Date: 20250307
Docket: CI 23-01-41703
(Winnipeg Centre)
Indexed as: Duncan v. The City of Winnipeg
Cited as: 2025 MBKB 33

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

BELINDA DUNCAN,	)	Andrew C. Derwin and Israel Ludwig
plaintiff,	)	for the plaintiff
-and-	)	
THE CITY OF WINNIPEG,	)	Ashley L. Pledger
defendant.	)	for the defendant
	)	JUDGMENT DELIVERED: March 7, 2025

ASSOCIATE JUDGE GOLDENBERG

INTRODUCTION

[1] The plaintiff, Belinda Duncan (Ms. Duncan), filed a statement of claim against the defendant, the City of Winnipeg (the City), alleging that she was constructively dismissed from her employment (the Claim). The City moved to strike the Claim in its entirety without leave to amend. For the reasons that follow, the Claim is struck in its entirety without leave to amend.

PROCEDURAL ISSUE

[2] During the course of submissions at the contested hearing, I posed questions to counsel relating to the language of the collective agreement. Counsel requested and were granted leave to provide further written submissions relative to my questions. Those further submissions, by way of supplemental briefs, have been considered for this decision.

BACKGROUND

[3] Ms. Duncan was a unionized employee with the City's Winnipeg Police Service (the WPS) from December 2000 until April 2022. She was a member of the Winnipeg Police Association (the WPA), which was the certified bargaining agent on her behalf.

[4] In December 2017, Ms. Duncan applied for a lateral transfer into the City's Community Relations Diversity Unit (the Diversity Unit). In March 2018, she learned that she was not selected for the transfer and filed an appeal of the transfer decision. In April 2018, the City informed her that she would not be moved into the Diversity Unit at that time (the Transfer Decision).

[5] In April 2019, Ms. Duncan filed a Human Rights Complaint to the Manitoba Human Rights Commission (the MHRC), alleging that the Transfer Decision made by the Chief of Police constituted discrimination on the basis of her ancestry. In October 2021, the MHRC dismissed the Human Rights Complaint, noting as follows:

> The Board noted that the Complainant elected to actively engage her union with respect to the issues outlined in her Human Rights Complaint and that the nature of these issues fall within the overlapping jurisdiction between the labour process and the Commission's complaint process.

> Accordingly, the Board decided to accept the investigator's recommendation to dismiss the complaint because it would be an abuse of process for the Commission to further investigate the alleged contravention of *The Human Right's Code*…

[6] In May 2022, Ms. Duncan filed an Application to the Manitoba Labour Board (the MLB) alleging that the WPA breached its duty of fair representation and committed an unfair labour practice. While that complaint was against the WPA, the City had standing and filed materials in response to the Application.

[7] In September 2022, the MLB dismissed the Application and found:

> 80. The materials show that the Association considered the strengths of the Applicant's case on a few separate occasions, and provided its opinion in relation to the same. The materials do not suggest that the Association made any false assurances or misinformation at any point. The Applicant claims that the Association failed to act, but it is clear from the materials that the Association spoke to her, correspondence with her, and met with her. There is no suggestion that its conduct was in any way discriminatory, arbitrary or in bad faith.
>
> 81. Consequently, and in conjunction with the Board's finding that the Application is untimely, the Application is dismissed.

[8] In its decision, the MLB also found that Ms. Duncan did not request a grievance to be filed about a possible constructive dismissal:

> 55. The Applicant was not terminated from employment. She recently resigned but asserts that she was constructively dismissed as a result of the Employer and the Association's actions. The Employer denies that it constructively dismissed the Applicant. The Applicant did not request for a grievance to be filed regarding a possible constructive dismissal. The Association points out that the Applicant has made no allegation that subsection 20(a) is engaged by her choice to retire.
>
> 56. The Board agrees. Subsection 20(a) is not engaged by the simple fact that an applicant claims to have been constructively dismissed. Further, a timely request for the bargaining agent's assistance is a key and necessary element of a successful duty of fair representation application. In this case, the Applicant did not request any assistance from the Association as it relates to her resignation from employment. For the purposes of this section 20 Application, the Board accepts that the Applicant was not terminated.

[9] In October 2022, Ms. Duncan filed an Application for Review and Reconsideration of the MLB dismissal. It was dismissed in January 2023.

[10] Ms. Duncan did not file an application for judicial review in the Court of King's Bench with respect to either the MHRC dismissal or the MLB Reconsideration dismissal.

[11] In June 2023, Ms. Duncan filed the Claim alleging that the City constructively dismissed her from her employment and breached the fiduciary duty it owed to her as an employee.

ANALYSIS

Motion to Strike

[12] The City seeks to strike the Claim in its entirety in accordance with Rule 25.11 of Court of Kings Bench Rules, M.R. 553/88**,** which provides:

> 25.11(1) The court may on motion strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,
> (a) may prejudice or delay the fair trial of the action;
> (b) is scandalous, frivolous or vexatious;
> (c) is an abuse of the process of the court; or
> (d) does not disclose a reasonable cause of action or defence.

[13] The City says that the subject matter of the MHRC Complaint, the MLB Application and the Claim are the same. It says that the Claim is scandalous and vexatious, does not disclose a reasonable cause of action and is an abuse of the process of this court and a collateral attack on the MHRC and MLB dismissals.

Abuse of Process and Collateral Attack

[14] I agree with the City that the issues in the MHRC Complaint, the MLB Application and this Claim are essentially the same. They all relate to an employment dispute that

arose from the Transfer Decision. While the MHRC Dismissal and MLB Reconsideration Dismissal were subject to judicial review, an application for judicial review was not filed. The MHRC Complaint was against the City, and although the MLB Application was against the WPA, the City had standing.

[15] I also agree that the Court of King's Bench, by way of a statement of claim, is the wrong forum for the subject matter of the Claim. The only proper way for Ms. Duncan to have a matter before this Court concerning the subject matter in the Claim would have been a judicial review of either the MRHC Dismissal or the MLB Reconsideration Dismissal.

[16] The MHRC and the MLB, having jurisdiction to make such orders, dismissed the Complaint and Application. Their decisions are binding and conclusive since judicial review was not sought. I agree with the City that the Claim is an improper attempt to have this Court reconsider the MRHC Dismissal and MLB Reconsideration dismissal and is a collateral attack on those decisions.

[17] *The Labour Relations Act,* C.C.S.M. c. L10 (the *LRA*) provides that the collective agreement between the City and the WPA is binding on every employee in the bargaining unit.

[18] The essential character of the Claim, even its characterization as a breach of fiduciary duty as well as wrongful dismissal, is a dispute about the Transfer Decision and a constructive dismissal that allegedly flowed from the Transfer Decision and/or other workplace incidents or conditions. In accordance with the *LRA* and the collective

agreement, the allegations in the Claim arise out of and fall squarely within the exclusive jurisdiction of the arbitrator.

[19] In ***Northern Regional Health Authority v. Horrocks***, 2021 SCC 42, the decision begins with the following comment on this exclusive jurisdiction:

> 1 Labour relations legislation across Canada requires every collective agreement to include a clause providing for the final settlement of all differences concerning the interpretation, application or alleged violation of the agreement, by arbitration or otherwise. The precedents of this Court have maintained that the jurisdiction conferred upon the decision-maker appointed thereunder is *exclusive*. At issue in this case, principally, is whether that exclusive jurisdiction held by labour arbitrators in Manitoba extends to adjudicating claims of discrimination that, while falling within the scope of the collective agreement, might also support a human rights complaint.

[20] In ***Horrocks***, the employee filed a human rights complaint, and this Court, on judicial review, found that the human rights adjudicator lacked jurisdiction. The union in ***Horrocks*** was not interested in pursuing arbitration, which effectively precluded the employee from bringing her claim to a forum other than a labour arbitrator through her bargaining agent.

[21] The Supreme Court of Canada addressed the concern of an employee being left without a forum where a union does not take forward their grievance. It found as follows:

> 15 This argument is unsustainable in light of this Court's jurisprudence. Properly understood, the decided cases indicate that, where labour legislation provides for the final settlement of disputes arising from a collective agreement, the jurisdiction of the arbitrator or other decision-maker empowered by this legislation is exclusive. This applies irrespective of the nature of the competing forum, but is always subject to clearly expressed legislative intent to the contrary.
>
> . . .
>
> 37 Furthermore, this concern is mitigated by the union's duty of fair representation -- codified in Manitoba in s. 20 of *The Labour Relations Act* -- which "acts as a check on the principle of exclusivity" (C. Mummé, "Questions,

> Questions: Has *Weber* Had an Impact on Unions' Representational Responsibilities in Workplace Human Rights Disputes?", in Shilton and Schucher, *One Law for All?*, 229, at p. 237). Unions themselves are also subject to human rights obligations and may be held directly liable under human rights legislation for engaging in discriminatory conduct, including entering into a discriminatory agreement (*The Human Rights Code*, s. 14; *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, at pp. 989-94).
>
> 38 Of course, there will be instances of a union declining to advance a grievance to arbitration without breaching its duty of fair representation or engaging in discrimination. And, in such cases, the employee will indeed be left without a forum for resolution. But this state of affairs - - which, it bears restating, can be undone by clearly expressed legislative intent to the contrary -- is a product of the union's statutorily granted monopoly on representation (*Bisaillon*, at paras. 24-28; *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39, [2001] 2 S.C.R. 207, at para. 41). In other words, it is a product of legislative choice, to which we are bound to give effect.

[22] The SCC in ***Horrocks*** also went on to quote ***St. Anne-Nackawic Pulp & Paper Co. v. C.P.U., Local 219***, 1986 CarswellNB 116, and ***Weber v. Ontario Hydro***, 1995 CarswellOnt 240, to support the basis for exclusive jurisdiction of the arbitrator:

> 18 . . .
>
> The collective agreement establishes the broad parameters of the relationship between the employer and his employees. This relationship is properly regulated through arbitration and it would, in general, subvert both the relationship and the statutory scheme under which it arises to hold that matters addressed and governed by the collective agreement may nevertheless be the subject of actions in the courts at common law... . The more modern approach is to consider that labour relations legislation provides a code governing all aspects of labour relations, and that it would offend the legislative scheme to permit the parties to a collective agreement, or the employees on whose behalf it was negotiated, to have recourse to the ordinary courts which are in the circumstances a duplicative forum to which the legislature has not assigned these tasks.
>
> ...
>
> ... if the courts are available to the parties as an alternative forum, violence is done to a comprehensive statutory scheme designed to govern all aspects of the relationship of the parties in a labour relations setting. Arbitration, when adopted by the parties as was done here in the collective agreement, is an integral part of that scheme, and is clearly the forum preferred by the legislature for resolution of disputes arising under

> collective agreements. From the foregoing authorities, it might be said, therefore, that the law has so evolved that it is appropriate to hold that the grievance and arbitration procedures provided for by the Act and embodied by legislative prescription in the terms of a collective agreement provide the exclusive recourse open to parties to the collective agreement for its enforcement. [Emphasis added; pp. 718-19 and 721.]

20 . . .

> The issue is not whether the action, defined legally, is independent of the collective agreement, but rather whether the dispute is one "arising under [the] collective agreement". Where the dispute, regardless of how it may be characterized legally, arises under the collective agreement, then the jurisdiction to resolve it lies exclusively with the labour tribunal and the courts cannot try it. [Emphasis in original; text in brackets in original; para. 43.]

[23] In support of her position that her Claim is not an abuse of process, Ms. Duncan relies on two decisions that predate ***Horrocks*** as well as the specific working of the collective agreement in this case.

[24] The collective agreement between the City and the WPA reads in part as follows:

> 22. The Collective Bargaining Agreement between the City and the WPS (the "**Collective Agreement**") reads:
>
> Grievances involving the suspension or dismissal of Police Officers or other matters specifically covered by the City of Winnipeg (the Act) may be referred to the Chief Administrative Officers (CAO) or designate following the process and time limits provided for by the Act, as amended from time to time. [emphasis added]
>
> Failing satisfactory settlement of the grievance pursuant to Sections 3 or 4 above, the Association, not later than fifteen (15) days from the receipt of the decision of the Chief of Police or his designate pursuant to the hearing under Section 3, or the CAO's decision under Section 4, may refer the grievance to arbitration pursuant to the provisions of Article VI of this Agreement [emphasis added]
>
> In no event shall the Association be entitled to proceed to arbitration on a grievance matter unless the grievance has been referred to the Chief of Police or his/he designate or to the CAO or designate pursuant to Section 3 or 4 respectively. [emphasis added]
>
> Should the grievance matter not be referred to arbitration within the said fifteen (15) day period the Association, or the City, shall thereafter be barred from doing so. [emphasis added]

[25] In ***Watkins v. Central Park Lodges of Canada Ltd.***, [1985] M.J. No 212, 35 Man.R. (2d) 310, our Court of Appeal addressed wording in a collective agreement that provides that an unjust discharge "may" but not "must" be taken up as a grievance. The court compared that to other collective agreement language that provided that a dismissal "shall" be dealt with as a grievance. The court found as follows at paragraph 8:

> 8 The court is reluctant except in the clearest of cases to deprive a litigant of the right to pursue a remedy in court. There may be enough distinctions between the collective agreement in this case and East-West Packers (supra) so as not to foreclose Watkins' remedy of an action in damages for wrongful dismissal. So in the result I would restore the order of the Referee, Mr. Grey Richardson, with costs to Watkins both here and before the learned motions judge and the Referee.

[26] Ms. Duncan's position is that her Claim is not within the exclusive jurisdiction of the arbitrator and is, therefore, not an abuse of process. She relies on ***Watkins*** as an authority for drawing a distinction between permissive and mandatory language in collective agreements. She also relies on ***Livington v. Gulf Canada Products Co.***, [1986] M.J. No. 96, in which the court found that an employee's claim should not be struck where the collective agreement had permissive language:

> 9 In the present case, the position of the Union is unknown because the plaintiff has not followed the grievance procedure set out in Article 9.02 of the collective agreement. He has no wish to do so because he does not want to return to work for Gulf Products, and he seeks a broader remedy than he could obtain under the collective agreement. I do not think his right to commence the present action should be foreclosed because he has not followed the grievance procedure outlined in Article 9.02 of the collective agreement, particularly where, as here, there is no requirement for compulsory arbitration, and the plaintiff could not invoke the arbitration procedure without the support of the Union. I note the comments of Bridges, C.J.N.B. in Woods v. Miramichi Hospital (1966) 59 D.L.R. (2d), 290 at 295-96, made in reference to a provision of the New Brunswick Labour Relations Act:
>
> > "I do not think this provision should be interpreted as restricting the plaintiff to only the remedy of having her dismissal processed as a

> grievance under the collective agreement and an arbitration held. To hold that it should be so interpreted would mean that an employee, who has been wrongfully dismissed, would be without remedy unless his dismissal was taken up by the union and carried by it to arbitration. I cannot believe that it was the intention of the Legislature to vest such powers in a union or to prevent ah employee on his dismissal from bringing an action as the plaintiff has."

[27] During the course of submissions, counsel for the plaintiff also relied on ***Winnipeg Football Club v. Reaves***, [1990] M.J. No 711, for the proposition that permissive language in a collective agreement keeps the door open for employees to pursue claims in court, and in those cases the arbitrator does not have exclusive jurisdiction over labour matters.

[28] In the collective agreement in ***Reaves***, the employee had the option to initiate a grievance and refer a matter for arbitration. In contrast, with the WPA collective agreement the employee must initiate the grievance procedure, but all subsequent decisions are exclusively the WPA's. In accordance with the Labour Relations Act, if the union improperly exercises its discretion, the employee has recourse by filing an application before the Manitoba Labour Board.

[29] I disagree that these cases assist the plaintiff. I find that ***Horrocks*** addresses the concerns raised in the older cases, albeit in a different manner. Specifically, ***Horrocks*** addresses the employee's concern of a union not proceeding with a grievance. As noted, there is a safeguard in place, namely the duty of fair representation and the ability of an employee to challenge a union that does not proceed with a grievance. Ms. Duncan afforded herself this opportunity and filed an unfair labour practice against the WPA. Therefore, contrary to her counsel's

submissions, Ms. Duncan was not entirely at the mercy of the WPA to invoke arbitration. Furthermore, she could also have sought judicial review but did not.

[30] To initiate the grievance procedure, Ms. Duncan *must* have first raised the issues with the WPA. In relation to the Transfer Decision, she raised the issue with the WPA, and the WPA declined to file a grievance. The MLB Dismissal found that the plaintiff's Application was untimely but also that she failed to establish a *prima facie* violation of the *LRA*.

[31] In relation to the alleged forced retirement or constructive dismissal, the MLB found that Ms. Duncan did not request the WPA to file a grievance about the constructive dismissal. However, her seeming preference to file a statement of claim instead of contacting the WPA does not oust the exclusive jurisdiction of the labour arbitrator.

[32] The Supreme Court of Canada in ***Horrocks*** acknowledged that unionized employees may be left with recourse in matters where their union declines to grieve or refer a grievance to arbitration. The court found itself bound by the legislative intent of unions' monopoly on representation and left it up to the Legislature to express a contrary intent (see paras 36 and 38 of ***Horrocks***).

[33] Under the *LRA*, every collective agreement in Manitoba must contain a just cause provision for disciplining and dismissing an employee. When it does not, the *LRA* contains a deemed just cause provision (see section 78).

[34] By expressly listing discipline and dismissal as being matters contemplated in collective agreements in sections 78 and 79 of the *LRA*, our Legislature demonstrated the legislative intent to have these disputes fall within the ambit of the collective agreement and within the exclusive jurisdiction of the labour arbitrator.

[35] In addition, when reviewing the *LRA* for legislative intent pertaining to the role between arbitrators, the Manitoba Labour Board and the Court, the *LRA* limits the court's role to enforce an arbitration decision or judicial review of an arbitration or board decision on narrow grounds. Additionally, the MLB can refer questions of law to the Court of Appeal. There is no apparent legislative intent to expand the court's role in labour matters beyond this.

[36] Ms. Duncan is bound by the legislative scheme in the *LRA* and cannot opt out to pursue a civil claim in the circumstances. Although granting the City's motion leaves Ms. Duncan with no further avenue to pursue the matter, that does not mean she is entitled to sue the City for wrongful dismissal.

[37] I find that the subject matter of the Claim is within the exclusive jurisdiction of the labour arbitrator as the essential character of the dispute arises from the collective agreement. The absence of a grievance does not bring the matter within the Court's jurisdiction, except on judicial review.

[38] Accordingly, I find that the Claim is an abuse of the process of this Court and a collateral attack on the MHRC and MLB dismissal and should be struck without leave to amend for that reason.

Scandalous and Vexatious and No Reasonable Cause of Action

[39] The City submitted that the Claim also contains no reasonable cause of action and is scandalous and vexatious in nature. Given my findings that the Claim ought to be struck as an abuse of process, I do not intend to set out as detailed an analysis of this alternate position put forward by the City.

[40] I do, nevertheless, agree that the Claim contains scandalous and vexatious allegations about several employees within the Winnipeg Police Service and Ms. Duncan's interactions with these employees. Despite targeting specific City employees, the Claim does not name them as defendants, nor does it connect such allegations to a cause of action against the City. Nor does the Claim allege vicarious liability of the City for the alleged conduct of its employees.

[41] As for pleading a reasonable cause of action, I find that the Claim falls short of setting out the constituted elements of each cause of action and the material facts upon which each is based. The allegation of constructive dismissal is a bare allegation without sufficient material facts to support it. While paragraph 25 of the Claim alleges that Ms. Duncan was subjected to intolerable work conditions, it fails to particularize the alleged intolerable work conditions.

[42] A claim for a constructive dismissal requires material facts alleging that the employer unilaterally, substantially or improperly changed the terms or nature of the plaintiff's employment, affecting a fundamental term of the employment contract (See: ***Irvine v. Jim Gauthier Chevrolet Oldsmobile Cadillac Ltd.***, 2013 MBCA 93 at paras. 43-58.)

[43] While I may have been prepared to allow leave to appeal to give Ms. Duncan an opportunity to correct these deficiencies, I am not doing so given my finding that the Claim is an abuse of process.

Motion to Expunge

[44] In addition to its motion to strike, the City brought a motion to strike portions of the affidavit of Ms. Duncan, affirmed on September 22, 2023, in support of her position that the Claim ought not to be struck. While I agree with the City that portions of the affidavit and attachments thereto are improper, I am not dealing formally with the expungement motion. The decision on whether to expunge certain portions is not germane to the decision I reached on striking the Claim without leave to amend. Given my decision on the substantive motion, I find that a formal ruling on the expungement motion is not required.

CONCLUSION

[45] In conclusion, I am striking the Statement of Claim in its entirety without leave to amend.

[46] If costs cannot be agreed upon, I will receive written submissions.

J. L. Goldenberg
Associate Judge