

SUPERIOR COURT

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No : 500-06-001039-201

DATE : May 29, 2024

PRESIDED BY : HONOURABLE SILVANA CONTE, J.S.C.

CAROLE DAVIES
Plaintiff

v.
AIR CANADA
Defendant

JUDGMENT

[1] Defendant is seeking the partial dismissal of the class action on the basis that the action instituted by unionized class members falls within the exclusive jurisdiction of the grievance arbitrator.

Context

[2] On November 17, 2022, the Court of Appeal authorized a class action against Defendant and named Plaintiff as the authorized representative to act on behalf of the following class:

All retired employees of the defendant eligible for free and reduced travel ("FRT") flight passes in retirement.

[3] Plaintiff worked for Air Canada for over 29 years. Plaintiff alleges that over the past several decades, Air Canada entered into distinct and individual contract with the class members and undertook to grant and continue to make available, including upon retirement, FRT passes to all employees with at least six months' experience and also undertook, throughout that period, to ensure that priority for the use of those passes would be determined by seniority.

[4] Plaintiff alleges that Air Canada has issued tens of thousands of FRT passes (B1 or C1 passes), to current Air Canada employees, and in doing so, has diminished the usefulness and priority of the class members' FRT passes (C2 passes) thereby causing injury to approximately 30,000 retirees, many of whom opted for early retirement to enjoy said travel benefits.

[5] Plaintiff argues that Air Canada's management rights are subject to articles 6, 7 and 1375 C.C.Q. and that it has violated its implicit to act in good faith by the unreasonable exercise of those rights.

[6] Plaintiff seeks injunctive orders as well as, damages for the abusive exercise of management rights.

[7] On June 22, 2023, Air Canada's leave for appeal to the Supreme Court of Canada was denied¹.

[8] On September 18, 2023, the class action proceeding was filed with the Court and notices were thereafter published with the Court's authorization.

[9] On January 12, 2023, Air Canada filed its application for declinatory exception.

Arguments

[10] Air Canada argues that the essence of the dispute concerns employee benefits or remuneration and as such, these working conditions form an integral part of the Collective Agreement between Air Canada and the Airline Division of the Canadian union of Public Employees (hereinafter the "Collective Agreement")² for which the arbitrator would have exclusive jurisdiction.

[11] Plaintiff alleges that the management promises made to class members are not expressly or implicitly referenced in the Collective Agreement but arise from individual contracts concluded at the time of their employment. In addition, Plaintiff argues that there has been an abusive exercise of management rights which is outside the scope of the Collective Agreement, and which gives rise its claim for damages.

¹ *Air Canada v. Carole Davies*, 2023 CanLII 54508 (SCC).

² Exhibit R-1.

[12] Air Canada acknowledged at authorization that FRT passes never formed part of the discussions and negotiations of employee working conditions under the Collective Agreement³. However, it takes the position that the passes are issued at management's sole and unfettered discretion.

Analysis

[13] A class action proceeding is a procedural vehicle that does not confer substantive rights. As such, the action does not have the effect of conferring jurisdiction on the Superior Court over a proposed class of members that would otherwise fall within the subject-matter jurisdiction of another court or tribunal⁴.

[14] Under article 584 of the *Code of Civil Procedure (CCP)*, Defendant can only raise a preliminary exception where it concerns a substantial number of class members and pertains to an issue to be dealt with collectively. It is not contested that the declinatory exception raised herein under article 167 CCP concerns a substantial number of class members who, like the representative Plaintiff, were unionized employees.

[15] Plaintiff has the burden of establishing, on a *prima facie* basis, that the individual claims of each class member meet one of the connecting factors under article 3148 of the *Civil Code of Quebec (CCQ)*. At this stage of the proceeding, the facts alleged in the originating application are taken as averred and while the Court reviews the evidence to determine whether that *prima facie* burden has been met, it does not engage in an evaluation of the merits of the claim⁵.

[16] The opposing party may present evidence to challenge these facts. Here Defendant raises the existence of an agreement to submit the dispute to arbitration in accordance with paragraph 2 of article 3148 CCQ.

[17] The Supreme Court in *Bisaillon*⁶ as well as the Court of Appeal in *Regroupement*⁷ apply the test set out in *Weber v. Ontario Hydro*⁸, to determine whether the arbitrator has sole jurisdiction over a dispute justifying the dismissal of a class action. The Court must determine whether the essential character of the dispute arises either explicitly or implicitly from the Collective Agreement. This determination is based upon the factual context in which it arose, not its legal characterization.

³ *Davies v. Air Canada*, 2021 QCCS 3119 (CanLII), at para 17.

⁴ *Bisaillon v. Concordia University*, 2006 SCC 19 (CanLII) at para 19; *Bou Malhab v. Diffusion Métromédia CMR Inc.*, 2011 SCC 9 (CanLII), at para 52.

⁵ *Transax Technologies Inc. v. Red Baron Corp. Ltd.*, 2017 QCCA 626 (CanLII), at para 16.

⁶ *Bisaillon*, *supra* at paras 33-38.

⁷ *Regroupement des cols bleus retraités et préretraités de Montréal v. Ville de Montréal*, 2020 QCCA 399 at para 25.

⁸ *Weber v. Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 S.C.R. 929, at paras. 63-66.

[18] In *Bisaillon*⁹ the Court held as follows:

30 I will begin by reviewing the subject-matter aspect of the jurisdiction of grievance arbitrators. The Labour Code gives the grievance arbitrator exclusive jurisdiction over “any disagreement respecting the interpretation or application of a collective agreement” (ss. 1(f) and 100.1 L.C.). To determine whether a dispute arises out of a collective agreement, it is necessary to follow the analytical approach adopted by this Court in *Weber*. As McLachlin J. explained, “The question in each case is whether the dispute, in its essential character, arises from the interpretation, application, administration or violation of the collective agreement” (*Weber*, at para. 52).

28 It is worth noting that the monopoly on collective representation is not limited to the context of the collective agreement but extends to all aspects of employee-employer relations (*Isidore*, at para. 41; *Noël*, at para. 57). The union’s monopoly with respect to collective bargaining is based not only on the existence of a collective agreement, but also on the certification of the union (*Isidore*, at para. 38; *CAIMAW v. Paccar of Canada Ltd.*, 1989 CanLII 49 (SCC), [1989] 2 S.C.R. 983, at pp. 1007-8). For this reason, any negotiations regarding conditions of employment that are not mentioned in the current collective agreement must be conducted by the certified union.

[...]

31 The first stage of this approach consists in identifying the essential character of the dispute. On this point, the Court has stressed that what must be done is not limited to determining the legal nature of the dispute. On the contrary, the analysis must also take into account all the facts surrounding the dispute between the parties: *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14, at paras. 25 and 29.

32 At the second stage, it must be determined whether the factual context so identified falls within the ambit of the collective agreement. In other words, it must be determined whether the collective agreement implicitly or explicitly applies to the facts in dispute. [...]

33 This Court has considered the subject-matter jurisdiction of grievance arbitrators on several occasions, and it has clearly adopted a liberal position according to which grievance arbitrators have a broad exclusive jurisdiction over issues relating to conditions of employment, provided that those conditions can be shown to have an express or implicit connection to the collective agreement [...]

(Court’s emphasis)

[19] Does the class action deal with working conditions that are expressly or implicitly referenced in the Collective Agreement?

⁹ *Bisaillon*, *supra* note 4 at paras 28, 30-33.

[20] The Court finds that there is no express or implicit reference to the FRT passes in the Collective Agreement.

[21] The essence of the dispute concerns: 1) the FRT passes promised to the class members and arising from individual and distinct contracts¹⁰. Plaintiff argues it is akin to a hiring bonus, a perk offered to employees for over 62 years and one that remains upon retirement according to the retiree handbook¹¹; and 2) the abusive exercise of management rights when removing the seniority privilege attached to the C2 passes by issuing the C1 passes to active employees¹².

[22] While section 1.01 provides that the express purpose of the Agreement is to provide amongst other things, "the continuation of employment under condition of reasonable hours, compensation and working conditions", it is clear that the parties did not intend for the FRT passes to be considered a "working conditions" subject to the Agreement as Air Canada admits that there is no reference to the FRT passes because they were not the subject matter of the negotiations with the union and left to the discretion of management¹³.

[23] Air Canada referenced the case of *Canadian Union of Public Employees v. Air Canada*,¹⁴ where the Court maintained the judicial review of an arbitral award dismissing a union grievance by flight attendants. In that case, the flight attendants argued that Air Canada discriminated against flight attendants on the basis of sex by providing priority travel passes to pilots in violation of a promise made during the collective bargaining process.

[24] The arbitrator and Court found that the promise was limited to business commuter passes and not special personal travel passes that were awarded on a discretionary basis from time to time. However, there was no debate as to jurisdiction. The business passes formed part of the negotiations between the union and Air Canada and were expressly referenced in the Collective Agreement.

[25] The promises alleged in the present case fall outside the scope of the Collective Agreement and, can also arguably fall under section 3 of the Collective Agreement dealing with the reservation of Air Canada's management rights with regard to the control and direction of its employees.

[26] The Court of Appeal, in this case, acknowledged that there are some exceptions to the rule that acknowledges the monopoly of unions to negotiate on behalf of its members as follows¹⁵:

¹⁰ Paragraphs 1, 12, 13, 16, 65 and 66 and of the Originating Application.

¹¹ Exhibit P-5.

¹² Paragraphs 46, 49, 50, 65 and 66 of the Originating Application.

¹³ Note 3.

¹⁴ 2019 ONSC 4613.

¹⁵ *Davies v. Air Canada*, 2022 QCCA 1551 (CanLII) at para 24.

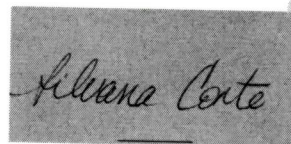
[24] Secondly, the judge erred in dismissing out of hand the possibility that Air Canada's alleged obligations arose out of distinct contracts legally independent from the collective agreements. While, in principle, a collective agreement leaves no room for separate contracts concerning the conditions of employment,[14] there is authority recognizing the possibility that independent agreements addressing matters not mentioned in the collective agreement may exist and be legally effective. For this reason, one cannot exclude the possibility that Air Canada's longstanding practice regarding FRT passes gave rise to one or several tacit contracts constituting the source of its alleged obligations. Again, the issue at this stage is not whether the appellant is likely to succeed, but rather whether her argument is frivolous or obviously ill-founded. I find that it is not.

[27] The Court on the merits has jurisdiction to determine if the exercise of management rights in issuing the FRT passes resulted in individual contracts with the class members or is simply the exercise of management discretion and, if so, whether these rights were exercised in a reasonable manner and in good faith.

FOR THESE REASONS, THE COURT:

[28] **DISMISSES** Air Canada's application for declinatory exception;

[29] **THE WHOLE** with costs to follow suit.



Signature numérique
de Silvana Conte
Date : 2024.05.29
11:38:19 -04'00'

SILVANA CONTE, J.S.C.

Me Michael Heller
HELLER & ASSOCIATES
Attorney for the Plaintiff

Me Sébastien Richemont
Me Mirna Kaddis
FASKEN MARTINEAU DUMOULIN S.E.N.C.R.L.

Me Louise-Hélène Senecal
AIR CANADA
Attorneys for the Defendant

Date of hearing : May 21, 2024