CITATION: CHRISTMAS v. FORT McKAY, 2014 ONSC #373
COURT FILE NO.: CV-12-461796
DATE: 20140128

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: BERND CHRISTMAS, Plaintiff

AND

FORT McKAY FIRST NATION, Defendant

BEFORE: CHIAPPETTA J.

COUNSEL: *Mark Ellis*, for the Plaintiff

Thomas Gorsky and *C. Chan*, for the Defendant

HEARD: January 13, 2014

ENDORSEMENT

[1] The Plaintiff commenced an action for wrongful dismissal against his former employer, Fort McKay First Nation, which is located in the province of Alberta.

[2] The Defendant seeks, by way of this motion, a dismissal or stay of the proceeding pursuant to Rule 21.01(3) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 ("the Rules"), and s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[3] The Defendant argues that the Ontario Superior Court of Justice does not enjoy jurisdiction *simpliciter* because there is no real and substantial connection between the Plaintiff's cause of action and the province of Ontario. In the alternative, the Defendant argues that Ontario is *forum non conveniens*.

[4] The Plaintiff argues that the Ontario Superior Court of Justice has jurisdiction *simpliciter* and that the Defendant has failed to rebut the presumption of jurisdiction and has failed to satisfy its burden of showing why the court should decline exercising jurisdiction.

[5] Both parties rely on the relevant legal tests as set out in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572, at paras. 90, 91, 103, 105, 108. In *Van Breda*, the Supreme Court of Canada outlines the approach to determine whether a domestic court should assume jurisdiction over a foreign defendant. The court reaffirmed that a two-part test applies: (1) jurisdiction *simpliciter* and (2) *forum non conveniens*. Jurisdiction is a legal issue. *Forum non conveniens* is discretionary.

[6] The approach to be taken is as follows:

(a) The court is to inquire whether presumptive connecting factors exist between the litigation and the forum. The plaintiff bears the onus of establishing that one or more presumptive connecting factor(s) exist;

(b) The court must decide whether the presumption of jurisdiction resulting from the connecting factors can be rebutted. The defendant bears the onus of rebutting any presumptive connecting factor;

(c) If one or more presumptive connecting factor(s) exists and has not been rebutted, the court is to assume jurisdiction subject to the application of *forum non conveniens;* and

(d) If one or more presumptive connecting factor(s) does not exist or where it has been rebutted, the court shall stay or dismiss the action.

[7] For reasons set out below, I conclude that the respondent Plaintiff has not established presumptive jurisdiction in Ontario. The Defendant's motion is granted. The action is dismissed.

Background

[8] The Plaintiff is a duly called Barrister and Solicitor pursuant to accreditation by the Law Society of Upper Canada and the Nova Scotia Barristers and Solicitors Society. Prior to his employment with the Defendant, the Plaintiff ran his own successful legal practice in the Greater Toronto Area in the province of Ontario.

[9] On December 20, 2011, the Plaintiff received an offer of employment from the Defendant via e-mail in Ontario. The e-mail was sent by Max Jacobs, the Director of Human Resources for the Defendant, from Alberta.

[10] The Plaintiff revised some terms of the offer of employment as received. On January 26, 2012, the Plaintiff sent the revised employment agreement to the Defendant via e-mail from Ontario to Alberta. Later that same day, the Plaintiff received an offer of employment duly executed by Larry Hewko on behalf of the Defendant via e-mail from Alberta to Ontario.

[11] The Plaintiff signed the offer of employment he received on January 26, 2012 from Mr. Hewko while at his home in Toronto, Ontario. Thereafter, he e-mailed the document to Mr. Hewko in Alberta.

[12] The employment agreement, which was executed by both parties, contains a Choice of Law provision that states the laws of the Province of Ontario are to govern the agreement and any disputes of any kind arising thereunder.

[13] The Plaintiff's employment was terminated on May 16, 2012 allegedly for just cause. The Plaintiff has since moved back to Ontario to restart his legal practice.

[14] The Defendant is composed of Cree and Dene people and is signatory to Treaty 8, and the Defendant is a member of the Athabasca Tribal Council. The Defendant does not dispute that the Plaintiff moved from Ontario to Alberta to start his employment with Fort McKay First Nation and agrees that the Plaintiff's duties of employment were carried out in Alberta.

Analysis

Jurisdiction Simpliciter - The Real and Substantial Connection Test

[15] The Plaintiff submits that one of the presumptive connecting factors articulated by *Van Breda* exists between this action and Ontario because the employment agreement in dispute was made in Ontario. This would, therefore, *prima facie* entitle this court to assume jurisdiction over the dispute: see *Van Breda*, at paras. 90, 117.

[16] The Plaintiff notes that the Defendant originally e-mailed him an offer of employment on December 20, 2011. Since he did not accept the offer of December 20, 2011, but rather responded with a counter-offer on January 26, 2012, the Plaintiff argues that he became the offeror and the Defendant became the offeree. It follows, he submits, that the contract is deemed to be made in Ontario when he, as offeror, received an executed offer of employment in accordance with his revisions by e-mail from the Defendant on January 26, 2012.

[17] Upon review of the said e-mail communications and the respective offers of employment, I conclude that the offer of employment attached to Mr. Hewko's e-mail of January 26, 2012 did not represent a binding contract. The Plaintiff was in Ontario on January 26, 2012 when he received the e-mail from Mr. Hewko, on behalf of the Defendant, attaching an offer of employment signed by Mr. Hewko. The offer included an "acceptance page" that stated, "I agree to the terms and conditions in the within agreement". The same day, the Plaintiff sent a signed offer of employment by return e-mail from his home in Ontario to Alberta. This signified the Plaintiff's acceptance of the employment agreement.

[18] It is well-established that when acceptance of a contract is transmitted electronically and instantaneously, the contract is considered to be made in the jurisdiction where the acceptance is received: see *Eastern Power Ltd. v. Azienda Communale Energia & Ambiente* (1999), 178 D.L.R. (4th) 409 (Ont. C.A.), at paras. 23, 27-29, leave to appeal to S.C.C. refused, [1999] S.C.C.A. No. 542; and *Inukshuk Wireless Partnership v. 4253311 Canada Inc.*, 2013 ONSC 5631, 117 O.R. (3d) 206, at paras. 25-29.

[19] In this case, acceptance was received in Alberta. Whether the Plaintiff's acceptance was to that of a counter-offer or a revised offer is not relevant in these circumstances. On January 26, 2012, an offer of employment was presented to the Plaintiff. The Plaintiff was within his right not to accept it, to revise it, or to ignore it. At the time the Plaintiff received the offer, it was not a binding agreement. The Plaintiff chose to accept the offer by virtue of his signature under a statement clearly acknowledging acceptance of the terms and conditions therein. The offer, as accepted, was not binding until the Plaintiff's signed acceptance was sent to the Defendant by e-mail, which was received in Alberta. For these reasons, I conclude that the acceptance of the

contract in dispute was received in Alberta and that Alberta is, therefore, the province where the employment contract was made.

[20] The Plaintiff argues that if the court decides the employment contract was not made in Ontario, it must determine if the Choice of Law provision in the employment agreement confers jurisdiction *simpliciter* to the Ontario court. The employment agreement states that the laws of the Province of Ontario are to govern. The Plaintiff submits that based on the list of considerations outlined in *Van Breda*, a Choice of Law provision should be considered a new presumptive factor beyond the four connecting factors articulated therein. This non-exhaustive list of factors are set out as follows, at para. 90:

> (a) the defendant is domiciled or resident in the province;
>
> (b) the defendant carries on business in the province;
>
> (c) the tort was committed in the province;
>
> (d) the contract connected with the dispute was made in the province.

[21] In my view, a Choice of Law provision should not be a new presumptive connecting factor for assuming jurisdiction in the circumstances of this case. Presumptive factors are those which connect the Defendant to the jurisdiction chosen by the Plaintiff in a real and substantial way. In this case, the Defendant agreed with the Plaintiff that Ontario law would apply to any dispute under the contract. Imposing jurisdiction on the Defendant solely as a result of its agreement on choice of law would unfairly broaden the scope of its contractual agreement to choice of forum in addition to choice of law. The parties themselves limited their agreement to choice of law.

[22] Moreover, Choice of Law is properly a consideration for the court when analyzing *forum non conveniens*. It is an error in law to conflate the legal test relating to *forum non conveniens* with the test for jurisdiction *simpliciter*: see *Van Breda*, at para. 101. Choice of Law is also one of the presumptive factors that permit a party to serve another party outside Ontario, pursuant to Rule 17.02(f)(ii) of the Rules. It is a proper procedural consideration only after jurisdiction is established.

[23] Finally, note that in *Van Breda*, the Supreme Court of Canada considered the Ontario Court of Appeal's identification of presumptive connecting factors, which included the existence of a contractual provision that the law of Ontario would apply. The Supreme Court of Canada revised the Ontario Court of Appeal's list and in doing so did not include as a potential criterion to establish jurisdiction, a contract stipulation that Ontario law is to apply.

[24] For these reasons, I conclude that the list of presumptive factors articulated in *Van Breda* is not properly expanded to include a Choice of Law provision from an employment agreement.

[25] The Plaintiff further argues that the Defendant knew, or ought to have known, that the Plaintiff would be giving up his lucrative legal practice in Ontario in order to accept employment with the Defendant. The Plaintiff suffered large opportunity cost damages in Ontario such that

the action of the Plaintiff against the Defendant has a real and "substantial" connection to Ontario.

[26] Where damages are sustained, however, was not given presumptive effect for jurisdiction by the Supreme Court of Canada or the Ontario Court of Appeal: see *Van Breda*, at paras. 55, 89. Both the courts found that "damages sustained in Ontario" would not serve as a reliable indicator of a real and substantial connection: see *Van Breda*, at paras. 55, 89. While the list of presumptive factors articulated in *Van Breda* is non-exhaustive, jurisprudence indicates it would be inappropriate to expand the list to include where damages occurred.

[27] I therefore conclude that the Plaintiff has failed to establish a listed or new presumptive connecting factor linking the subject matter of the action to Ontario, which would indicate jurisdiction *simpliciter*. As such, there is no real and substantial connection between the Plaintiff's cause of action and the Ontario Superior Court of Justice.

[28] Having therefore found that the Plaintiff's action lacks a real and substantial connection with Ontario, and, in turn, Ontario lacks jurisdiction *simpliciter* regarding the Plaintiff's action, I need not address *forum non conveniens*.

Disposition

[29] For reasons set forth above, the Defendant's motion is granted and the Plaintiff's action is dismissed.

Costs

[30] The Defendant is entitled to its reasonable costs for this matter on a partial indemnity basis and seeks $18,000 inclusive in this regard. The Plaintiff suggests that costs fixed at $10,000 is more reasonable and proportionate. I accept the time spent by the Defendant on this motion as set out in its costs outline. In my view, however, costs fixed at $13,000 is appropriate considering proportionality, the complexity of the issues on this motion, and the expectations of the parties.

CHIAPPETTA J.

Date: January 28, 2014