

CITATION: Kanhai v Toronto Transit Commission 2024 ONSC 3986
COURT FILE NO.: CV-21-660689
MOTION HEARD: 20240712

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Sheldon Kanhai, Plaintiff

AND:

Toronto Transit Commission, Defendant

BEFORE: Associate Justice Jolley

COUNSEL: Mahrukh Bhali, counsel for the moving party plaintiff

Giuseppe Agostino, counsel for the responding party defendant

HEARD: 12 July 2024

REASONS FOR DECISION

[1] The plaintiff seeks leave to amend his statement of claim to add a claim for damages for violations of his human rights. Initially, he brought this civil action as well as an application before the Human Rights Tribunal of Ontario (“HRTO”). The statement of claim in the civil action referenced his allegations of discrimination and breach of human rights but did not include a claim for damages relating to those alleged breaches. In the civil action, the plaintiff specifically pleaded:

38. Kanhai states that he has already filed an Application before the Human Rights Tribunal of Ontario, seeking remedy for employment discrimination on the basis of his Post-Traumatic Stress Disorder and depression. Kanhai states that it is for this reason alone that he does not seek statutory damages under Section 46.I of the *Ontario Human Rights Code*, R.S.O. 1990, C. H. 19, as amended:

[2] He claimed separate reinstatement and damages claim in his application before the HRTO.

[3] The defendant moved to dismiss the plaintiff’s HRTO application on the basis that the plaintiff had commenced this civil action which was “factually and legally identical in substance to the [HRTO action]”, according to the defendant’s submissions. The defendant argued in its written submissions in support of the dismissal that in both proceedings the plaintiff “alleged discrimination in his employment based on his Post Traumatic Stress Disorder and depression” and asserted that the defendant had a duty to accommodate him, which it failed to satisfy. Both proceedings, according to the defendant, cited the plaintiff’s termination as an act of discrimination by the defendant on the basis of disability.

[4] It argued that the plaintiff relied on the same material facts in each proceeding and that it was not appropriate to have a duplication of proceedings heard in multiple fora. The HRTO agreed (*Kanhai v TTC* 2023 HRTO 1610), and dismissed the plaintiff's HRTO application, holding that:

[14] In this case, the civil claim and Application both concern the events that led up to the applicant's termination from the respondent. While the applicant has attempted to separate the allegations into two categories, those pertaining to the alleged Code discrimination and those pertaining to the alleged wrongful termination, they are in fact all part of one factual matrix, and both will have to be considered to determine the legal issues in either proceeding.

[5] Having obtained a dismissal of the plaintiff's HRTO complaint on the basis that all issues should be decided in the civil action, the defendant now objects to the plaintiff attempting to do that very thing. It argues that it would be an abuse of process for the plaintiff to amend this parallel proceeding, upon which it relied to obtain a dismissal of the HRTO proceeding, to include the claims that it argued before the HRTO should be heard together. I find it would be unfair for the plaintiff to be denied the opportunity to pursue his human rights damages claim in this action, on the basis of the doctrine of election or on any other basis, when this is the very ground the defendant relied on its HRTO motion – that all issues should be heard in one forum.

[6] In the course of its argument, the defendant clarified that its election argument was focused on preventing a result that allowed a plaintiff to add a new cause of action after a limitation period had expired. In other words, it was the election to amend this proceeding after the expiry of the limitation period that gives rise to the defendant's objection. Accepting that to be the case, I find that the plaintiff is not alleging a new cause of action so the limitation period issue is not at play. Instead, he is seeking a different remedy arising from the very same facts that he has pleaded from the outset, something acknowledged by the defendant before the HRTO.

[7] Where a claim already pleads substantially all of the material facts that give rise to the further proposed remedies, amendments that set out an alternative claim for relief arising out of the same general factual matrix previously pleaded are not a new cause of action. (*Galluzzi v Pearllann Consulting Inc.* 2017 ONSC 3298 at paragraph 9). I note the language of the "same factual matrix" was specifically referenced by the HRTO in its decision dismissing the plaintiff's application, reproduced at paragraph 5, *infra*.

[8] This motion to amend the statement of claim is on all fours with *Klassen v Beausoleil* 2019 ONCA 407 which held at paragraph 28:

An amendment does not assert a new cause of action - and therefore is not impermissibly statute-barred - if the "original pleading contains all the facts necessary to support the amendments ... such that the amendments simply claim additional forms of relief, or clarify the relief sought, based on the same facts as originally pleaded." ... Put somewhat differently, an amendment will be refused

when it seeks to advance, after the expiry of a limitation period, a "fundamentally different claim" based on facts not originally pleaded: *North Elgin*, at para. 23.

- [9] Unlike *Robins v PricewaterhouseCoopers* 2017 ONSC 1778, on which the defendant relies, the proposed amendment in this instance is not a factually distinct claim from what was originally pleaded. A review of the proposed amendments confirms that it does not add any new paragraphs except under the prayer for relief and the deletion of the rationale for not claiming the human rights damages in the original pleading. As noted in *Di Filippo v Bank of Nova Scotia* 2024 ONCA 33 at paragraph 40:

If a statement of claim pleads all the necessary facts to ground a claim on one or more legal basis, and the original statement of claim only asserts one of the legal bases - that is, one cause of action based on those facts - the statement of claim can be amended more than two years after the claim was discovered to assert another legal basis for a remedy arising out of the same facts - that is, another cause of action. This is because it is only the discovery of the claim, as defined in the Limitations Act and the case law, that is time barred under s. 4, not the discovery of any particular legal basis for the proceeding.

- [10] The defendant's argument that the claim is statute barred flies in the face of its position before the HRTO that both actions made the same allegations of discrimination and failure to accommodate and were, in effect, "the same complaint".
- [11] I find *Jaffer v York University* 2010 ONCA 654 not applicable. The plaintiff does not propose to sue civilly solely for a breach of the Code. He has a freestanding cause of action for wrongful dismissal. The defendant argues that it has a defence to that claim as it has paid the plaintiff what he would be owed should the claim succeed. That the defendant might have a defence or, more precisely, that the plaintiff may not have damages, does not abrogate from the fact that the claim, as proposed, claims both a breach of the Code and a separate breach of the employment contract.
- [12] Lastly, I am not satisfied that the defendant will suffer any prejudice should the amendment be permitted. It has been aware the plaintiff's claim for breach of his human rights since at least August 2019. While the defendant indicated that two of its employees have since left the organization, it has not stated that it did not interview those individuals in respect of the earlier HRTO claim or that they are not available or their whereabouts unknown.
- [13] Further, I note that it has already defended these allegations in the HRTO context when it filed a 67 paragraph, evidence laden response to the application, denying that it had discriminated against the plaintiff.
- [14] The plaintiff is granted leave to amend his statement of claim to add a claim for damages for human rights discrimination, in the form of the proposed amended statement of claim contained in his motion record.

[15] Considering all the circumstances, including the defendant's own bill of costs, I find the sum of \$5,000 fixed on a partial indemnity basis to be an amount that the defendant would reasonably expect to pay if unsuccessful on the motion. I fix costs in that all inclusive amount, payable by the defendant to the plaintiff within thirty days.

Associate Justice Jolley

Date: 15 July 2024