SUPERIOR COURT OF JUSTICE
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FROM: Angie

NUMBER OF PAGES: 13

RE: Baker and Lucier v. Navistar, Chatham Court File No.: 5329-12

MESSAGE: Enclosed please find Justice Gates' Reasons with reference to the above-noted motion.

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CITATION: Baker and Lucier v. Navistar, 2012 ONSC 6451
COURT FILE NO.: 5329-12 (Chatham)
DATE: 20130509

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Cathy Baker and Joe Lucier	)	Lewis N. Gottheil, for the Plaintiffs
Plaintiffs	)	
– and –	)	
Navistar Canada, Inc.	)	John C. Field and Lauri A. Reesor, for the Defendant
Defendant	)	
	)	**HEARD:** November 14, 2012 and January 22, 2013

Proceeding under the *Class Proceedings Act, 1992*

GATES J.:

1. OVERVIEW

[1] The plaintiffs as representatives of Locals 127 and 35 ("the Union") of CAW–Canada ("CAW") seek an order certifying this as a class proceeding pursuant to the *Class Proceedings Act, 1992* ("*CPA*").

[2] They claim to represent all unionized employees of Navistar Canada, Inc.'s ("Navistar") Chatham plant who they say were constructively or wrongfully dismissed from employment following the closure of that plant on/or about July 28, 2011.

[3] They also seek a declaration that:

i) they are entitled to compensation in lieu of notice for outstanding wages, vacation pay, overtime, premiums, benefits and severance pay;

ii) Navistar has breached its contracts of employment or the terms of its employment relationship with the plaintiffs and the class members;

iii) Navistar breached the terms of its employment relationship with the plaintiffs and each member of the class and/or its obligation to act in good faith and/or fair dealing.

[4] In response, Navistar brings this motion pursuant to rules 21.01 and 25 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to strike out the Amended Statement of Claim and to dismiss the plaintiffs' claim to being entitled to bring this proposed class proceeding. It says that this court has no jurisdiction to hear this matter.

[5] Navistar submits that at all times the plaintiffs and all the members of the proposed class were represented by the CAW as their exclusive bargaining agent such that exclusive jurisdiction rests with the Ontario Labour Relations Board ("OLRB") pursuant to the Ontario *Labour Relations Act*, S.O. 1995, c. 1, Sch. A. ("*LRA*").

[6] Each of the two Locals 127 and 35 had a collective agreement with Navistar at its Chatham plant which expired on June 30, 2009 at which time all the employees were on lay-off.

[7] Both sides undertook unsuccessful negotiations for new agreements from May 2009 to May 2011. There was neither a strike by the Union nor a lock-out by the company. Navistar then closed the plant permanently on or about July 28, 2011, after which both sides began negotiations for a closure agreement including issues related to the pension plan. To date those negotiations have not been successful.

[8] Navistar's position, simply put, is that the labour relations scheme embodied in the *LRA* displaces the common law of individual employment contracts and that, therefore, the only proper forum to deal with these issues is the OLRB and not the courts. Furthermore, it says that there are no individual contracts of employment in existence here.

[9] There is no evidence that the Union's bargaining rights have been either terminated or abandoned. While the plaintiffs and the proposed class members remained on lay-off with recall rights after June 30, 2009, this became academic with the permanent closure of the plant on July 28, 2011.

[10] Both sides separately requested a partial wind-up of the Pension Plan from the Deputy Superintendant of Pensions at Financial Services Commission of Ontario ("FSCO") on March 9 and 23, 2012. Subsequently, meetings were held at FSCO in July and September 2012 between Navistar, the Union, and FSCO.

[11] In the final analysis, Navistar says, the Union continues to be the certified bargaining agent of Baker and Lucier, as well as all of the members of the proposed class, as reflected in the ongoing negotiations for a closure agreement and the pension negotiations at FSCO.

2. ISSUE:

[12] Despite the expiration of the two collective agreements on June 30, 2009, and the subsequent permanent closure of Navistar's Chatham plant, is there a continuing labour

relationship between the parties which vests exclusive jurisdiction in the OLRB or are the plaintiffs and all the employee members of the proposed class free to access the courts to seek redress of their claims?

3. DISCUSSION:

[13] In the March 4, 2012 edition of the Chatham Daily News, it published a story about the ongoing Navistar issues and it quoted Ken Lewenza ("Lewenza"), the CAW President, who says that the Union would be filing suits immediately. The original Statement of Claim was issued a couple of weeks later, a pressure tactic Navistar says, by the CAW to secure a closure agreement from it.

[14] On March 26, 2012, the day before the Statement of Claim was filed, Lewenza wrote to all the locals' membership stating that ("we"), the CAW, have moved to launch a class action proceeding and that it has written to FSCO to request a wind-up of the pension plan. This, Navistar says, speaks to the fact that the CAW is still very much involved on behalf of its member employees which in turn supports its view that the OLRB must govern here.

[15] It is fair to say that the obligation to meet and negotiate is enshrined in the *LRA* and it is an ongoing and positive duty of both sides to do so.

[16] But, the Union says, Navistar's previous failure to bargain the completion of a closure agreement is a breach of its obligation of good faith and fair dealing.

[17] For its part, Navistar says that because the statutory scheme still governs in the absence of either of the two factors earlier referred to (voluntary abandonment or decertification of the Union's bargaining rights), there is no means by which this dispute can be transferred to the courts; it must be heard by the OLRB.

[18] Furthermore it says, while with either a collective agreement or an individual employee contract, one can always resort to the minimum standards of the *ESA*, this does not give a new right to the employees to negotiate directly. The CAW continues to be the employees' sole bargaining agent at FSCO for the various entitlements under the collective agreement, and to bargain for a closure agreement for them. For this reason, Navistar says, they cannot seek access to the courts on the mistaken belief that they each now have individual contracts of employment. They never did.

4. THE LAW:

[19] Because a collective bargaining relationship provides for bargaining procedures, there are no individual bargaining rights. Nor should they be given that ability (See: *The Board of Governors of Loyalist College of Applied Arts and Technology v. Ontario Public Service Employees Union* (2003), 63 O.R. (3d) 641 (C.A.), leave to appeal to the Supreme Court refused).

[20] Navistar says that its position in this matter is informed by three significant Supreme Court of Canada cases which clearly establish, that notwithstanding the expiration of a

collective agreement and a subsequent plant closure, there remains a collective bargaining relationship such that access to the courts in common law is precluded and the sole body having jurisdiction to hear this application is the OLRB, pursuant to the *LRA*.

[21] The cases in question are:

i) *Canadian Ass'n of Industrial, Mechanical and Allied Workers, Local 14 v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983 ("*Paccar*").

[22] The narrow issue under appeal was whether the decision of the respondent Labour Relations Board of British Columbia permitting an employer to unilaterally alter terms and conditions of employment following the termination of a collective agreement was subject to review.

[23] After the collective agreement between the union and *Paccar* expired, the parties negotiated towards a new agreement without success. The company gave notice to the union that the collective agreement was terminated as of July 4, 1983 and set out the terms and conditions which it would put into effect on that same date.

[24] In deciding against the union, the Board relied upon *McGavin Toastmaster Ltd.*, [1976] 1 S.C.R. 718 for the proposition that following the termination of a collective agreement, individual contracts of employment do not revive. It said that where an employer-employee relationship is governed by the Labour Code it is not appropriate to refer to individual contracts of employment and common law principles flowing therefrom. The Labour Code is premised on a collective relationship between an employer and its employees, with individual dealings between employer and employee being prohibited (See: *Paccar*, at para. 10).

[25] Laskin J., in *McGavin*, stated that the inapplicability of individual contracts of employment and the common law apply, irrespective of whether a collective agreement is in force. According to the Board,

> This conclusion flows from the fundamental change brought about by the certification of a trade union to represent a group of employees in a bargaining unit. Once certified, that union has the exclusive authority to bargain on behalf of and bind the employees in the unit. The individual employee has no authority to bargain on his own behalf whether a collective agreement is in force or not. . . . Individual employees may no longer make contracts regarding terms and conditions of employment; only the trade union may (See: *Paccar*, at para. 10).

[26] In his reasons at para. 25 in *Paccar*, LaForest J. expressed the significance of a collective bargaining relationship when he stated that the tribunal correctly rejected the argument that "on termination of the collective agreement individual contracts of employment revive". He reiterated that Laskin J. in *McGavin* found that employer-employee relations governed by a collective agreement displaced the common law of individual employment.

[27] He further stated that he could see no reason why the displacement of the common law by statutory access to a labour board should be restricted to those cases where the collective agreement continues in existence. In his view the operative factor is the ongoing duty on the parties to bargain collectively and in good faith and that as long as that obligation remains then the tripartite relationship of union, employer and employee brought about by the Code, displaces common law concepts. The termination of the collective agreement has no effect on the obligation of the parties to bargain in good faith and the union retains its certification as the representative of the employees, whether a collective agreement is in force or not.

ii) *Bisaillon v. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666.

[28] This case concerned a unionized employee of Concordia University's application for authorization to initiate a class action alleging that the university had wrongfully used employee pension plan funds. The employee, Mr. Bisaillon, claimed to represent all members of Concordia's pension plan and he was a member of a certified union.

[29] His application to the Superior Court for certification was dismissed and following an appeal, the Supreme Court of Canada confirmed the judgment of the Superior Court.

[30] In his reasons, Crepeau J. of the Québec Superior Court when dismissing the motion, noted that the applicant Bisaillon had conceded that the class action application was part of a negotiating strategy of the eight unions which were dissatisfied with the university's refusal to negotiate improvements in their pension plan (See: *Bisaillon*, at para. 11).

[31] In its reasons supporting the trial judge's decision, the Supreme Court noted three legal consequences of the certification of an association of employees, at paras. 24-28:

- Firstly, the Labour Code gives certified unions a set of rights which amounts to a monopoly on representation and the union on certification acquires the exclusive power to negotiate conditions of employment with the employer, for all members of the bargaining unit. Once a collective agreement is in place, this monopoly also extends to the implementation and application of the agreement.

- Secondly, the monopoly on representation also has a significant impact on the employees' rights because the system of collective representation proscribes the individual negotiation of conditions of employment; it is as if a screen is erected between the employer and the employees in the bargaining unit and this prevents the employer from negotiating directly with its employees. As such it precludes the employees from negotiating their individual conditions of employment directly with their employer.

- Lastly, the collective representation system in labour law has a significant impact on the employer, requiring it to recognize the certified union and to enter into good – faith collective bargaining exclusively with it. In return however the employer derives a number of benefits including industrial peace for the term of the agreement.

[32] To allow this application before me would be tantamount to permitting the employees and their union to do indirectly what they are forbidden to do directly; that is to circumvent the collective bargaining relationship that survives the expiry of the former collective agreement and the plant closure.

[33] It appears to be clear that this is a thinly veiled negotiating strategy by the Union to force a close-out agreement.

iii) *Ainscough v. McGavin Toastmaster Ltd.*, [1976] 1 S.C.R. 718

[34] At issue here was the employees' entitlement to severance pay as provided for by the terms of their collective agreement with their employer, which the company had refused to pay following its closure of the plant. The company had argued that since the employees had left the plant and did not report for work they were not entitled to severance pay, and it shut down the plant after they engaged in an illegal strike; that is to say it took the position that the strike was illegal because it occurred during the existence of a collective agreement.

[35] However in its decision the court found that while it was open to the company to take disciplinary action against the plaintiffs for participating in the unlawful strike, its action in closing the plant brought it within the obligations in the collective agreement which provided that in the event of a plant closure it would agree to pay severance pay to the employees at their regular rate.

[36] The Supreme Court concluded that in the face of a collective agreement with the certification of a union as the bargaining agent of the employees that it was not possible to consider individual contracts of employment nor was it possible to treat the collective agreement as a mere appendage of individual relationships.

[37] Further, the court relied on its previous decision in *Syndicat catholique des employés de magasins de Québec Inc. v. Compagnie Paquet Ltée*. [1959] S.C.R. 206 for the principle that once a union was certified for collective bargaining, there is no more room left for private negotiation between employer and employee. Those individual relationships between them have meaning only at the hiring stage. Therefore the common law as it applies to individual employment contracts is no longer relevant to employer – employee relations which are governed by a collective bargaining relationship.

[38] The plaintiffs rely on *Burns Meats Ltd. v. Noa* [1987] 1 W.W.R. 131 ("*Burns Meats*"), a decision of the Alberta Queen's Bench, which held the court had jurisdiction to hear actions for wrongful dismissal in circumstances where there is an existing collective bargaining regime in place between the company and the union.

[39] Mason J. concluded that individual contracts of employment exist until a collective agreement replaces them. He stated that "[w]here no collective agreement is in existence, even though a collective bargaining relationship exists, individual contracts of employment do exist until a collective agreement replaces them." In the case at hand, there was no collective agreement in force but nevertheless there remains the collective bargaining relationship between the union and the company.

[40] It is to be observed that this case predates *Paccar* which in my view effectively overrules *Burns Meats*.

[41] *Johnston v. Dresser Industries Canada Ltd.* (1990), 75 O.R. (2d) 609 (C.A.) ("*Dresser*") is a unique case where the court had jurisdiction to hear an action arising from individual contracts of employment even though the employees were subject to terms of a collective agreement. There, six employees from England were induced to come to Canada and each of them signed an individual pre-employment contract. When they were subsequently laid off they sued the company. It was held that their individual employment contracts superseded the existing collective agreement so that they were permitted to access the courts. This however is not the case at hand.

[42] While numerous other authorities were referred to by Navistar, in my view most of this was unnecessary because of the very clear direction on the issue, from the Supreme Court of Canada referred to herein.

[43] The plaintiffs say that their entitlement to damages is premised on the determination of whether a cause of action exists pursuant to rule 21.01(b); whether this court has jurisdiction; and further because an employment relationship existed the question becomes whether this is a contract of employment or an employment relationship at a minimum level.

[44] They say these questions give rise to an arguable issue, so that it is not "plain and obvious" that there is no cause of action here because, with the expiry of the collective agreement, there is no longer any grievance or arbitration procedure available to the employees.

[45] The essence of the plaintiffs' position is that what is at stake here are implied terms of individual employment relationships with Navistar which they are asserting now because with the plant's closing their recall rights evaporated as did the right to arbitration. Therefore they say access to the courts for redress is essential and the two components of their claims (statutory and breach of the implied terms of their employment) provide jurisdiction to the court.

[46] Simply put, their case concerns the enforcement of certain employment relationship rights which continue, despite the expiration of their collective agreements and the closure of the plant.

[47] In support of their argument that the expiration of their collective agreement enables the court to change the terms and conditions of employment, they rely on *Paccar* where, at para. 28, the court referred to the earlier Ontario Court of Appeal decision of *Re Telegram Publishing Company and Zwelling* (1975) 67 D.L.R. (3d) 404 ("*Re Telegram*"). Kelly J.A. there stated that the accepted view appears to be that where an agreement has expired and an employee has continued to work for the employer who has continued to accept the benefit of his services, absent an agreement to the contrary or any circumstances from which there may be implied terms and conditions of employment which are different from those set out in the original agreement, the terms and conditions

of his/her employment are to be implied that would be similar to those spelled out in the expired collective agreement.

[48] Adopting the *Re Telegram* case, by analogy, they say that because there is neither a strike nor a lockout here and Navistar never made any changes to the working conditions where workers were available to work, the terms of the previous collective agreement dealing with them could be pursued individually in the courts.

[49] However that scenario has no application here because the employees did not continue to work after the expiration of their collective agreements in June 2009.

[50] I am not aware of any authority to support the proposition advanced by the plaintiffs that where there is neither a strike nor a lockout the employment relationship would therefore be considered to be changed.

[51] Turning to the questions of whether the OLRB is the only body which has jurisdiction to provide the remedies sought, in my view it is.

[52] In *Pleau v. Canada (Attorney General)* (1999), 182 D.L.R. (4th) 373 (N.S.C.A.), Cromwell J.A. considered an action by an employee (covered by the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35) who sued the federal government and certain individual defendants for damages. A motion by the defence to strike the Statement of Claim was dismissed and the chambers judge's decision was upheld on appeal.

[53] In his reasons, Cromwell J.A. accepted the reasoning of McLachlin J.A. in the case of *Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v. Canadian Pacific Ltd.*, [1996] 2 S.C.R. 495 where she stated that while the employer argued the dispute resolution mechanism in the labour relations code was exclusive and stood as a bar to any other remedies, since the Code did not cover all aspects of the dispute, no matter how comprehensive the statutory scheme for their regulation may be, there is always a possibility that events will produce a difficulty which the scheme had not foreseen. Therefore, it is important in such circumstances there be a tribunal capable of resolving the entire matter and this is precisely why the common law developed the notion of "inherent jurisdiction" of the court.

[54] The plaintiffs before me say because there is nothing in the Record before the court which demonstrates that the OLRB can fully address these issues, access should be permitted to the courts.

[55] However, the Union retains its certification as the exclusive bargaining agent of the employees whether a collective agreement is in force or not. There is an ongoing duty on both parties to bargain in good faith, and so long as that obligation remains, the three-part relationship between union, employer and employee created by the *LRA* displaces common law concepts. In other words, the termination of a collective agreement has no effect on the parties' ongoing obligation to bargain in good faith. While Navistar acknowledges a continuing duty on both parties to bargain in good faith, in his affidavit, Simon E. Mortimer labour counsel for Navistar says that the Union breached this duty when it declared to the media it was going to file suit in the courts. This was reported by

the Chatham Daily News on March 4, 2012, following an interview with the CAW National President, Ken Lewenza.

[56] On the facts in the Record before me, I consider it important to note that even though this duty between the Union and Navistar continues, it is obvious that the Union, per se, is very clearly behind and supportive of, the issuance of the Statement of Claim.

[57] While the Board cannot impose a close-out agreement on the parties, if one party or the other (here, the Union) feels that negotiations for a close-out are not moving forward with dispatch, it can request the Board charge the other party with failing to bargain in good faith.

[58] The court has no jurisdiction here to entertain the claims asserted by and for the employees. The continuance of the collective bargaining relationship stands as a bar to the plaintiffs' attempt to create an alternate legal relationship between individual employees and the company.

[59] Consistent with the CAW's continuing obligation to represent the employees' interests, at no time prior to the collective agreement expiring on June 30, 2009 and thereafter up to the present, has the Union ever treated the relationship between Navistar and the Union as nonexistent or changed. It has remained very much a party to the post-closure process.

[60] Furthermore, from a common sense perspective, it is difficult to understand how Navistar could negotiate separate closure agreements with several hundred individual employees. Its continuing obligation has always been to deal only with the CAW which has remained as the certified bargaining agent of the employees.

[61] Access to the *ESA* can be made by an individual employee but this personal right has nothing to do with any change in the employment relationship between the union and the company.

[62] Navistar is obligated as employer to deal with the Union; it cannot ignore the certificate issued by the Labour Board decades ago certifying the CAW as representing the employees at Navistar's Chatham facility. For the plaintiffs and the CAW to suggest that a series of individual employment contracts emerge subsequent to the plant closure lacks any air of reality. Individuals in such a scenario could not be entitled to pick and choose what they wanted individually to accept or reject from the expired collective agreement. This would not only be unworkable, it would lead to chaos.

[63] While the Board cannot impose a close-out agreement, it could order the parties to meet to negotiate one. This, in my view, negates the plaintiffs' claims that they are without remedies. The Board's authority or jurisdiction has not been extinguished with the plant's closure.

[64] There are two fundamental principles which frame this jurisdictional dispute. Firstly, legislative pronouncements must be respected by the courts. The legislature has put in place a comprehensive statutory scheme requiring employers and employees to take certain disputes to specialized tribunals where they can be resolved in a timely and cost

effective way that minimizes the disruption in the workplace. However this can only work if the courts, except when exercising their supervisory powers through judicial review, stay out of these disputes (See: *Myrtezaj v. Cintas Canada Ltd.* (2008), 90 O.R. (3d) 384, at para. 2).

[65] Secondly, on the other side of the jurisdictional dispute stands the individual's right to access to justice. Where they are alleged to have been wronged in the context of the employer-employee relationship, which are either not caught by the legislative scheme or they cannot be remedied under that scheme, then like any other litigant they must have access to the courts (See: *Cintas*, at para. 3).

[66] An interpretation that would give the courts concurrent jurisdiction with another tribunal would undermine these policy objectives (See: *Cintas*, at para. 36).

[67] The plant closure here did not reduce the collective representation of the employees to that of individual supplicants hoping to engage the charity of Navistar for a close-out agreement which would be a unique bargaining scenario. The spirit and the obligation of their expired collective agreement, premised as it is on a focused collectivism toward their (now former) employer remains, as does the obligation of Navistar to exercise all of its focused rights on bringing this issue to a close.

[68] It appears to me to be contradictory and counterintuitive for the Union to publicly decry a lack of bargaining progress with Navistar and then, indirectly through these individual plaintiffs attempt to impose jurisdiction on the courts where clearly none exists.

[69] The essential character of this dispute is the claim by the plaintiffs that Navistar is not bargaining in good faith for a closure agreement. This action, framed as a wrongful dismissal, appears to be a tactical decision by the Union to skirt around its obligation to continue negotiating as the certified bargaining agent of the Navistar employees.

[70] The terms previously bargained for in the collective agreement may have expired but the collective bargaining relationship survives and continues to govern the parties unless circumstances arise that would suggest otherwise. I see no such circumstances in the case before me.

[71] For the reasons stated, the plaintiffs cannot establish that they have individual contracts of employment upon which to base their claims in court (See: *Dresser*). As a result, the plaintiffs' claims are without foundation in law.

Decision

[72] This application is dismissed with costs to the defendant Navistar on the partial indemnity scale.

[73] If the parties are unable to agree the defendant shall deliver its Bill of Costs, not exceeding seven pages, within 30 days of this Order. The plaintiffs shall deliver their response, if any, within 20 days thereafter.

Richard C. Gates

Released: May 9, 2013

CITATION: Baker and Lucier v. Navistar, 2012 ONSC 6451

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Cathy Baker and Joe Lucier

Plaintiffs

– and –

Navistar Canada, Inc.

Defendant

REASONS FOR JUDGMENT

Richard C. Gates
Justice

Released: May 9, 2013