Citation: Brazeau v. I.B.E.W. 2003 BCSC 1041
Date: 20030430
Docket: S013087
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment

Master Groves

April 30, 2003

BETWEEN:

WAYNE BRAZEAU

PLAINTIFF

AND:

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

DEFENDANT

Counsel for Plaintiff: F.G. Potts
Counsel for Defendant: A.E. Black, Q.C.

N.J. Hain

Place and Date of Hearing: Vancouver, B.C.

April 30, 2003

[1] **THE COURT:** The plaintiff applies in the week prior to trial to amend the Statement of Claim, the pleadings.

[2] The background of this case is that the plaintiff sues the defendant, IBEW, for a breach of employment contract. The plaintiff alleges that he was fired because of a false allegation of sexual harassment. He views himself as being an employee of longstanding, 27 years with the union, who provided loyal service. The defendant asserts that the plaintiff was dismissed for cause related to the allegations of sexual harassment.

[3] The amendments that are presented for approval by the court seek to expand an existing allegation of bad faith and a claim for punitive damages to include post-termination conduct, which the plaintiff says is deserving in and of itself of punitive damage, conduct the plaintiff views as harsh, vindictive and reprehensible. I note that punitive damages themselves were within the confines of the original pleading.

[4] In regards to the applications for amendments of pleadings, the law is clear. The law is that amendments to pleadings should be allowed unless there is no hope of success in the pleadings themselves, or the opposing party, in this case the defendant, can show prejudice which cannot be cured by way of costs or an adjournment. Recent authority for that is the ***Meingast v. Paul Revere Life Insurance Co.***, [2002] B.C.J. No. 999, a decision of Master Scarth.

[5] On the issue of no hope of success, it is argued by plaintiff's counsel that this should be considered only if it is plain and obvious that the claim discloses no reasonable cause of action, and they cite as authority ***Hunt v. T & N*** (1990), 49 B.C.L.R. (2d) at 273.

[6] The plaintiff characterizes some of these amendments as housekeeping and providing more particulars, two areas of amendments which should not be seriously objected to. However, there is also the contentious area of expanding the cause of action for bad faith.

[7] In analyzing the expanded cause of action for bad faith, the argument, as I understand it, is this and based on the following case authority: In the case of ***Vorvis v. The Insurance Corp. of British Columbia*** (1989), 36 B.C.L.R. (2d) at page 273, the court concludes that punitive damages are possible in an employment situation if the actions of the employer are reprehensible and are an independent actionable wrong.

[8] The case of ***Wallace v. United Grain Growers Ltd.***, [1997] 3 S.C.R. 701, concludes, in part, that there is an implied duty of good faith and a duty to deal fairly in employment contracts as there is in insurance contracts. Finally, there is the case of ***Whiten v. Pilot House Insurance*** (sic), a 2002 decision of the Supreme Court of Canada cited at [2002] S.C.J. No. 19. One of the conclusions which the plaintiff draws from this case is that a breach of an implied duty to act in good faith in insurance cases is an independent actionable wrong.

[9] Thus, as the plaintiff suggests, the cases read together mean that in an employment contract there is a duty to act, both pre and post-termination, with the utmost good faith, and punitive damages can flow if in an employment case there has been a breach of this good faith, both in the actions leading up to the termination and the post-termination actions.

[10] The plaintiff's counsel argues effectively that these cases build logically on each other. I do not think anyone would dispute that the conclusions, which the plaintiff's counsel suggests these cases logically lead to on the facts, would expand this area of the law quite considerably.

[11] Expanding the law is one thing, but, in my view, even if this argument is an expansion of the law, or if the chances of a court finding the law to be as the plaintiff believes it to be, are somewhat remote, that does not, in my view, fall within the category of no hope of success. It seems to me that there is an argument here. It seems to me it might not be an argument that is made before, but it is an argument that can be made, perhaps should be made, but definitely does not fall within the category of no hope of success. So, in my view, dealing with the first issue on the amendments, there is, in my view, a hope of success with the amendments as pled.

[12] The defendant makes three arguments against the amendments generally and specifically. His first argument is that the amended pleadings which are before the court were not the same amended pleadings on which the court granted short leave yesterday. His concern is, as a result, the court today has no jurisdiction to deal with these amended pleadings.

[13] The concern is that in the motion attached to the short leave *praecipe* yesterday some of the paragraphs, paragraphs 6, 15 and 16, which were amendments, were not underlined and, as such, counsel for the defendant was not necessarily directed specifically to those amendments. This was obviously done through some inadvertence, plaintiff's counsel noticed this matter yesterday evening and faxed over an amended Amended Statement of Claim at about ten o'clock.

[14] In my view, this lack of jurisdiction argument fails for the following reasons: It is clear that through inadvertence only paragraph 6 and 15 and 16 were not underlined, but in comparison of the original Statement of Claim with the amendments, underlined or otherwise, it is clear that there was a substantial change to paragraph 6. It is also equally clear that paragraph 15 and 16 were substantially amended as those numbers did not even exist in the original Statement of Claim, which was only composed of ten paragraphs. It seems clear to me that it is only through inadvertence of a temporary nature that the paragraphs were not underlined as is required, and I would not accede to an argument that the application should be dismissed on that basis.

[15] Secondly, defendant argues that the pleadings speak or draw attention to what is otherwise inadmissible evidence. They refer to paragraphs 13(d) and 13(c) of the proposed amendments, which have the effect of drawing in the conduct of counsel, both in British Columbia and perhaps in the United States, as to the post-termination conduct of the defendant.

[16] In my view, an opposition to the amendments on this basis also fails. If there is an actionable wrong, a breach of duty of good faith post-termination, then the handling of the litigation, which is usually the post-termination action of the defendant, is clearly relevant, and, clearly, it was considered by the Supreme Court of Canada in the ***Whiten v. Pilot House*** case, which I cited earlier.

[17] Finally, the defendant argues that they are prejudiced as a result of the timeliness of this action.

[18] It is true that the application to amend the pleadings comes very late in the day. We are now approximately four days prior to trial. Ms. Thiele's, counsel for the plaintiff, explanation is that it is only in late preparation after a review of the combined effect of the various cases, including the ***Whiten v. Pilot Insurance Co.*** case, a decision which I should say was penned approximately one year ago in February of 2002, long after the pleadings closed here, that Ms. Thiele felt it was necessary to amend the pleadings.

[19] It is true that the timeliness of these amended pleadings are unfortunate, but in terms of the prejudice potentially suffered by the defendant as a result of the pleadings, I note firstly that the defendant is not an individual, but a large international union. Secondly, there has been no argument of prejudice before me other than the delay itself. I have not heard that, for example, some witness of crucial nature is on death's door or otherwise not likely to be able to attend trial at some later date. Thirdly, I note, that in regards to Mr. Brazeau's amended claim, he is still within the limitation period to commence a separate and independent action for a duty which he alleges to exist, the breach of good faith, in pre and post-termination conduct. To require him to do so and to require the matter to be dealt with by the courts through litigation and trial on two different occasions is not what the Rules suggest should happen and it is clearly not in anyone's best interest.

[20] In my view, if, as a result of granting the amendments, the trial has to be adjourned at the request of the defendant, the prejudice that the defendant would suffer could be dealt with by way of the adjournment itself and by way of an order for costs thrown away, and I note that the plaintiff has offered an adjournment and have offered, upon consideration perhaps or upon taxation, to pay the defendant their costs thrown away.

[21] Getting back to the test to allow amendments, amendments should be allowed unless there is no hope of success in the amended action, and I find that the amendments do not fall within the category. Secondly, in my view, the opposing party here, the defendant, has not shown that the prejudice that they would suffer, if they do suffer prejudice, cannot be cured by way of costs or

order for costs or adjournments.

[22] So as a result, I am going to allow the proposed amendments and, on the issue of costs of this application, there will be costs in the cause.

"Master J. Groves"