

CITATION: Kingsley v. City of Ottawa, 2013 ONSC 1032
COURT FILE NO.: 11-53239
DATE: 2013-02-14

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
DEREK KINGSLEY and TANIA)
KINGSLEY) Jason Dutrizac , for the
) Plaintiff/Applicant
Plaintiffs/Applicants)
)
- and -)
) Iain Aspenlieder, for the
THE CITY OF OTTAWA) Defendant/Respondent
)
Defendant/Respondent)
)
)
) **HEARD:** February 14, 2013

2013 ONSC 1032 (CanLII)

RULE 21.01(a) - REASONS FOR DECISION

T.D. RAY, J

- [1] The plaintiffs bring this Rule 21 motion for determination of questions of law that have been raised by the parties in the pleadings, determination of which may shorten the trial, or simplify the trial of the issues.
- [2] The plaintiffs commenced this action January 19, 2012 for damages in excess of 1.8 million dollars for damages. The plaintiff Derek Kingsley claims damages for negligence, damages for wrongful dismissal, damages for intentional and emotional distress, damages for discrimination and failure to accommodate in his employment. The plaintiff Tania Kingsley claims FLA damages.

- [3] The negligence claim appears from the statement of claim to arise from the failure of the defendant's vehicle which the plaintiff had been operating, and which caused him serious injuries. The FLA claim arises out of the injuries to Derek Kingsley.
- [4] The balance of the claims are described in terms that claim damages from the defendant arising from the employment relationship.
- [5] In its statement of defence of March 6, 2012, the defendant pleads that since the plaintiff was in the course of his employment his action for damages for negligence is barred by virtue of s 28 of the WSIA¹. It further pleads the collective agreement and says that all of the claims are in fact disputes that must dealt with under the provisions of the collective agreement and pleads the Labour Relations Act². The plaintiff acknowledges that a grievance process is under way with respect to the employment issues and that it has advanced to the arbitration stage.
- [6] The plaintiff seeks an order concerning these issues, and proposes that the examination for discovery of the plaintiff, the collective agreement, and various correspondence be considered on this motion. This is not disputed by the defendant.
- [7] Rule 21.01(a) permits any party to bring a motion to determine a question of law raised in the pleadings. The "plain and obvious" test applies. The facts as alleged in the statement of claim are taken to be true for the purpose of this rule. The parties have expanded the facts somewhat for example by including the collective agreement and correspondence. However these additional facts are not in dispute.

¹ *Workplace Safety and Insurance Act*, 1997, SO 1997, c 16, Sch A, section 28.

² *Labour Relations Act*, 1995, S.O. 1995, c. 1, Sched. A, s. 48.

[8] The plaintiffs' claims for damages arising out of the truck incident are governed by s. 28 of the WSIA which provides that no Schedule 2 employee may sue his Schedule 2 employer for damages for injury. The plaintiff Derek Kingsley is a schedule 2 employee. The defendant is a schedule 2 employer and is the plaintiff's employer. While the plaintiff Tania Kingsley was not a schedule 2 employee, her FLA claim is dependant on the success of the plaintiff Derek Kingsley's claim. The plaintiff argues that the section 28 prohibition only applies to workers who are not entitled to WSIA insurance, as noted by section 27³. The plaintiff's claim was rejected by the WSIB January 7, 2010, by reason of a finding that the plaintiff was not acting in the course of his employment at the time of his injury. The plaintiff has not appealed but apparently has an extension of time to appeal the decision. During argument, the defendant brought to my attention section 17 of the WSIA which permits the Board to award benefits to a worker whose injuries caused serious impairment. It seems not in dispute that the plaintiff was catastrophically injured from the truck incident.

[9] The purpose of the legislation is to provide a no fault avenue for an employee who comes under section 28 of the WSIA to claim compensation. Since the plaintiff has been held to be disentitled to benefits as contemplated by section 27 of the WSIA, then it is not *plain and obvious* that his claim is barred by section 28(2).

[10] It is not appropriate on this motion for me to weigh the evidence concerning whether the plaintiff was or was not in the course of his employment at the time he was injured. That factual finding would be for the trial of an issue, or a motion for summary judgement if so advised.

[11] The balance of the claims arise directly or indirectly from the plaintiff Derek Kingsley's employment relationship with the defendant. The plaintiff concedes

³ 27. (1) Sections 28 to 31 apply with respect to a worker who sustains an injury or a disease which entitles him or her to benefits under the insurance plan and to the survivors of a deceased work entitled to benefits under the plan.

that those portions of his claim cannot survive by reason of the collective agreement and ongoing labour relations proceedings. Those portions of the statement of claim are therefore struck.

[12] It is therefore ordered that paragraphs 1(a) after the word “negligence”, 1(b), 1(c), and 1(d) are struck; as are paragraphs 33-34, and 53-73 of the plaintiffs’ statement of claim. The plaintiff is ordered to deliver a fresh as amended statement of claim. The defence has 20 days after delivery of the amended statement of claim to deliver an amended statement of defence.

[13] Both parties filed costs outlines. If they cannot agree on costs, they may make submissions of two pages or less within 14 days and a further five days for reply.

Honourable Justice Timothy Ray

Released: February 14, 2013

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