CITATION: Blake v. University Health Network, 2021 ONSC 7139
COURT FILE NO.: CV-21-00670531-0000
DATE: 20211029

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: RENITA BLAKE, ERENA BUZHAKER, ANNA KEKTSIDIS-PISZKO, OLGA KUDRITSKA, LEE KENG KOH AKA EUNICE KOH, GIFITII KEBEDE, SHANA-LEE BAILEY, RENATA BAK, SHAWN BERTHELOT, HEATHER BURGESS, ANTONIA D'ALESSANDRO, NATASHA DEMIANIW, KRISTIN DUNLOP, MARIA MERCEDES ERASO AGREDO, HOLLY ALISON HEPBURN, TONY JARDIM, DANICA JOVANOVIC, GEORGIA JOVANOVIC, SOSSY KIDIKIAN, JOANNA KIWAK, KAROLINE KULHANEK, CHARLENE LORD, ANETA MASLANKA, ERIKA NIKKEL, KIMIL NIZNIK, IVA PAVIC, NATASHA PETERS, ANDREW SAARINEN, ANGUS SMITH, BARBARA STASIAK, NARGES TZOGAS, AFRODITE VORVIS, DANIJELA VUKOVIC, ELAINE WALKER-ESSON, SHANDELLE WILSON, MAGDALENA ZEBROWSKA, AND NATALIE SILVA, Plaintiffs/ Moving Parties

AND:

UNIVERSITY HEALTH NETWORK, LAKESIDE LONG-TERM CARE CENTRE, MICHENER INSTITUTE OF EDUCATION, PRINCESS MARGARET CANCER CENTRE, TORONTO GENERAL HOSPITAL, TORONTO REHABILITATION INSTITUTE, TORONTO WESTERN HOSPITAL, Defendants/Responding Parties

BEFORE: S.F. Dunphy J.

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Nini Jones (Nini.Jones@paliareroland.com) and *Jodi Martin* (Jodi.Martin@paliareroland.com), for the intervenor, OPSEU

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HEARD at Toronto (Video): October 28, 2021

REASONS FOR DECISION

[1] On Friday October 22, 2021, I issued an interim injunction to preserve the employment *status quo* of a group of employees of the defendant University Health Network until further argument could be heard with brief reasons issued at the time.

[2] In summary, the plaintiffs had issued a Notice of Action disputing on a number of grounds the validity of a recently adopted employment policy of the defendant employer requiring all of its more than 17,000 employees to be fully vaccinated or face termination of their employment commencing October 22, 2021 (i.e. the day I heard the interim injunction application). I issued brief reasons later that day and directed a preliminary hearing on the question of my jurisdiction to grant the relief sought to be held this morning.

[3] It is perhaps necessary for me to underscore that this decision does *not* address the question of the merits or legality of the vaccine policy adopted by UHN. The interim injunction granted last week did not decide whether the requested injunction could or should issue. It merely decided that the *status quo* could be preserved with minimal impact upon the parties until now so as to permit a better opportunity to examine that very question. At this early stage, the plaintiff is required to satisfy the three-part test described in the Supreme Court of Canada decision in *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 SCR 311 namely:

a. Is there a serious issue to be tried on the question of liability?

b. Is there a real potential for irreparable harm to ensue if relief is not granted? and

c. Does the balance of convenience favour the granting of relief at this early stage?

[4] The jurisdictional question being addressed today goes to the heart of the first of the *RJR* criteria. There is no serious issue being taken today with whether there is at least the *potential* for the vaccination policy to be found to be unreasonable, unlawful or a breach of the contractual rights of some or all of the plaintiffs after a thorough review process. If, as is claimed, there is no jurisdiction to examine the issue at all however there can be no serious issue to be tried on the question of liability in this forum.

Issues to be decided

[5] The following are the issues that shall be addressed in these reasons:

a. Do the unionized plaintiffs have standing to seek the relief sought in the proposed expanded statement of claim?

b. In the case of the claims made by the unionized plaintiffs, does this court have the jurisdiction to grant the interim relief or permanent relief sought?

c. In the case of the remaining plaintiffs who are not members of a union, ought the interim injunction to be continued?

Analysis and discussion

(a) Do the unionized plaintiffs have standing to seek the relief sought in the proposed expanded statement of claim?

[6] The resolution of this question must be considered against the backdrop of s. 48(1) of the *Labour Relations Act, 1995*, SO 1995, c 1, Sch A which provides that "[e]very 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".

[7] The defendant and the intervenor unions may differ on many issues that arise in the course of their relationship. They do, however, concur quite strongly on this point: the jurisdiction of the prescribed arbitration process to resolve disputes arising in the collective bargaining context is exclusive and must be carefully secured against interference from the civil courts.

[8] A convenient starting point to understand the current state of the law as regards the exclusive jurisdiction of the dispute resolution regime mandated by the *LRA* can be found in the Supreme Court of Canada decision in *Weber v. Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 SCR 929. Prior to *Weber*, there had been some question as to whether the "exclusive jurisdiction" approach to the question was the correct one. Since *Weber*, that question has been laid to rest. Rather than re-invent the wheel, I shall

summarize here some of the key guidance that emerges from *Weber* and subsequent Supreme Court of Canada jurisprudence on the subject that must be applied to this case:

a. The *LRA* confers exclusive jurisdiction on labour tribunals to deal with *all* disputes between the parties arising from the collective agreement – there is no overlapping jurisdiction: *Weber* at para. 50 and 67;

b. Determining whether a particular dispute is subject to this exclusive jurisdiction requires a consideration of the dispute and of the ambit of the collective agreement: *Weber* para. 51;

c. The dispute must be examined to determine whether its "essential character" arises from the interpretation, application, administration or violation of the collective agreement: *Weber* para. 52;

d. The "essential character" of a dispute is not determined by reference to the particular label or description applied to the matter in the pleadings but by reference to the factual circumstances surrounding the claim and the terms of the collective agreement – if the arbitrator is empowered to remedy the alleged wrong then its essential character is covered by the collective agreement: *Jadwani v. Canada (Attorney General),* 2001 CanLII 24157 (ON CA) at paras. 30-35;

e. In resolving disputes before them, arbitrators have the power and duty to apply the law of the land to the disputes before them: *Weber* para. 56;

f. The exclusivity of the jurisdiction conferred in relation to disputes arising from a collective agreement is not displaced by the existence of specialized statutory tribunals including under human rights legislation – the language establishing the competing regime must be carefully considered to determine whether there is a clearly expressed legislative intent to displace the arbitrator's exclusive jurisdiction: *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 (CanLII) at para. 33-35, para. 39;

g. The exclusive jurisdiction of a labour arbitrator is subject to the residual jurisdiction of the superior court to grant remedies that lie outside the remedial authority of a labour arbitrator, including interlocutory injunctions to ensure that there is no "deprivation of ultimate remedy": *Horrocks* at para. 23.

[9] The Supreme Court has also described as "one of the fundamental principles" of labour relations law the "monopoly that the union is granted over representation": *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39 (CanLII), [2001] 2 SCR 207 at para. 41. While often described as the "collective bargaining agent", the "agency" of the union is in reality a creature of statute. It is a unique type of agency since it is one conferred by statute following certification of the union over the bargaining unit and which can be neither revoked nor altered by an individual employee.

[10] I shall not refer to every one of the numerous cases cited by the intervening unions in their very helpful written submissions. I can fairly summarize the jurisprudence of the last twenty-five years at least by observing that Canadian courts have adopted a broad and liberal approach to the question of whether the essential character of a particular dispute lies within or without the ambit of a collective agreement. There is no basis to apply a strict or adverse construction approach to the question and the weight of the jurisprudence very heavily supports this approach.

[11] While I was strongly urged by the plaintiffs to defer consideration of the "essential character" question until a later date, I cannot agree. The Legislature has gone to great pains to erect a high walls surrounded by a deep moat to preserve and protect the labour relations environment from external incursions. The exclusive agency of the union and the exclusive jurisdiction of the arbitral dispute resolution regime mandated are but two of the most prominent elements of that edifice. Deferring a consideration of the jurisdictional foundation for the intervention of the court until *after* it has already intervened in a material way would fundamentally undermine those carefully calibrated defences. The interventions of the court in the delicate balance of labour relations would swiftly evolve from few and far between to routine. In the present case, two critical factors that were present when a *short-term* and limited interim injunction was put in place was the determination that there would be little to no practical impact of the interim order prior to the time fixed for the hearing of this motion given the scheduling of employees and the notable absence of the voice of the collective bargaining agents from the process at that stage.

[12] The facts before me demonstrate quite persuasively that the essential character of this dispute goes to the very core of the collective bargaining agreement and relationship. Despite the different statutory schemes invoked in support of the claim – all of which an arbitrator is fully capable of taking into account in resolving the dispute – the claim calls into question the right of the employer to have enacted and enforced its vaccine policy. This clearly requires a consideration of the management rights clause of the collective agreements governing each of the unionized employees. The intersection of those management rights with bargained-for health and safety policies are also fundamental aspects of the collective agreements in place in this case. The claim disputes the right of the employer to terminate the employment of the affected employees. There are few aspects of a collective agreement more fundamental than establishing what does and does not constitute just cause for the discipline or termination of employment of an employee subject to it. The very foundation of the dispute *depends* on the existence of the collective agreements since, as shall be seen below, there is simply no general right to interfere with the decision of an employer to terminate the employment of an employee with or without cause.

[13] It is quite material to note that the unions in this case have not been silent as the impugned policy has been announced and implemented. *All* of them have filed a variety of individual and policy grievances in relation to the vaccination policy. The fact that the unions have not pursued all of the remedies desired by the plaintiffs in the time frame they would have liked does not affect the analysis. The plaintiffs take issue with the manner in which the unions have pursued the resolution of those grievances but not with

their right to do so. The essential character of a dispute is not altered by strategic choices made as to the remedy being pursued.

[14] I am satisfied that the essential character of the dispute advanced by the plaintiffs lies squarely within the ambit of the collective agreements to which the unionized members are party. There are outstanding grievances challenging the very same policy that are even now being adjudicated within the dispute resolution regime prescribed. I have no reason to believe that a lengthier or more detailed dive into the facts would alter this conclusion. The dispute in question resides at the very core of the collective bargaining relationship and not at its periphery.

[15] Applying these conclusions regarding the jurisdictional foundation of the claim to the *RJR* test, it is clear that the first part of the test cannot be satisfied. The unionized plaintiffs have failed to satisfy me that there is a serious issue to be tried as to their standing to prove liability. No injunction can be issued or continued in the face of that determination. This finding is of course subject to the narrower question next addressed.

(b) <u>In the case of the claims made by the unionized plaintiffs, does this court have the jurisdiction to grant the interim relief or permanent relief sought?</u>

[16] Mr. Parry urged me to continue the existing interim injunction while staying the civil claim in favour of the arbitration process if I concluded as I have done on the standing/jurisdiction question discussed above. In support of this proposed course of action, he referred to the residual jurisdiction discussed by the Supreme Court in *Horrocks* to grant remedies that lie outside the remedial authority of a labour arbitrator, including interlocutory injunctions, to ensure that there is no “deprivation of ultimate remedy”.

[17] All of the intervening unions agreed that *in an appropriate case* a collective bargaining agent does indeed have standing to bring a civil claim for an injunction to restrain conduct that is the object of an arbitrable dispute. However, where judicial discretion exists, it must always and everywhere be exercised judicially. The residual authority in question is not a sort of Trojan Horse that can be applied to undermine the exclusive jurisdiction of the arbitration process or the exclusive agency of the union in representing its members through that process. Properly understood, the residual discretion must be seen as complementary to and not destructive of those fundamental labour relations principles.

[18] There may arise cases where, for example, an arbitration board does not have the necessary remedial tools to hand to preserve the *status quo* pending the determination of the dispute. In such cases, there may be a risk of the remedy sought being rendered ineffective or moot and appropriately calibrated intervention may be called for.

[19] There is at least an arguable case on the present facts that this may be the case. The very object of a mandatory vaccine policy is to compel employees subject to the policy to receive the vaccine. Logic requires me to observe that no *mandatory* policy is needed to compel the willing. An arbitrator can reinstate an employee terminated for failing to yield before such a policy if it is ultimately found to be unreasonable or otherwise

contrary to the collective agreement. However, no remedy exists to undo a vaccine once administered. This policy in question and this vaccine are both relatively new and their application in the collective bargaining context is yet to be settled. In this, the policy is at least potentially able to be differentiated from the older, more established vaccine requirements. These and other similar questions are not mine to determine but lie within the province of the exclusive dispute resolution process within that collective bargaining relationship.

[20] I am nevertheless not satisfied that this would be an appropriate case to open the narrow window of residual jurisdiction the Supreme Court has conceded remains. *None* of the unions who have intervened on this hearing asked me to maintain the interim injunction in place for a period of time to permit them to bring their own applications. *All* of them have the undoubted standing to do so. The decision of the collective bargaining agents to pursue or not pursue a particular remedy is one that is entitled considerable deference in our civil court given the fundamental nature of the labour relations principles involved.

[21] As noted, each of the unions is in the process of pursuing a variety of individual and policy grievances in respect of the policy and have made the strategic choices they have made as to process and relief sought in their undoubted capacity as exclusive collective bargaining agent.

[22] The plaintiffs are in effect calling into question the *manner* which those disputes are being resolved by the union. They view interim relief as essential to preserve the utility of the other remedies being pursued.

[23] This position of the plaintiffs must be considered in light of the fundamental labour relations principles that the court's narrow residual discretion is intended to complement and not undermine. The union is charged with the *exclusive* carriage of the grievances challenging this policy. The unions have made a different choice than the plaintiffs and determined that the existing battery of available remedies (including reinstatement of employment) are adequate to redress the wrongs being alleged. They have all had the time and opportunity to seek interim relief of the sort sought by the plaintiffs if they wished. None have done so; none have asked for time to do so.

[24] In effect, the plaintiffs would have me substitute my judgment on the adequacy of the remedies pursued for that of the exclusive bargaining agent. It seems to me that an approach of deference is called for and I would decline to disturb the judgment of the collective bargaining agents. Such a deferential approach ensures that the residual discretion is confined to its proper auxiliary role.

[25] The position of the Ontario Nurses' Association is slightly different from that of the other unions in that the ONA asserts neutrality on the question of whether the residual jurisdiction of the court can be invoked by an individual member of the bargaining unit as has been done in this case. However, the ONA has not itself sought interim relief.

[26] There remains considerable dispute as to whether individual union members have any standing to pursue interim remedies under the residual discretion left to the civil courts. One case has permitted such a claim to be advanced by members but did so in circumstances where the union in question was supporting the application: *Aranas v. Toronto East General & Orthopaedic Hospital Inc*., 2005 CanLII 1056 (ON SC). In view of my determination that the decision of the unions not to pursue the remedy is entitled to deference, I do not find it necessary to decide the narrow question of whether individual members of a collective bargaining unit have standing to invoke the court's residual discretion. Whether they do or do not have standing, I would not disturb the progress of the grievances over which the unions of exclusive right of carriage by imposing a remedy – even an interim remedy – that the union is not requesting.

(c) In the case of the remaining plaintiffs who are not members of a union, ought the interim injunction to be continued?

[27] What then is the status of this claim as regards the plaintiffs not subject to the collective bargaining regime?

[28] As a general rule, private-sector employment may be terminated at will outside of the collective bargaining sphere in Ontario. Where cause is not alleged, or if cause is alleged and not proved, compensation is payable to the employee. The level of compensation may be a function of a written contract, of statutory minimum standards or of the common law. Given that fundamental principle, it is hard to see how any plaintiff who is not in a union can allege irreparable harm arising from threatened termination of employment. If the termination of their employment is not justified, they are not entitled to their job back – they are entitled to money. Money, by definition is not only an adequate remedy it is the *only* remedy.

[29] Mr Parry suggested that some of the plaintiffs may have additional rights under the *Human Rights Code.* That may be the case in respect of some of them. The problem in this case is that there is simply no evidence before me that comes close to establishing even a serious issue to be tried that the impugned vaccine policy contravenes the anti-discrimination provisions of the *Code* as regards any of them. I do not preclude such proof being led at some later date, I merely observe that the record before me simply does not justify the imposition of an injunction grounded solely on that narrow speculative ground.

[30] An injunction which cannot be imposed cannot be maintained either. I would dissolve the interim injunction as it relates to the non-union employees as well.

Disposition

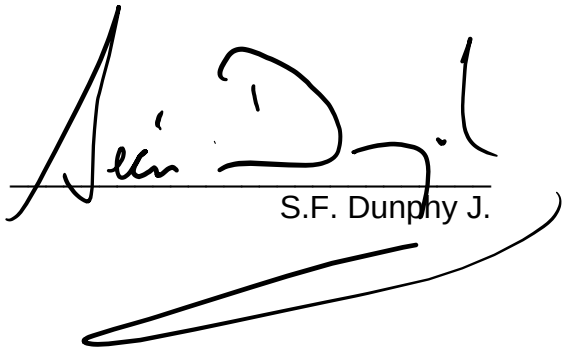
[31] For the foregoing reasons, I find that I cannot grant the injunction sought in the case of the unionized plaintiffs and must therefore dissolve the interim injunction granted to permit time for that question to be addressed.

[32] I also find that the plaintiffs have failed to satisfy the first arm of the *RJR* test as regards the plaintiffs who are not subject to a collective bargaining agreement. The

requested injunction cannot be granted nor can the interim injunction remain in place in the case of these plaintiffs.

[33] This matter has not proceeded past the point of a Notice of Action and a Notice of Motion for an interlocutory injunction brought thereunder. The plaintiffs may or may not choose to alter the scope or breadth of the intended proceeding in light of my decision herein when the time comes to finalize and file a statement of claim. It would be premature of me to strike in its entirety an intended action before it has been finalized as UHN requests me to do.

[34] I have no specific request before me for costs of this *motion.* Costs of the action were requested by UHN but the action has not been dismissed at this juncture. In the circumstances, there shall be no order as to costs of this motion or the interim injunction appearance that preceded it.



S.F. Dunphy J.

Date: October 29, 2021