SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-001039-201

DATE: November 27, 2020

PRESIDING: THE HONOURABLE THOMAS M. DAVIS, J.S.C.

WALTER EDWARD DAVIES
Plaintiff
v.
AIR CANADA
Defendant

JUDGMENT

OVERVIEW

[1] The context of Plaintiff Walter Edward Davies (**Mr. Davies**) proposed class action has been discussed in the Court's judgment on Air Canada's application to examine Mr. Davies.[1]

[2] The present judgment is limited to Air Canada's application to produce relevant evidence prior to the authorization hearing. The evidence that Air Canada wants to produce is:

> a) The arbitration award and the judgment rendered on judicial review further to a grievance filed on January 28, 2015 by the Canadian Union of Public Employees, Air Canada Component, namely:

JD2836

[1] *Davies* c. *Air Canada*, 2020 QCCS 3843.

i) *Air Canada* and *Canadian Union of Public Employees, Air Canada Component,* Grievance CHQ-15-07 : Policy Grievance regarding denial of B1 Travel Passes, award dated April 13, 2018 (Arbitrator Steinberg) (the "Arbitration Award");

ii) *Canadian Union of Public Employees*, *Air Canada Component* v. *Air Canada*, 2019 ONSC 4613, judicial review rendered on August 1, 2019 (Thorburn, Myers and Favreau JJ) (the "Judicial Review Judgment");

(together, the "CUPE Judgments") copies of which are filed herewith en liasse as Exhibit AC-1;

b) A Sworn Statement by Anthony Bursey, Director, Crew Scheduling, at Air Canada, dated September 17, 2020, and the annex in support thereof, a copy of which is filed herewith as Exhibit AC-2, namely:

i) The collective agreement between Air Canada and The Canadian Union of Public Employees (Airline Division) effective from September 1, 1987 to August 31, 1990 (Annex A);

c) A Sworn Statement by Leslie-Ann Vezina, Director, Employee Travel and Recognition, at Air Canada, dated September 17, 2020, a copy of which is filed herewith as Exhibit AC-3;

1. AIR CANADA'S POSITION

[3] Essentially, Air Canada takes the position that the requested evidence is necessary for the Court to properly consider whether Mr. Davies' application meets the criteria of article 575 C.C.P. It characterizes the legal syllogism as follows:

6. The Petitioner's proposed legal syllogism, which this Honourable Court must analyse to determine if the Amended Authorization Application meets the criteria of article 575 CCP, appears to rely on three purported causes of action, namely that:

a) The Respondent breached an alleged contractual obligation towards its retired employees with respect to FRT privileges (Amended Authorization Application, paras. 1, 45 a., 47, 55, 61 c.).

b) The Respondent contravened the representations made to the class members when they were initially granted the rights to the FRT flight passes (Amended Authorization Application, paras. 9, 10-11, 45 b.); and

c) By awarding to its active employees special personal FRT Privileges of higher priority than the C2/Y10 FRT Privileges, the Respondent is targeting senior citizens in violation of their right to the safeguard of their dignity, and

> discriminates against the proposed class members on the basis of age (Amended Authorization Application, paras. 23, 53, 45 d. iii.).[2]

[4] Given that the syllogism is largely framed in contract, Air Canada believes that the evidence it wishes to produce is necessary to complete some overly vague or even incorrect allegations in the authorization application.

2. MR. DAVIES' POSITION

[5] Mr. Davies vigorously opposes Air Canada's application. In short, he posits that his amended authorization application is sufficiently detailed such that the production of additional evidence is not necessary for the Court to properly carry out its filtering role.

[6] To resume his oral argument: Air Canada employees and retirees have enjoyed the FRT passes for almost 70 years. The passes have allowed them to enjoy significant travel privileges and a certain predictability of access, based on seniority. Air Canada, having awarded higher priority flight passes to current employees, has significantly eroded the benefit or privilege and the rights of the retirees have been trampled upon. For. Mr. Davies, the retirees rights are clearly described in the amended application and no additional evidence is warranted.

3. ANALYSIS

[7] The Court must exercise prudence in considering an application to produce additional evidence. Its role is explained by the Court of Appeal in *Asselin* c. *Desjardins Cabinet de services financiers inc.*:

> [38] Bien sûr, aux termes mêmes de l'art. 574 *C.p.c.* (autrefois 1002 a.*C.p.c.*), « le tribunal peut permettre la présentation d'une preuve appropriée/the court may allow relevant evidence to be submitted », accessoirement à la contestation de la demande d'autorisation, le demandeur étant pour sa part autorisé à déposer au soutien de sa procédure, sans permission préalable, certaines pièces qu'il estime de nature à donner du poids à ses allégations. Mais cela doit être fait avec modération et être réservé à l'essentiel et l'indispensable. Or, l'essentiel et l'indispensable, côté demandeur, devraient normalement être assez sobres vu la présomption rattachée aux allégations de fait qu'énonce sa procédure. Il devrait en aller de même du côté du défendeur, dont la preuve, vu la présomption attachée aux faits allégués, devrait être limitée à ce qui permet d'en établir sans conteste l'invraisemblance ou la fausseté. C'est là le « couloir étroit » dont parle la Cour dans *Agostino*. Car, ainsi que l'écrit succinctement le juge Chamberland, au stade de l'autorisation, « le fardeau [du requérant] en est un de logique et non de preuve ». Il faut conséquemment éviter de laisser les parties passer de la

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2 Plan of argument of the Respondent Air Canada in support of the Application for Authorization to Adduce Relevant Evidence.

logique à la preuve (prépondérante) et de faire ainsi un pré-procès, ce qui n'est pas, répétons-le, l'objet de la démarche d'autorisation.[3]

[References omitted]

[8] Other judges have also explained the principles governing whether a defendant should be authorized to produce additional evidence. Justice Courchesne provides a thoughtful analysis in *Option Consommateurs* c. *Samsung Electronics Canada inc.*:

> [11] Le Tribunal rappelle certains principes émis par les tribunaux et qui doivent être considérés lorsqu'une demande d'interrogatoire et de communication de documents pré-autorisation lui est soumise :
>
> - le juge dispose d'un pouvoir discrétionnaire afin d'autoriser une preuve pertinente et appropriée ainsi que la tenue d'un interrogatoire du représentant, dans le cadre du processus d'autorisation;
>
> [...]
>
> - la vérification de la véracité des allégations de la demande relève du fond;
>
> - le tribunal doit analyser la demande soumise à la lumière des enseignements récents de la Cour suprême et de la Cour d'appel sur l'autorisation des actions collectives et qui favorisent une interprétation et une application libérales des critères d'autorisation;
>
> - à ce stade, la finalité de la demande se limite au seuil fixé par la Cour suprême, soit la démonstration d'une cause défendable ; le tribunal doit se garder d'autoriser une preuve qui inclut davantage que ce qui est strictement nécessaire pour atteindre ce seuil;
>
> - le tribunal doit se demander si la preuve requise l'aidera à déterminer si les critères d'autorisation sont respectés ou si elle permettra plutôt de déterminer si le recours est fondé ; dans cette dernière hypothèse, la preuve n'est pas recevable à ce stade;
>
> - la prudence est de mise dans l'analyse d'une demande de permission de produire une preuve appropriée ; il s'agit de choisir une voie mitoyenne entre la rigidité et la permissivité;
>
> [...]
>
> - le fardeau de convaincre le tribunal de l'utilité et du caractère approprié de la preuve repose sur la partie qui la demande.[4]

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3 2017 QCCA 1673.
4 2017 QCCS 1751.

[References omitted; The Court's underlining]

[9] In *Société AGIL OBNL* c. *Bell Canada*, having considered the Court of Appeal's judgment in *Asselin*, Justice Lussier opines that additional evidence may also be appropriate to understand the operations of a defendant or to allow the production of a contract relevant to a dispute.[5]

[10] The latter element is of particular importance given the way that the authorization application is drafted, even accepting that the facts alleged must generally be taken as being true at this point of the proceedings.

[11] We know that Mr. Davies is a retired Air Canada employee and that, both while employed and after retirement, he and certain family members have been able to benefit from flight passes.

[12] The FRT flight passes, including the C-2 pass held by Mr. Davies, are not part of any contract or collective agreement, but are a benefit or perhaps a privilege that the employer, Air Canada, has made available to its employees for a long time. According to Mr. Davies, priority of use was generally by seniority, even in respect of retired employees, but that this has now changed to favour active employees.

[13] Air Canada posits that Mr. Davies' personal action is grounded in contract referring to paragraphs 1, 45 a., 47, 55, 61 c. of the amended authorization application.

[14] Unpacking those allegations as they relate to FRT passes, one sees reference to "an agreement with each member of the Class [...] during their employment and then during their retirement",[6] Air Canada's "refusal [...] to perform its contractual obligations",[7] "the nature of [... Air Canada's] contractual obligations" and "an action in contractual responsibility."[8]

[15] Mr. Davies then alleges a breach of articles 6, 7, 1375, and 1434 of the Civil Code. Articles 6 and 7 clearly have application in contractual situations (although they are broader in scope) and the latter two articles clearly govern the conduct of parties to a contract and the effect of contracts.

[16] It is, therefore, evident that Mr. Davies frames his action as one of contract, but the only documentary evidence that he produces are extracts from an employee handbook, as reprinted with additions and corrections as at January 2000, seemingly provided at a "pre-retirement planning workshop", but apparently not to Mr. Davies, as he retired in 1987.

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5 2019 QCCS 4432.

6 Amended Application for Authorization to institue a Class Action and to Appoint the Status of Representative Petitioner, par. 1.

7 *Id.*, par 47.

8 *Id.*, par 61 c.

[17] Therefore, there is little information in the authorization application on the contract that actually governed Mr. Davies' conditions of employment, on those that were in place at the time of his retirement and, if applicable, on retirement conditions that might have governed the relationship thereafter.

[18] The Court therefore considers it appropriate to allow Air Canada to produce some documentary evidence, if only to allow the Court to evaluate whether Mr. Davies' contention that the FRT passes are part of Air Canada's contractual obligations to him is false.

[19] Therefore, the Court will permit the production of the solemn declaration of Mr. Bursey and the attached collective agreement, subject to paragraph 6 being struck from the said solemn declaration, as it goes beyond what is necessary to evaluate the falsity of Mr. Davies' allegations regarding his employment conditions or contract.

[20] Moving now to the solemn declaration of Leslie-Ann Vezina. Air Canada takes the position that its production is necessary to provide context to the FRT program, which is largely absent from Mr. Davies' authorization application. What one sees in the application is, with respect, a somewhat vague description of the program that is sometimes coloured by Mr. Davies understanding of it.

[21] In some measure, the dissatisfaction of Mr. Davies is expressed at paragraphs 13 and 14 of his amended authorization application, which read as follows:

> 13. Historically, priority for the use of these FRT flight passes was determined by the length of service as an employee of the Respondent. In other words, an employee's or a retiree's years of service with the Respondent determined their priority to be seated in an economy or business class cabin when availing themselves of these flight passes (hereinafter the "seniority priority");
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> 14. It was the Petitioner's understanding and that of his co-workers that his boarding priority would increase with time and as he got older and worked longer it would be easier for him to board and travel with the FRT flight passes;

[22] However, how does the Court determine whether these allegations are false, or determine whether Air Canada is acting in conformity with usage without at least some evidence from Air Canada on the scope of the program? To say this differently, given that Mr. Davies posits that an unwritten contract exists that gives him a certain seniority priority, and given that it is necessarily a synallagmatic contract, can the Court determine whether Mr. Davies' affirmations on the scope of this contract are frivolous or not without some context from Air Canada? The Court does not think so.

[23] This does not mean that the entire solemn declaration should be admitted as some of the allegations go beyond providing what the Court needs for its limited filtering role at this juncture. The Court will allow the production of a solemn declaration that contains the equivalent of paragraphs 1, 2, 3, 5, 11, 12, 13, 14, 16 and 17.

[24] Turning now to the arbitration decision of arbitrator Larry Steinberg. The Court will allow its production. It is not contested that during his employment, Mr. Davies was a unionized employee in the same union that deposited the grievance before arbitrator Steinberg. He argues that his right is contractual, while at the same time alleging that the FRT passes do not form part of any collective agreement.

[25] Mr. Davies has the burden of demonstrating a tenable claim. How a non-negotiated, non-written privilege becomes part of a collective employment relationship will be part of that burden. Air Canada states that Mr. Davies' affirmation of a contractual right to an FRT pass with certain seniority rights is false. While this is likely a question of mixed fact and law, the determination of an arbitrator as to the status of the FRT passes under the applicable collective agreement is certainly a useful and important element of proof to the Court in determining whether the proposed cause of action is tenable.

[26] The Court will allow the production of the arbitral award and the judgment of the Ontario Divisional Court in judicial review.

FOR THESE REASONS, THE COURT:

[27] **GRANTS** Defendant's Application to Adduce Appropriate Evidence in part;

[28] **AUTHORIZES** the production of the following evidence:

- Arbitration Award *Air Canada* and *Canadian Union of Public Employees, Air Canada Component* (Grievance CHQ-15-07: Policy Grievance regarding denial of B1 Travel Passes), dated April 13, 2018, and further confirmed by justices Thorburn, Myers and Favreau of the Ontario Superior Court of Justice in the Judicial Review Judgment dated August 1, 2019;
- The solemn declaration of Anthony Bursey, striking paragraph 6;
- The solemn declaration of Leslie-Ann Vezina, limited to paragraphs 1, 2, 3, 5, 11, 12, 13, 14, 16 and 17;

[29] **WITHOUT JUDICIAL COSTS**.

THOMAS M. DAVIS, J.S.C.

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