Court of Queen's Bench of Alberta

Citation: T L K v Serva Group Ltd, 2017 ABQB 173

Date: 20170314
Docket: 1401 04515
Registry: Calgary

Between:

T.L.K.

Plaintiff

- and -

Serva Group Ltd.

Defendant

Restriction on Publication

The Court has used initials regarding the Plaintiff as a result of this judgment making reference to comments described in the memorandum of decision

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Memorandum of Decision
of
A. R. Robertson, Q.C., Master in Chambers

Introduction

[1] The plaintiff, T.L.K., was employed with the defendant as an expediter/buyer from February 7, 2012 to August 14, 2013, when she left on a disability claim. She sues for constructive dismissal, alleging that the workplace had become a poisoned environment.

[2] The defendant Serva Group Ltd. applies to have her claim summarily dismissed. Serva Group argues that the unfortunate incident that gave rise to the conflict was properly dealt with by management, that it was a "one off" event, and that she simply resigned.

[3] I have concluded that the employer did not repudiate the employment agreement; in fact the response from management was to re-assert its expectations of respectful behaviour amongst co-workers.

[4] Accordingly, the claim must be dismissed.

Background

[5] T.L.K. shared an office within the purchasing department with Nathan Clow, a co-worker who was a buyer and the aftermarket sales coordinator.

[6] On August 8, 2013 T.L.K. offered to perform after hours sales calls duties for Mr. Clow, because he was taking Friday, August 9 off so that he could attend a wedding. That involved T.L.K. being provided with a telephone that he normally used, referred to as the "aftermarket phone".

[7] When she received this phone, T.L.K. looked at some of Mr. Clow's emails that were accessible on it, between Mr. Clow and Ryan Smith and between Mr. Clow and Kara Johnson. They had been sent on August 7 and 8 and they discussed Ms. Kovacs. Mr. Ryan and Ms. Johnson were also co-workers at Serva Group.

[8] An email from Mr. Smith on August 7 is difficult to understand because it is written in abbreviated form. It apparently refers to some kind of code, and to an outsider its meaning is unclear. However, the parties clearly understood that Mr. Smith was being critical of an error that T.L.K. had made. Mr. Clow responded:

> I overheard you guys talking about it which made me chuckle when I saw this email.
>
> Steve is giving the aftermarket phone away this weekend while I go to a wedding… I hope she gets it.

[9] The reference to "Steve" it is to Stephen Welsh, who was the supervisor of both Mr. Clow and Ms. Kovacs. Although the email could be read as being neutral or perhaps supportive of Ms. Kovacs, it is acknowledged that it was not flattering to her. The "chuckle" referred to the mistake that she had made, and, "I hope she gets it" was intended to suggest that she might not understand what she was doing.

[10] On August 8, Mr. Clow wrote to and from Ms. Johnson in a series of emails. The thrust of these emails was to the effect that Ms. Johnson and Mr. Clow thought T.L.K. was a "crazy lady" and a "failure" and that by filling in for Mr. Clow she would leave things in "chaos". In one of them Mr. Clow interpreted some body language of another supervisor as indicating that he had a low opinion of T.L.K.

[11] It is not clear why T.L.K. was looking through his emails. Serva Group considers her to have been "snooping", but T.L.K.'s counsel argues that it was an appropriate thing for her to do to get up to speed. There is no evidence that she was instructed to look through them; Mr. Clow clearly did not expect her to do so. However, in the subsequent meetings and discussions she was not criticized for doing so.

[12] T.L.K. was upset about the string of emails, and on that Friday took them to Mr. Welsh. After speaking to him, she forwarded them to him and said, "if I would have known how Nate [thought or talked] about me – "a failure" I would have never offered to take his phone. Why did he not say anything in the meeting or to you if he thought I was not capable of handling his phone."

[13] T.L.K. was clearly hurt by the opinions expressed in the emails. Mr. Welsh's view was that this behaviour was out of character for Mr. Clow. On Monday, the first day that Mr. Clow was back in the workplace, Mr. Welsh met with him and the result of that discussion was that Mr. Clow volunteered to apologize to T.L.K., and he did so. He acknowledges that his apology was brief.

[14] T.L.K. viewed his apology as being insincere, and she told Mr. Welsh that. He offered to set up a three-way meeting. Mr. Welsh has testified that he had some training in conflict resolution, although there is no evidence that T.L.K. was aware of that. T.L.K. was not sure in her evidence if this offer was made before or after she left the workplace, but she was clear that the only resolution that would have been satisfactory to her was to work away from Mr. Clow. She appears not to have been interested in a further, three-way, meeting.

[15] After the incident arose, T.L.K. sent an email to Mr. Welsh complaining about Mr. Clow's "swearing". What she was complaining about was his coarse language. Mr. Welsh was previously aware of that, he had taken steps to try to reduce the coarse language in the workplace, but a problem that he had in dealing with T.L.K.'s complaint was that T.L.K. had also participated in using coarse language.

[16] Serva Group argues that her email requesting a move because of the foul language is important because it made no reference to the incident that had occurred only a few days before.

[17] I place no emphasis one way or the other on this email and the absence of the reference in it to the insulting emails exchanged a few days before. T.L.K. wanted to work in some place that Mr. Clow was not, and Mr. Welsh was well aware of why that was so.

[18] T.L.K. did not return to work on Wednesday, and in fact never returned to work. She went to see a physician, who provided a note saying that she needed to be off work until September 30. She then consulted a psychologist to deal with the consequences of being called a "crazy lady" and "failure" by a co-worker in a private communications between co-worker, apparently being the subject of some criticism by a third co-worker, and further possibly being the subject of some tacit criticism by a supervisor if Mr. Clow's interpretation of his body language was correct.

[19] Serva Group Ltd. management did not ignore her complaints. As mentioned, Mr. Welsh immediately dealt with it by discussing it directly with Mr. Clow at the earliest opportunity, and being advised that he was going to, and did, apologize.

[20] T.L.K. said that for her to return to work she could not work in the same office as Mr. Clow. Serva Group's response was that there was no other practical location for her to work. Space was tight, and Mr. Welsh, Mr. Clow and T.L.K. had recently been sharing an office although Mr. Welsh had been able to move into his own space. Giving her a private office, if that were possible, would have involved giving a private office to her ahead of several other more senior people. The only other place for her to work was on another floor down the hall,

and it was not practical for employees to be spending so much time walking around the building trying to reach her to get the job done.

[21] Furthermore, Serva Group's Director of Human Resources Terri Boushon, located in Oklahoma City, Oklahoma, became involved and on September 30, the day before T.L.K.'s expected return to work, wrote in an email:

> Our desire is that employees treat each other with dignity and respect, and work together as a team. If you experience any issues in the future, you may report them to your manager or to any higher member of management. You may also contact me at any time – my contact information is listed below.
>
> Once you send me your release [apparently referring to a medical release indicating that she could return to work], I would like to set up a call with you and Steve first thing in the morning when you return and will put together a plan of action to get you caught up with what's happened while you were away and what your priorities will be moving forward. I would also like to schedule a follow-up with you, maybe in a couple of weeks, to see how things are going with your return.

[22] This email of support from the Director of Human Resources was not enough to satisfy T.L.K. She said she would not return to work "at this time". She advised that she was still seeing her psychologist for counselling.

[23] Ms. Boushon said that she had understood that T.L.K. doctor had released her to come back to work immediately, and if that were not so she asked for another medical certificate supporting her absence. She reminded T.L.K. that Mr. Clow had been spoken to, had apologized to her, and had provided assurances that the problem will not occur again.

[24] A few hours later, T.L.K. advised that she would not return to Serva Group. She did not provide another doctor's letter to extend her short-term disability claim.

[25] Serva Group points out that the incident did not arise at the management level, but rather between co-workers. As soon as management (Mr. Welsh) found out about it, he responded appropriately. He arranged for an apology and had every reason to believe that the matter could be resolved at that level.

[26] This is not a case of repeated insulting behaviour, nor is it a case of insulting behaviour that was tolerated or condoned by management. The very opposite is true: it was not condoned, it was made clear to Mr. Clow that his behaviour was not acceptable, alternative resolutions were explored, none was available, and T.L.K. was given support at the highest level within the human resources department. She was offered an opportunity to provide further medical evidence supporting her absence. Ms. Boushon invited her to make a further complaint, perhaps to Ms. Boushon directly, if any further issues arose. Ms. Boushon planned to follow up with her in a couple of weeks.

[27] Accordingly, Serva Group says that this isolated incident, dealt with properly by management, does not suffice for an employee to assert that she has been constructively dismissed. There was no poisoned work environment that amounted to a repudiation of the employment contract, there was no history of relevant misbehaviour by co-workers, and when steps were taken to try to allow the individuals to move forward, T.L.K. did not even try to see if the steps taken to resolve her concerns would work.

[28] T.L.K. argues that she could not realistically have been expected to work in the same office with a co-worker who had told at least one other worker that she was crazy and a failure, particularly when communications from at least two others suggested that they either agreed with Mr. Clow, or at least did not disagree with him. Coming back to this work environment would simply have exposed her to further abuse, and the first round of abuse caused her to be so upset mentally that she needed medical and psychological assistance.

Analysis

[29] The fundamental legal question in a constructive dismissal claim is whether the employer's behaviour, by introducing a unilateral and fundamental change to the workplace, has amounted to a repudiation of the contract of employment by the employer. In these circumstances, had the employer so fundamentally breached its obligation to provide a safe and harassment-free workplace that she was entitled to leave? In my view, an employer who, when advised of a dispute among co-workers, takes reasonable steps that amount to a re-assertion of its expectations of mutual respect and support for the victim of harassment, cannot be said to have introduced any fundamental change to the workplace.

[30] The question on a summary dismissal application is whether there is any need for trial in order to make a fair and just decision. What further evidence would come out at trial in this dispute? A trial judge might be able to determine whether the apology was sincere. Mr. Clow says it was; T.L.K. clearly did not perceive it to be sincere. She immediately went to Mr. Welsh and let him know that. Perhaps the possibility of moving T.L.K. to another workspace might have been more thoroughly explored, but neither side suggests any further evidence that might be tendered.

[31] However, would either of these points be determinative?

[32] Whether was sincere or not, Mr. Clow did make an apology, at least of sorts, and workplace apologies that are mandated by circumstances are not necessarily heartfelt, but making the apology is an effort to move forward. Also, Mr. Welsh heard T.L.K. complaint that it was insincere, and he then offered to set up a three-way meeting, when he might have been able to watch and listen as they spoke and ensure that the relationship was mended as best as might be done. However, it appears from the evidence that it was not acceptable to T.L.K.

[33] It would no doubt have created collateral human resources consequences to move T.L.K. to her own office when other more senior employees did not have their own. In my view, such a resolution would have likely resulted in suspicion about what entitled her to special treatment, making a confidential resolution virtually impossible.

[34] To what extent should the Court take into her account her medical consequences? No one is suggesting that the doctor gave bad advice in supporting her claim for short-term disability. No one is suggesting that she did not properly seek psychological counselling. No one is suggesting a kind of malingering on her part. Her assertions of the impact the incident had on here were accepted by the employer.

[35] The Ontario Court of Appeal has recently addressed the analysis in ***General Motors of Canada v Johnson***, 2013 ONCA 502, 2013 CarswellOnt 10496 at paragraphs 66 and 67. That Court said that except for "particularly egregious stand-alone incidents", a workplace becomes poisoned only with repeated incidents, and that the proper perspective must be that of an "objective reasonable bystander":

> Workplaces become poisoned for the purpose of constructive dismissal only where serious wrongful behaviour is demonstrated. The plaintiff bears the onus of establishing a claim of a poisoned workplace. As the trial judge recognized, the test is an objective one. A plaintiff's subjective feelings or even genuinely-held beliefs are insufficient to discharge this onus. There must be evidence that, to the objective reasonable bystander, would support the conclusion that a poisoned workplace environment had been created. See for example, *Ata-Ayi v. Pepsi Bottling Group (Canada) Co.* (2006), 2006 CanLII 37418 (ON SC), 54 C.C.E.L. (3d) 148 (Ont. S.C.), at paras. 23 and 40; *Bobb v. Alberta (Human Rights and Citizenship Commission)*, 2004 ABQB 733 (CanLII), 370 A.R. 389, at para. 85; *Houtz v. 772910 Ontario Inc. (c.o.b. McFee's Tavern)*, [2002] O.J. No. 475 (S.C.), at para. 45; *Canada (Canadian Human Rights Commission) v. Canada (Canadian Armed Forces) (re Franke)*, 1999 CanLII 18902 (FC), [1999] 3 F.C. 653 (T.D.), at paras. 43-46.
>
> Moreover, except for particularly egregious, stand-alone incidents, a poisoned workplace is not created, as a matter of law, unless serious wrongful behaviour sufficient to create a hostile or intolerable work environment is persistent or repeated: *Bobb* at paras. 85-87; *Canada (Canadian Armed Forces) (re Franke) at paras. 43-46*.

[36] This approach had been adopted earlier by the Alberta Provincial Court in ***Lamb v Gibbs Gage Architects***, 2011 ABPC 315, 2011 CarswellAlta 2401 at para. 33.

[37] The Alberta Court of Queen's Bench has stated the test slightly differently by saying, "The test for constructive dismissal is objective, with a subjective component": ***Novakowski v Canadian Linen & Uniform Service Co***, 2015 ABQB 53at para. 75. But the "subjective" aspect is the feelings of those of a "reasonable person", not necessarily the feelings of the particular employee:

> The question that the Court must answer is "whether a reasonable person in the same situation as the [employee] would have felt that the essential terms of the employment contract were being substantially changed": ***Pathak v Jannock Steel Fabricating Co***, 1999 ABCA 8 at para 15.

[38] In my view, the response from management here is crucial to the analysis, including the determination of whether the incident was "particularly egregious" (the exception mentioned in ***General Motors***): the insulting communications were not condoned in any way by management. Management did not make an issue of T.L.K.'s so-called "snooping" on Mr. Clow's phone. Mr. Welsh considered the insults to be a significant issue and dealt with the problem accordingly. He expected, and arranged for, an apology. When that was not considered sincere, he suggested a three-way meeting to find an accommodation to move forward. The complaint was taken seriously by the Director of Human Resources, no issue was raised about her time off for medical leave, and further leave seems to have been contemplated if T.L.K. had provided another note or letter (or "release" as the Director of Human Resources called it) from her doctor. A follow-up discussion was planned. Further complaints, if the issue persisted, were anticipated and T.L.K. was encouraged to contact the Director of Human Resources directly in Oklahoma City.

[39] There were no repeated incidents. Management of the employer responded appropriately to the problem as soon as it was made aware.

[40] There may theoretically have been further steps management might have done. Perhaps if enough people were moved within the workplace a separate office might have been found for T.L.K. Perhaps she could have shared Mr. Welsh's office for a short period to allow re-introduction to the workplace. But both of these things would have shone a spotlight on the work arrangement changes and the reasons for them, and it is not at all clear that that would have been a healthy resolution for T.L.K, let alone the employer. I do not fault management for not pursuing resolution alternatives further.

[41] The resolution of workplace issues does not have to be a perfect one from the perspective of the employee, just as workplace human rights accommodations are not required to be perfect. It is a reasonable accommodation, or reasonable resolution, that is expected of employers. And as mentioned, where the employer's response is to take steps to re-assert its expectation that employees will treat each other with respect, there has been no repudiation of the employment agreement.

[42] The test for summary judgment is whether the Court can make a disposition that is fair and just to both parties on the existing record. There does not appear to be any evidence that might be available to a trial judge that might materially affect a review of the facts. There is no serious issue for trial.

[43] If the applying party's position is unassailable - meaning that it is so compelling that the likelihood of success is very high - then the application should be granted: ***Beier v. Proper Cat Construction Ltd.***, 2013 ABQB 351 at para. 61. In my view this threshold has been reached here.

Conclusion

[44] For these reasons, I dismiss the action. Costs may be spoken to by making an appointment with the Masters' Chambers Clerk or, if the parties agree, they may make written submissions for a desk decision.

Heard on the 1st day of March, 2017.
Dated at the City of Calgary, Alberta this 14th day of March, 2017.

A. R. Robertson, Q.C.
M.C.C.Q.B.A.

Appearances:

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