask.R. 133, [1992] S.J. No. 197 (QL)(Sask.Q.B.) as follows regarding the application of Rule 173(d):

18 Striking out an entire claim on the ground that it is frivolous, vexatious or an abuse of process of the court is based on an entirely different footing. Instead of considering merely the adequacy of the pleadings to support a reasonable cause of action, it may involve an assessment of the merits of the claim, and the motives of the plaintiff in bringing it. Evidence other than the pleadings is admissible. ...

19 Finally, a separate mention should be made of the power of the court to prevent abuse of its process, a power which is inherent as well as conferred under Rule 173. Bullen & Leake defines the power as follows at pp. 148-9:

> The term 'abuse of the process of the court' is a term of great significance. It connotes that the process of the court must be carried out properly, honestly and in good faith; and it means that the court will not allow its function as a court of law to be misused but will in a proper case, prevent its machinery from being used as a means of vexation or oppression in the process of litigation. It follows that where an abuse of process has taken place, the intervention of the court by the stay or even dismissal of proceedings, 'although it should not be lightly done, yet it may often be required by the very essence of justice to be done.'
>
> The term 'abuse of process' is often used interchangeably with the terms 'frivolous' or 'vexatious' either separately or more usually in conjunction. [footnotes omitted]

[9] As a result of my conclusion set out below, I am not going to concern myself with Rules 188 or 189.

III. ANALYSIS

[10] The defendant, Saskatchewan, raises several points. However I believe it is only necessary to discuss in detail the issue pertaining to the previous signed agreement.

[11] As indicated, the most obvious concern is that the plaintiff on April 22, 1999 signed an agreement clearly resolving and ending all controversies or concerns arising out of her past employment with Saskatchewan. It is not necessary to recite the entire agreement here but I note

from the agreement:

> 1. Forthwith upon the execution of this Agreement, SERM shall pay to Audrey $65,000.00 which it is agreed by the parties is being paid and received as general damages for personal injury to be allocated with respect to Audrey's claims for discrimination, her grievances, her Saskatchewan Human Rights Commission complaint and her claims with respect to mental anguish, mental distress, hurt feelings and legal and other expenses.
>
> 2. It is agreed by the parties that in consideration of the sum of $65,000.00 paid to Audrey by way of general damages for personal injury, the Union and Audrey do hereby remise, release and forever discharge the Government of Saskatchewan, Department of Environment and Resource Management, its employees, appointees, Cabinet Ministers, and any representatives of the Government, former or present, from all actions, causes of action and claims, including the said Grievances, No. 96-01-027 and 96-01-031, and Complaint, including, without limiting the generality of the foregoing, any action they may have for payments respecting services rendered or expenses incurred. Further, they relinquish any rights they have pursuant to the Public Service Act and Regulations and/or the Collective Agreement in place between the Government and the Union to claim any further payment except as provided below:
>
> > Audrey shall possess seniority and reemployment rights and shall be placed on the relevant reemployment list effective May 1, 1999. A seniority verification and reconciliation shall be done.
> >
> > SERM shall provide to Audrey a positive letter of reference in the form attached to this Agreement and marked as Schedule "A".

[12] I am not sure what the motivation now is for the plaintiff to sue the Province. The above agreement ended her employment relationship with the Province and any resulting causes of action. Additionally the affidavit of Ms. Burrow supports the contention of Saskatchewan that the agreement covers the issues raised in the claim. The plaintiff did not file any evidence to the contrary. In any event, her statement of claim speaks for itself.

[13] This reality results in the success of the Rule 173 application. Our Court of Appeal in *Alves et al. v. MyTravel Canada Holidays Inc. et al.*, 2011 SKCA 116 , 2011 SKCA 116, 377 Sask.R. 68 stated:

> 27 ...The root purpose of Rule 173 is to avoid the unseemly circumstance of defendants being obliged to expend energy and resources to ward off meritless litigation. While the Rule must be engaged carefully, and only in the clearest of situations, I see no basis for finding that the existence of a settlement agreement must somehow, as a matter of general principle, be excluded from the roster of matters which can render a claim vexatious or an abuse of process. Indeed, in addition to Marble, there are a number of cases where claims have been struck pursuant to the Rule because of a pre-existing settlement agreement between the plaintiff and defendant. See: *Elfenbaum v. Saskatchewan Crop Insurance Corporation*, [1995] S.J. No. 352 (Sask. Q.B.) (QL); *Morgan v. Saskatchewan* reflex, (1984), 36 Sask. R. 240 (Sask. Q.B.). See also: *Orlandello v. Nova Scotia (Attorney General)*, 2005 NSCA 98 , 2005 NSCA 98, 256 D.L.R. (4th) 21 at para. 22. (emphasis in the original)

[14] This quite frankly ends matters. I find that pursuant to Rule 173(a) no reasonable cause of action can exist because of the referred to agreement. Further under Rule 173(e), the continued prosecution of the suit would be an abuse of process. Accordingly I order that the plaintiff's claim against the defendant Saskatchewan be struck in its entirety with double costs to be paid by the plaintiff to Saskatchewan but as though there was only one defendant.

[15] Having decided as I have, it is not necessary to consider the other points raised by Saskatchewan.

IV. SUMMARY

[16] The plaintiff's claim against the Saskatchewan Environment and Saskatchewan Public Service Commission (Saskatchewan) is struck in its entirety and

pursuant to Rule 173, the plaintiff shall pay to Saskatchewan double costs but as though it was only one defendant.

_____ J.

T.J. KEENE

- Bradley-Kelly Construction Ltd. v. Ottawa-Carleton Regional Transit Commission, 1996 8038 (ON SC)
- B. P., Re, 2004 16127 (QC CQ)
- Reid v. Canada (Treasury Board), 2003 PSSRB 77

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