CITATION: Torres v. Navistar Canada, Inc., 2013 ONSC 4015
COURT FILE NO.: CV-11-433247
DATE: 20130610

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Joao Torres, Plaintiff

– AND –

SSQ Life Insurance Company Inc. carrying on business as SSQ Financial Group, and Navistar Canada, Inc., Defendants

BEFORE: E.M. Morgan J.

COUNSEL: *Courtney Mulqueen*, for the Plaintiff

Landon Young, for the Defendant, Navistar Canada, Inc.

Cameron Fiske, for the Defendant, SSQ, Life Insurance Company Inc. carrying on business as SSQ Financial Group

HEARD: June 5, 2013

ENDORSEMENT

[1] The Defendant, Navistar Canada, Inc. ("Navistar"), challenges the jurisdiction of this court on the grounds that the Plaintiff's claim is covered by a collective agreement with CAW. Navistar submits that under section 48(1) of the *Labour Relations Act, 1995*, SO 1995, c 1, Sch A ("*LRA*"), must be dealt with by way of binding arbitration.

[2] The Plaintiff was an employee of Navistar who was laid off work at the end of January 2009. His employment was covered by a collective agreement between Navistar and CAW-Canada Local 127 that expired June 30, 2009 (the "Collective Agreement"). Since that time the Navistar plant at which the Plaintiff worked has been closed and all employees have been on lay-off.

[3] No new collective agreement has ever been negotiated between Navistar and CAW. A closure agreement has been discussed between them, but to date no agreement has been concluded.

[4] There is no evidence here that CAW's bargaining rights have been terminated or abandoned. In fact, the Plaintiff is still represented by the CAW, although the CAW has not participated in this action or motion. A recent decision of this court has dealt with this very

Collective Agreement and its current status. In *Baker v Navistar Canada, Inc*., 2013 ONSC 2778, at para 70, the court found that "[t]he terms previously bargained for in the collective agreement may have expired but the collective bargaining relationship survives and continues to govern the parties [i.e. Navistar and the CAW membership] unless circumstances arise that would suggest otherwise."

[5] Accordingly, the only question to be decided here is whether circumstances have arisen that suggest that the "essential character" of the dispute between the Plaintiff and Navistar is outside the terms of the Collective Agreement. If the essential character arises from the interpretation, application, administration, or alleged violation of the Collective Agreement, an arbitrator rather than the court will have exclusive jurisdiction over the dispute. *Weber v Ontario Hydro*, [1995] 2 SCR 929, at para 57.

[6] The Collective Agreement incorporated by reference a document entitled the Health Security Program Agreement ("HSPA"), which provided, among other things, for short and long term disability benefits for Navistar employees. The HSPA was not an insurance policy, but rather the benefits thereunder were self-insured by Navistar. The administration of the claims for disability under the HSPA was done by the Defendant, SSQ Life Insurance Company Inc. ("SSQ"), under a contract with Navistar.

[7] Counsel for SSQ appeared at the hearing of this motion and made some brief submissions, but SSQ has not moved for any relief.

[8] To qualify for disability benefits under the HSPA, an employee had to establish that he is "unable to perform his regular job or any other job in the bargaining unit." Further, in order to qualify for long term benefits, the employee had to exhaust the maximum number of weekly disability benefits and meet the definition of "totally disabled" contained in art III, s. 1(b)(2) of the HSPA.

[9] In the event of a dispute over disability benefits, the regular grievance procedure in the Collective Agreement was displaced by a special procedure by which a labour arbitrator would be bound. A Joint Central Board of Administration was appointed by Navistar and the CAW, and this Board was to appoint a physician or health clinic to examine the employee and provide a definitive medial opinion regarding the claimed disability.

[10] The Plaintiff received weekly disability benefits from Navistar from March 16, 2009 until March 7, 2010. This was then extended for another three weeks, bringing the short term disability benefits up to the end of March 2010. On April 8, 2010, Navistar requested that the CAW, which had represented the Plaintiff during this entire process, forward his medical information for consideration for long term disability. This information was never provided to Navistar.

[11] On August 18, 2010, a representative of Navistar met with the CAW and agreed to have SSQ consider a claim for long term disability benefits for the Plaintiff despite his delay in filing a claim and providing supporting medical documentation. By mid-September 2010, this information and supporting documentation still had not been provided.

[12] On September 28, 2010, the Plaintiff, through his own counsel, advised Navistar that he intended to bring a court action claiming his disability rights. In response, Navistar advised Plaintiff's counsel that under the *LRA* it is obliged to deal with the CAW on its employee's behalf. At the same time, Navistar instructed SSQ not to consider any further the Plaintiff's claim for long term disability benefits.

[13] The CAW has taken no further action in regard to the Plaintiff's claim for disability benefits. Likewise, neither the CAW nor the Plaintiff has filed a grievance or referred the Plaintiff's claim for benefits to arbitration under the HSPA. There is no evidence in the record as to whether the CAW has cooperated with the Plaintiff or has refused to cooperate with him in pursuing his disability benefits claim.

[14] As indicated above, it has recently been determined that, "Navistar is obligated as employer to deal with the union; it cannot ignore the certificate issued by the Labour Board decades ago certifying the CAW as representing the employees at Navistar's Chatham facility." *Baker, supra,* at para 62. Applying this principle specifically to an employee's claim of rights, the Ontario Labour Relations Board has held that "rights which accrue to a party during the life of a collective agreement are in the nature of vested rights which are not automatically extinguished by the termination or expiry of the collective agreement under which they arose." *Genstar Chemical Limited v International Chemical Workers Union, Local 721*, 1978 Can LII 619, at para 10.

[15] The Plaintiff submits that he did not have the right to apply for or receive long term benefits during the life of the Collective Agreement, as he was still using up his short term disability benefits at the time the Collective Agreement expired. The Plaintiff's then argues that since he is claiming long term disability benefits for a period of entitlement commencing after the Collective Agreement expired, the essential character of his claim is not related to the Collective Agreement.

[16] Plaintiff's argument here is directly contrary to the Supreme Court of Canada in *Dayco (Canada) Ltd. v CAW*, [1993] 2 SCR 230, where it was found that a claim for retirement benefits by employees survived the closing of the employer's operations and the formal termination of the collective agreement governing its employees at its Ontario plant. As LaForest J. put it (at para 44), "the mere expiry of a collective agreement, without more, does not preclude the arbitrability of a grievance alleging a breach after that expiry."

[17] The Plaintiff also submits that the decision under dispute is that of SSQ rather than Navistar, and since SSQ is not a party to the Collective Agreemet any claim against SSQ will necessarily be within the jurisdiction of the court. Plaintiff's counsel analogizes SSQ as administrator to an insurance company, and contends that in typically the decision of an insurer that a claimant is not disabled is not an arbitrable decision. *London Life Insurance Co. v Dubreuil Brothers Employees Association*, 2000 CarswellOnt 2419.

[18] Navistar replies, correctly, that SSQ is not acting as insurer but rather as sub-contractor and agent for Navistar itself. The responsibility for paying disability benefits falls on Navistar as

party to the Collective Agreement; Navistar and CAW did not agree to turn the benefit plan over to an arm's length insurance company. The Plaintiff's claim for disability benefits is directly against Navistar, and his entitlement must rise or fall with the adjudicator's interpretation of the Collective Agreement. Outside of the Collective Agreement, there is simply no question of any entitlement to long term disability.

[19] Finally, counsel for the Plaintiff submitted in oral argument that in August 2010 Navistar agreed to have SSQ consider the disability claim despite the passage of so much time that he might otherwise have been disqualified, and that this gesture by Navistar effectively initiated a procedure that is outside of the HSPA and the Collective Agreement. Counsel contends that it is this novel process is in now the subject of the disability entitlement dispute, and the "essential character" of the dispute is therefore not covered by the *LRA*.

[20] I admire Plaintiff's counsel's creativity in making this submission, but it strikes me that the Plaintiff is grasping at straws. In *Baker* the employees made a somewhat similar argument with respect to retirement benefits that they asserted had newly arisen after expiry of the Collective Agreement. The court poured cold water on the point, commenting (at para 62), "[f]or the plaintiffs and the CAW to suggest that a series of individual employment contracts emerge subsequent to the plant closure lacks any air of reality."

[21] Likewise, to characterize Navistar's grant of a short indulgence to CAW in submitting the necessary medical information as the negotiation of an altogether new contract with the Plaintiff, is to stretch reality to the breaking point. In *Baker*, as here, the essential character of the dispute arose from the Collective Agreement.

[22] The claim against Navistar is dismissed. This court simply has no jurisdiction to entertain an action that arises under a Collective Agreement.

[23] In a commendable spirit of cooperation, the Plaintiff and Navistar have agreed that the successful party will receive fixed costs of $5,000. The Plaintiff shall therefore pay Navistar costs in the total amount of $5,000, inclusive of disbursements and HST. There are no costs ordered for or against SSQ.

Morgan J.

Date: June 10, 2013