Federal Court  Cour fédérale

Date: 20230817

Docket: T-89-21

Vancouver, British Columbia, August 17, 2023

PRESENT: Madam Associate Judge Catherine A. Coughlan

PROPOSED CLASS PROCEEDING

BETWEEN:

JENNIFER ANNE SANDERSON AND JENNIFER CONSTANT

Plaintiffs

and

HIS MAJESTY THE KING

Defendant

ORDER

I. Overview

[1] In the present motion, the Plaintiffs seek leave to file the Affidavit of Cheyanne Perfonic, sworn April 18, 2023. Their motion relies on Rules 3 and 4 of the *Federal Courts Rules*, SOR/98-106 [*Rules*]. The Defendant opposes the motion on the basis that the evidence sought to be adduced is inadmissible hearsay that does not meet the traditional exceptions to the rule against hearsay.

[2] The motion was heard together with another motion at a Special Sitting of the Court, via Zoom Videoconference, on August 2, 2023.

[3] The parties filed extensive motion records and books of authorities. On the morning of the hearing, Defendant's counsel provided the Court with a chart setting out the relevant procedural history of this proceeding.

II. Procedural Background

[4] The procedural history of this proceeding was set out in a companion motion. Nevertheless, for clarity and because I am issuing two separate Orders, I will repeat the procedural history and supplement it to address the present motion.

[5] The underlying action is a proposed class action, which was commenced on January 11, 2021. That action alleges systemic workplace discrimination based on race against Correctional Services Canada (CSC). The claim asserts that CSC failed to establish a procedure by which complaints of racism could be reported and pursued in a timely manner without the complainant risking retaliatory consequences.

[6] At the time the claim was filed, a certification motion was pending in another proposed class proceeding, *Hudson v HMTQ*, T-1523-19 [*Hudson*]. The *Hudson* claim similarly alleged systemic workplace harassment and discrimination against CSC but on the basis of gender.

[7] On March 30, 2021, the Court issued a Direction adopting a jointly-proposed timetable for the certification motion. The Direction required the Plaintiffs to deliver their certification evidence by July 6, 2021, with the Defendant delivering responding evidence by March 1, 2022. While not provided for in the *Rules*, the Direction also permitted the Plaintiffs to file reply evidence. The certification motion was anticipated to be heard in November or December 2022.

[8] On July 6, 2021, the Plaintiffs delivered four affidavits to the Defendant as required. However, on February 18, 2022, following the filing of a motion by CSC to strike the *Hudson* action, the Plaintiffs amended their claim. In correspondence between counsel, Plaintiffs' counsel advised that they would not be filing further evidence in consequence of the amended claim.

[9] On April 6, 2022, the Court issued an Order extending the timelines on consent of the parties. The Order provided the Defendant deliver responding evidence by April 12, 2022 and the Plaintiffs deliver reply evidence by May 10, 2022. The Order contemplated a certification motion in January or February 2023.

[10] On April 12, 2022, the Defendants delivered five affidavits.

[11] On May 9, 2022, Plaintiffs' counsel wrote to the Defendant seeking to pause the certification schedule pending a decision in *Hudson*. That correspondence, which is attached to the affidavit of Melissa Gratta, affirmed April 26, 2023, notes that "many of the issues in the *Hudson* case are similar to those in *Sanderson*, including the suitability of grievance processes at Correctional Services Canada."

[12] On May 11, 2022, the Court issued its decision in *Hudson* striking the claim on jurisdictional grounds.

[13] On June 2, 2023, at the request of the parties, the Court issued a Direction providing that the action would be held in abeyance pending either the expiration of the appeal period in *Hudson* or the determination of an appeal if one was pursued. Ultimately, no appeal was taken in *Hudson*.

[14] In a telephone call between counsel on July 6, 2022, the Defendants advised that they intended to take the same position on jurisdiction as had been taken in *Hudson*.

[15] On July 14, 2022, in email communications between counsel, Plaintiffs' counsel advised that they intended to file new evidence "to address the jurisdictional and preferability issues raised in the recent *Hudson* decision." That communication advised that the Plaintiffs would need until the end of August to prepare the new materials.

[16] On July 19, 2022, the Court issued a further Direction granting the parties an extension of time to August 31, 2023, to provide a revised schedule.

[17] On August 30, 2022, the Plaintiffs delivered the affidavit of James Cooke (Cooke affidavit). They also confirmed they would file no further evidence.

[18] On November 4, 2022, on consent of the parties, the Court issued an Order setting out a revised timetable requiring the Defendant to serve its response to the Cooke affidavit by

December 7, 2022. The Plaintiffs were to serve reply evidence, if any, by January 18, 2023. The parties were to provide their availability for a hearing in September and October 2023.

[19] On December 7, 2022, the Defendant served a further affidavit and a Motion to Strike the claim.

[20] On January 18, 2023, the Plaintiffs served the affidavits of Corey Nash (Nash affidavit) and Eduardo Tanjuatco (Tanjuatco affidavit).

[21] Following the receipt of correspondence from the parties and a case management conference on April 6, 2023, I issued a Direction setting a schedule for the companion motion in which the Defendant sought to strike the Nash and Tanjuatco affidavits as being improper reply evidence.

[22] On April 26, 2023, Plaintiffs' counsel advised the Court by correspondence that they intended to bring a motion for leave to file an additional affidavit and proposed that it be addressed by reference to the schedule set in my April 6, 2023 Direction.

[23] On June 28, 2023, the parties jointly requested that both motions be heard together at an oral hearing which request was granted.

III. Issue

[24] The sole issue for this Court is whether the Perfonaic affidavit should be filed.

A. *The Perfonic Affidavit*

[25] Cheyanne Perfonic is a legal assistant at Klein Lawyers LLP, counsel for the Plaintiffs. Ms. Perfonic deposes that she downloaded a press release entitled "Canada's unions call for federal government to settle Black Class Action lawsuit" dated March 27, 2023. Her affidavit exhibits the press release as Exhibit "A".

[26] Ms. Perfonic further deposes that:

> On April 13, 2023, I accessed and viewed a video of a press conference Nicholas Marcus Thompson attended on March 27, 2023 with Larry Rousseau (who identifies himself as the Executive Vice President of Canadian Labour Congress), and Jennifer Carr (who identifies herself as the National President of the Professional Institute of the Public Service of Canada), Chris Aylward (who is identified by Nicholas Thompson as the National President of the Public Service Alliance of Canada), and Alex Silas (who is identified by Nicholas Thompson as the Regional Executive Vice President for the National Capital Region of the Public Service Alliance of Canada). The video is posted online and dated March 27, 2023 at https://www.blackclassaction.ca/post/canada-s-unions-cal1-for-federal-government-to-settle-black-class-action-lawsuit.

[27] She deposes that she transcribed the English portions of the press conference which are attached as Exhibit "B" to her affidavit.

IV. Legal Test

[28] The Plaintiffs argue that since there are no specific rules addressing the test for filing additional evidence on a certification motion under Rule 334.16, the Court should look to the jurisprudence concerning Rule 312 where filing supplementary evidence is addressed. While the

parties appear to agree on the applicable test for the exercise of the Court's discretion to grant leave, it is nonetheless useful to restate it here.

[29] To obtain leave pursuant to Rule 312(a) a party must satisfy two preliminary requirements: (i) the evidence must be admissible; and (ii) the evidence must be relevant to an issue that is properly before the Court: *Connolly v Canada (Attorney General)*, 2014 FCA 294 [*Connolly*] at para 6; *Forest Ethics Advocacy Association v National Energy Board*, 2014 FCA 88 [*Forest Ethics*] at para 4. Further, the interests of justice must support the granting of leave: *Tsleil-Waututh Nation v Canada (Attorney General*), 2017 FCA 128 [*Tsleil-Waututh*] at para 11.

[30] Assuming those two preliminary requirements are met, the party must then convince the Court that it should exercise its discretion in favour of granting leave. In determining whether the granting of leave is in the interests of justice, the Court should be guided by the following three questions:

(i) was the evidence sought to be adduced available when the party filed its affidavits or could it have been available with the exercise of due diligence?

(ii) will the evidence assist the Court in the sense that it is relevant to an issue to be determined and sufficiently probative that it could affect the result?

(iii) will the evidence cause substantial or serious prejudice to the other party? (*Connolly*, *supra* at para 6; *Forest Ethics*, *supra* at para 6; *Tsleil-Waututh* at para 11).

[31] This Court has recognized that the factors or questions in *Forest Ethics* are non-exhaustive and the jurisprudence does not prescribe how they are to be weighed by the Court. As each decision is discretionary and fact-specific, there may be other factors that the Court may consider. An overarching consideration for the Court in exercising its discretion, is the general principle in Rule 3 that the *Rules* must be interpreted and applied "so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits" (*Tsleil-Waututh* at para 13).

V. Position of the Parties

[32] Turning to the preliminary requirements of admissibility and relevance, there is little dispute that the Perfonic affidavit is largely hearsay evidence. Relying on the Supreme Court of Canada's decision in *R v Khelawon*, 2006 SCC 57 at para 2, the Defendant argues that hearsay evidence is presumptively inadmissible because it cannot be reliably tested. Further, the Defendant argues that the Perfonic evidence fails to meet the principled exception to admissibility because it does not meet the twin requirements of necessity and reliability.

[33] With respect to necessity, the Defendant argues that the Plaintiffs have largely ignored their evidentiary burden to show that the evidence sought to be admitted could not have been obtained as direct evidence. For example, they allege that the Plaintiffs have failed to show any efforts at all to obtain the evidence directly nor have they provided any evidence to show that obtaining the evidence directly would have been unduly burdensome: *Democracy Watch v Canada (Attorney General)*, 2023 FC 31 at para 28.

[34] With respect to reliability, the Defendants argue that the Perfonic evidence is neither substantively nor procedurally reliable as there are no safeguards for testing the evidence under oath or otherwise: *R v Bradshaw,* 2017 SCC 35 at paras 92 and 95. The Defendant asserts that the contents of the affidavit, which include statements of union officials, are hearsay statements of advocates for their membership who are actively engaged in litigation with the Defendant. Further, the Defendant says the proposed evidence lacks corroboration which further undermines its trustworthiness.

[35] In their written representations, the Plaintiffs do not address the admissibility and reliability of the admittedly hearsay evidence. Rather, in their Reply Representations, they argue that the Defendant misunderstands the purpose for which the affidavit is being filed. The Press Release and the transcript of a press conference quoting statements from union leaders is being filed to show what public statements were being communicated to class members and the extent to which these union leaders say they can or cannot assist class members in the resolution of workplace disputes.

[36] At the hearing of this matter, counsel for the Plaintiffs was at pains to say the evidence was not being relied upon for the truth of its contents but rather merely to show what class members were being told by their union leaders concerning the grievance procedures available to address workplace disputes.

[37] The Plaintiffs argue the evidence is probative of the efficacy and effectiveness of the internal recourse mechanisms available to class members. Further, the Plaintiffs argue that the

Court, in a certification motion, routinely considers evidence of this sort because the threshold is simply “some basis in fact” rather than the civil standard of proof.

[38] The Plaintiffs point out that in *Hudson*, the Court concluded that it had insufficient evidence before it to assess the adequacy of union representation for all proposed class members and thus lacked jurisdiction to deal with claims of sexual harassment. The Plaintiffs argue that the Perfonic affidavit addresses the Court’s comments made in *Hudson* and provides a fuller and more accurate record which will promote the proper determination of the certification motion on the merits. This, the Plaintiffs argue is consonant with Rule 3.

VI. Discussion

[39] I am satisfied that the Perfonic affidavit is hearsay evidence and in some instances multiple levels of hearsay, and is thus inadmissible. I am also satisfied that the evidence does not meet the principled exception to admissibility because the Plaintiffs have not shown the evidence is necessary or reliable. Despite Plaintiffs’ counsel’s arguments to the contrary, it is clear to me that this evidence is tendered for the truth of its contents. Specifically, the Court is being asked to accept the statement of union leaders regarding their inability to assist federal public service employees with their grievances and complaints and that they cannot provide adequate union representation due to systemic failures.

[40] I do not accept the Plaintiffs’ arguments that the Perfonic affidavit provides useful context for the Court. In that regard, the Plaintiffs’ arguments are inconsistent. On the one hand, they argue that the statements are not tendered for the truth of their content but merely for context. Yet on the

other hand, they argue that the evidence addresses the evidentiary lacunae identified by the Court in *Hudson*. Clearly, the Plaintiffs proffer the Perfonic affidavit with the expectation that the Court will accept the evidence for its truth.

[41] It is noteworthy that the procedural history of this matter discloses that the Plaintiffs paused the action specifically to address concerns arising from the *Hudson* decision. That said, they provide no evidence as to what steps, if any, they took to obtain direct evidence from union leaders to fill the evidentiary void identified in *Hudson* as opposed to attempting to rely on untested hearsay evidence.

[42] As to the Plaintiffs' argument that courts take a flexible approach to evidence in certification motions because of the low evidentiary threshold, I acknowledge that the Plaintiffs directed to the Court to numerous instances where hearsay evidence was considered on a certification motion. However, the circumstances are not comparable to the present case. In those cases, the Plaintiffs provided that evidence as part of their certification record. The courts hearing those motions accepted the evidence for context only. In this case, the Plaintiffs require leave because their evidence was filed at two earlier junctures and the Defendant has already responded to that evidence. At this late stage of the proceeding, the Court is required to scrutinize the evidence prior to its admission. As I have already concluded, the evidence does not meet the twin requirements of necessity and reliability and will not be admitted into evidence.

[43] Further, for the reasons outlined above, I am satisfied that the Plaintiffs have not established that the filing of the Perfonic affidavit is in the interests of justice.

[44] Having come to the conclusion that the Perfonic affidavit does not meet the preliminary requirement of admissibility and relevance, there is no need for me to consider the three questions set out at paragraph 30 above and I decline to do so.

ORDER in T-89-21

THIS COURT ORDERS that:

1. The motion is dismissed.

2. There is no order as to costs.

"Catherine A. Coughlan"
Associate Judge