IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***F.G. v. R.F.,***
2003 BCSC 1136

Date: 20030721

Docket: S023002

Registry: Vancouver

Between:

F.G.

Plaintiff

And

R.F.

Defendant

Before: The Honourable Madam Justice Ross

Reasons for Judgment

Counsel for Plaintiff — Timothy J. Delaney
Counsel for the Defendant — James L. Straith
Date and Place of Hearing: — April 22, 2003 Vancouver, B.C.

INTRODUCTION

[1] These were applications brought by each party to the proceedings to strike portions of the pleadings. The plaintiff applied to strike the counter-claim on the grounds that it disclosed no reasonable cause of action. The defendant sought to strike those portions of the Statement of Claim alleging malicious prosecution.

[2] The defendant conceded that if the relief it sought with respect to the Statement of Claim was granted, the counter-claim should also be struck. Accordingly, the defendants application will be addressed first.

BACKGROUND FACTS

[3] Both the plaintiff and the defendant are paramedics who are employed by the B.C. Ambulance Service. Both are members of the Canadian Union of Public Employees ("CUPE").

[4] The incident giving rise to this litigation occurred on April 19, 2001 in North Vancouver. The plaintiff alleges that the defendant wrongfully and intentionally administered a noxious substance that rendered the plaintiff unconscious and then sexually assaulted and battered the plaintiff. These allegations are denied by the defendant.

[5] The plaintiff made a complaint to the RCMP. No criminal charges were laid against the defendant.

[6] The plaintiff repeated the allegations in the workplace. The defendant then, on May 16, 2002, filed a grievance against the plaintiff under Article 31.03 of the Collective Agreement, the provision dealing with workplace harassment. Article 31.03 provides:

(a) The Union and the Employer recognize the right of employees to work in an environment free from harassment. The Employer shall take such actions as are necessary respecting an employee engaging in harassment.

(b) *“Workplace Harassment”* is defined as one or a series of incidents involving unwelcome comments or actions which may concern a person’s race, colour, ancestry, place of origin, religion, marital status, physical or mental disability, age, sex, or sexual orientation or similar personal characteristic:

(i) when such conduct might reasonably be expected to cause embarrassment, insecurity,

discomfort, offence or humiliation to any person or group;

(ii) when submission to such conduct is made either implicitly or explicitly a condition of employment;

(iii) when such conduct has the purpose or the effect of interfering with a person's work performance, or creating an intimidating, hostile or offensive work environment.

(c) Workplace harassment does not include actions occasioned through the exercise, in good faith, of the Employer's managerial and supervisory rights and responsibilities.

(d) "Sexual Harassment" is defined as one or a series of incidents involving unwelcome sexual advances, requests for sexual favours, or other verbal or physical conduct of a sexual nature:

(i) when such conduct might reasonably be expected to cause embarrassment, insecurity, discomfort, offence or humiliation to another person or group;

(ii) when submission to such conduct is made either implicitly or explicitly a condition of employment;

(iii) when such conduct has the purpose or the effect of interfering with a person's work performance or creating an intimidating hostile or offensive work environment.

(e) Types of behaviour which constitutes sexual harassment include, but are not limited to:

(i) jokes of a sexual nature that are clearly embarrassing or offensive, especially when such jokes are told or carried out after the joker has been advised that they are embarrassing or offensive;

(ii) leering;

(iii) the display of offensive material of a sexual nature;

(iv) sexually degrading words used to describe a person;

(v) derogatory or degrading remarks directed towards members of one sex or one sexual orientation;

(vi) sexually suggestive or obscene comments or gestures;

(vii) unwelcome sexual flirtations, advances, or propositions;

(viii) unwelcome inquiries or comments about a person's sex life;

(ix) persistent unwanted contact or attention after the end of a consensual relationship;

(x) requests for sexual favours;

(xi) unwanted touching;

(xii) verbal abuse or threats; and

(xiii) sexual assault

(f) Complaint Procedure

(i) This Clause does not preclude an employee from filing a complaint under Section 13 of the *B.C. Human Rights Code*, however, an employee shall not be entitled to duplication of process. An employee making a complaint of harassment must choose to direct a complaint to either the B.C. Council of Human Rights or to the process specified in Clause 31.03. In either event, a complaint of harassment, if included as an element of a grievance shall not be pursued through the process identified in Clause 31.03.

(ii) The employee may submit a written complaint to the Executive Director and President of the Union, providing full particulars of the allegation, including the name(s) of the individual(s) involved, the pertinent date(s), and the wrongdoing which is alleged to have occurred.

(iii) Upon receipt of a written complaint, and subject to (ii) above, the Executive Director and President of the Union will request John McConchie, or a mutually agreed alternate, to conduct an investigation.

(iv) A complaint filed under the Clause will be dealt with in a confidential manner.

(v) An employee who files a written complaint which would be seen by a reasonable person to be frivolous, vindictive or vexatious may be subject to disciplinary action. Disciplinary action taken may be grieved pursuant to Article 9 – Grievance Procedure.

(vi) The Investigator will have the same powers as an arbitrator. The Union and Employer will share equally in the payment of fees and expenses of the Investigator.

(vii) The Investigator will be requested to complete their investigation within thirty (30) days, and will provide a copy of the investigation to the Employer, Union and complainant.

(viii) The Investigator has no authority to amend the Collective Agreement, nor to make recommendations with respect to systemic issues. The recommendations of the Investigator will be for the purpose of resolving the complaint between the complainant and respondent(s), only. Such recommendations will be implemented by the Employer and will constitute a final resolution of the complaint, binding on all parties.

[7] John Kinzie was appointed Complaints Investigator pursuant to the terms of the Collective Agreement. The plaintiff was represented through the Union in respect of the complaint.

[8] The Statement Of Claim was issued on May 30, 2002. Part of the relief sought was an injunction restraining the defendant from continuing the grievance procedure. No application was, however, brought for such relief on an interim basis. The Statement of Claim alleges the tort of malicious prosecution with respect to the grievance filed by the defendant. It is this pleading that is at issue in the present motion.

[9] Mr. Kinzie concluded his investigation and in reasons dated June 28, 2002, held that the plaintiff had engaged in sexual harassment within the meaning of Article 31.03 of the Collective Agreement, stating:

In summary, I have concluded that Mr. G. has engaged in sexual harassment within the meaning of Article 31.03 of the collective agreement. His verbal allegations of sexual assault against Mr. F. made to his fellow employees in the workplace and to the Employer have, and could reasonably be expected to have, caused Mr. F. embarrassment, insecurity, discomfort, offence and humiliation and have had the effect of creating an intimidating work environment for him. Further, his communication of these allegations was not justified by any obligation owed to the Employer or to his fellow employees. Nor has he justified his communication of his allegations by establishing that they are true. He has not sought to establish their truth to me, despite being given that opportunity.

Paragraph A(3) of the protocol between the Employer and the Union dated June 20, 2001 provides that:

Where after receiving the report the Employer issues discipline and the Union challenges the measure or sufficiency of the discipline, the Complaints Investigator will retain jurisdiction to issue a determination as to the appropriateness of the discipline in the circumstances of the case and may call for a meeting/hearing with the Employer and the Union for that purpose.

Accordingly, I retain jurisdiction to deal with any further issues that arise in this matter pursuant to the authority vested in me under the terms of the June 20, 2001 protocol agreement and the provisions of Article 31.03 (f) of the collective agreement.

[10] The plaintiff's counsel, then by letter dated July 26, 2002 requested Mr. Kinzie rescind his decision, step down as Investigator and appoint a new Investigator or reconsider the decision. Submissions were made with respect to alleged breaches of natural justice, apprehension of bias, factual errors and the scope of jurisdiction.

[11] Mr. Kinzie responded by letter dated February 12, 2003. In the meantime, the Employer had written to both the plaintiff and the defendant. The letter to the plaintiff, dated August 12, 2002 stated:

The investigative process contemplated under Article 31.03 into complaints against you by Paramedic R.F. for workplace harassment has now been concluded by Investigator Kinzie. I am aware that you have been provided a copy of Mr. Kinzie’s report and you, no doubt, have had opportunity to read it.

Meanwhile file evidence reveals you were written on September 4, 2001, warning how, in future, any incidents of inappropriate discussions at the workplace would be treated as a disciplinary matter and as an express violation of various BCAS policies. For your reference, I have attached to this letter a copy of that earlier correspondence.

As far as BCAS is concerned, this matter is now deemed concluded.

[12] Mr. Kinzie's response noted that he had not replied earlier because he was aware of the Employer's correspondence. He stated:

The Union did not subsequently challenge the measure or sufficiency of the discipline imposed on Mr. G., presumably because Mr. G. did not challenge it. In any event, because there was no such challenge, it was my conclusion that my jurisdiction in this matter was at an end.

Referring to the contents of your July 26, 2002 letter, I do not propose to debate the merits of my report dated June 28, 2002 with you. Having made my report, I do not believe that would be appropriate.

My purpose in drafting my letter to the Employer and the Union in August, 2002 in response to your July 26, 2002 letter was to request their views on my jurisdiction. As an investigator under their collective agreement, they would have a significant interest in the nature and scope of my jurisdiction. However, having issued my report, I believe I would have been without jurisdiction to reconsider it on my own. In my view, my report would have been subject to review under Section 99 or Section 100 of the Labour Relations Code, but no one had taken such a step. Recusing myself would only have arisen as a potential issue if a challenge to discipline was referred back to me. The latter became academic after the Employer's August 12, 2002 letter to Mr. G. and no challenge to it was advanced by the Union.

In summary, following receipt of Mr. Gotto's letters to Messrs. G. and F., I have taken no further action in respect of Mr. F.'s complaint except to advise him, and now you, that my jurisdiction in respect of that complaint is at an end. In my view, I do not, and did not back in August, 2002, have the jurisdiction to take any of the steps you asked me to take.

[13] As Mr. Kinzie stated, no review proceedings were commenced with respect to his investigation pursuant to the ***Labour Relations Code*** R.S.B.C. 1996, c. 244 (the "***Code***"). Instead, the litigation was commenced in which the plaintiff alleges, *inter alia*, the tort of malicious prosecution with respect to the initiation by the defendant of the grievance which was the subject of Mr. Kinzie's investigation and report.

ANALYSIS

Jurisdiction

[14] The defendant submits that the allegations of malicious prosecution should be struck pursuant to Rule 19(24)(b),(c) and (d) of the *Rules of Court* on the basis that the matters are outside the jurisdiction of the Court to entertain, have already been addressed and are *res judicata*.

[15] The leading case with respect to the jurisdictional question is ***Weber v. Ontario Hydro,*** [1995] 2 S.C.R. 929. In that decision, the Court endorsed the exclusive jurisdiction model of the effect of final and binding arbitration clauses in labour legislation. The Court held that if the "essential character" of a dispute arises from the interpretation, application, administration or violation of a Collective Agreement, then the dispute must be dealt with by the dispute resolution process provided in the Collective Agreement and labor relations statutes and not by litigation in the Courts.

[16] In reaching a conclusion with respect to the essential character of the nature of the dispute, the Court directed that two elements be considered: the dispute and the ambit of the Collective Agreement. The legal characterization of the dispute is not determinative of jurisdiction. (See paragraph 52)

[17] The Court retains jurisdiction over disputes which do not "expressly" or "inferentially" arise out of the Collective Agreement and where a remedy is required that an arbitrator is not empowered to grant.

[18] Madam Justice McLachlin, as she then was, speaking for the majority, articulated the policy which animates the adoption of the exclusive jurisdiction model as follows:

To summarize, the exclusive jurisdiction model gives full credit to the language of s. 45(1) of the *Labour Relations Act*. It accords with this Court's approach in *St. Anne Nackawic*. It satisfies the concern that the dispute resolution process which the various labour statutes of this country have established should not be duplicated and undermined by concurrent actions. It conforms to a pattern of growing judicial deference for the arbitration and grievance process and correlative restrictions on the rights of parties to proceed with parallel or overlapping litigation in the courts: see *Ontario (Attorney-General) v. Bowie* (1993), 110 D.L.R. (4th) 444 (Ont. Div. Ct.), per O'Brien J.

[Para. 58]

[19] The ***Code***, as with other labour statutes across the country, contains a provision for the final and binding determination of disputes arising out of Collective Agreements. Section 82 of the ***Code*** provides:

(1) It is the purpose of this Part to constitute methods and procedures for determining grievances and resolving disputes under the provisions of a collective agreement without resort to stoppages of work.

(2) An arbitration board, to further the purpose expressed in subsection (1), must have regard to the real substance of the matters in dispute and the respective merit of the positions of the parties to it under the terms of the collective agreement, and must apply principles consistent with the industrial relations policy of this Code, and is not bound by a strict legal interpretation of the issue in dispute.

[20] Pursuant to section 84, every Collective Agreement must contain a provision for the final and conclusive settlement of disputes arising out of the Collective Agreement, including the question of the discipline of an employee bound by the Agreement. Section 84 provides:

(1) Every collective agreement must contain a provision governing dismissal or discipline of an employee bound by the agreement, and that or another provision must require that the employer have a just and reasonable cause for dismissal or discipline of an employee, but this section does not prohibit the parties to a collective agreement from including in it a different provision for employment of certain employees on a probationary basis.

(2) Every collective agreement must contain a provision for final and conclusive settlement without stoppage of work, by arbitration or another method agreed to by the parties, of all disputes between the persons bound by the agreement respecting its interpretation, application, operation or alleged violation, including a question as to whether a matter is arbitrable.

(3) If a collective agreement does not contain a provision referred to in subsections (1) and (2), the collective agreement is deemed to contain those of the following provisions it does not contain:

(a) the employer must not dismiss or discipline an employee bound by this agreement except for just and reasonable cause;

(b) if a difference arises between the parties relating to the dismissal or discipline of an employee, or to the interpretation, application, operation or alleged violation of this agreement, including a question as to whether a matter is arbitrable, either of the parties, without stoppage of work, may, after exhausting any grievance procedure established by this agreement, notify the other party in writing of its desire to submit the difference to arbitration, and the parties must agree on a single arbitrator, the arbitrator must hear and determine the difference and issue a decision, which is final and binding on the parties and any person affected by it.

[21] The authority of an arbitration board is stated in section 89 which provides:

For the purposes set out in section 82, an arbitration board has the authority necessary to provide a final and conclusive settlement of a dispute arising under a collective agreement, and without limitation, may

(a) make an order setting the monetary value of an injury or loss suffered by an employer, trade union or other person as a result of a contravention of a collective agreement, and directing a person to pay a person all or part of the amount of that monetary value,

(b) order an employer to reinstate an employee dismissed in contravention of a collective agreement,

(c) order an employer or trade union to rescind and rectify a disciplinary action that was taken in respect of an employee and that was imposed in contravention of a collective agreement,

(d) determine that a dismissal or discipline is excessive in all circumstances of the case and substitute other measures that appear just and equitable,

(e) relieve, on just and reasonable terms, against breaches of time limits or other procedural requirements set out in the collective agreement,

(f) dismiss or reject an application or grievance or refuse to settle a difference, if in the arbitration board’s opinion, there has been unreasonable delay by the person bringing the application or grievance or requesting the settlement, and the delay has operated to the prejudice or detriment of the other party to the difference,

(g) interpret and apply any Act intended to regulate the employment relationship of the persons bound by a collective agreement, even though the Act’s provisions conflict with the terms of the collective agreement, and

(h) encourage settlement of the dispute and, with the agreement of the parties, the arbitration

board may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.

[22] The ***Code*** provides for the review of decisions of arbitrators. Pursuant to section 99, an appeal may be brought to the Labour Relations Board. Pursuant to section 100, the Court of Appeal may review a decision with respect to a general issue of law not included in the scope of section 99. Section 99 provides:

(1) On application by a party affected by the decision or award of an arbitration board, the board may set aside the award, remit the matters referred to it back to the arbitration board, stay the proceedings before the arbitration board or substitute the decision or award of the board for the decision or award of the arbitration board, on the grounds that:

(a) a party to the arbitration has been or is likely to be denied a fair hearing, or

(b) the decision or award of the arbitration board is inconsistent with the principles expressed or implied in this Code or another Act dealing with labour relations.

(2) An application to the board under subsection (1) must be made in accordance with the regulations.

[23] Section 100 provides:

On application by a party affected by a decision or award of an arbitration board, the Court of Appeal may review the decision or award if the basis of the decision or award is a matter or issue of the general law not included in section 99(1).

[24] Finally section 101 of the ***Code*** provides:

Except as provided in this Part, the decision or award of an arbitration board under this Code is final and conclusive and is not open to question or review in a court on any grounds whatsoever, and proceedings by or before an arbitration board must not be restrained by injunction, prohibition or other process or proceeding in a court and are not removable by certiorari or otherwise into a court.

[25] Article 31.03(vi) of the Collective Agreement provides that the Investigator appointed pursuant to the complaints procedure with respect to this clause will have the same powers as an arbitrator. Article 31.03(viii) provides that the recommendations of the Investigator will be implemented by the Employer and will constitute a final resolution of the complaint, binding on all parties.

[26] The complaint in question was that the plaintiff had brought the dispute to the workplace, had spread the allegations of criminal sexual assault against the defendant to the Employer and fellow employees. In so doing the plaintiff had contaminated the workplace in such a fashion as to constitute harassment pursuant to the Collective Agreement. In my view, it is clear that the essential character of the dispute or complaint with respect to the grievance arises out of the Collective Agreement. Accordingly, pursuant the principles of ***Weber***, *supra*, the Court does not have jurisdiction to deal with the matter.

Jurisdiction – Malicious Prosecution

[27] The plaintiff submits that the matter, because it is a claim for malicious prosecution, falls outside the scope of ***Weber***. It is, in counsel’s submission, the essential character of that claim, and not the character of the grievance that must be considered. Counsel relies upon the analysis in ***Piko v. Hudson's Bay Company*** (1998), 41 O.R. (3d) 729 (Ont. C.A.), as support for the proposition that an action for malicious prosecution falls outside the scope of the principles in ***Weber***.

[28] The facts in ***Piko*** are succinctly stated by Laskin J.A., speaking for Court, as follows;

Piko was employed by the Bay as a retail sales representative at its Sherway Gardens Store from 1983 until she was fired on July 9, 1993. The Bay fired her because she allegedly "improperly marked down a comforter and then purchased it at a marked down price". Piko claims that the Bay also instigated criminal proceedings against her for fraud. She was charged with fraud, but in December 1993, the Crown withdrew the criminal charge.

In June 1994, nearly a year after she lost her job, Piko grieved her discharge under the terms of the Collective Agreement between the Bay and her representative union, a division of Local 1000 of the United Steelworkers of America. In November 1994 an arbitrator dismissed Piko's grievance because she had not filed it in time and had not given a reasonable explanation for her delay. Because the grievance was dismissed for being untimely, the arbitrator did not consider whether Piko had been unjustly discharged.

In November 1995, Piko sued the Bay for damages for malicious prosecution and damages for mental

distress caused by the criminal proceedings. In her Statement of Claim, Piko alleged that the Bay falsely and maliciously accused her of fraud; that the Bay caused her to be arrested, charged and prosecuted; that the Bay did not have reasonable and probable grounds to initiate criminal proceedings against her; and that the Bay and its employees acted maliciously because Piko was a woman from the former State of Yugoslavia and because of her religious beliefs. Piko also alleged that because of the Bay's actions, she was brought to trial on December 7, 1993. At trial the Crown withdrew the charge against her.

[29] Mr. Justice Laskin concluded that the action could be maintained because the dispute did not arise out of the Collective Agreement. In essence, he concluded that once the employer invoked the criminal process, it took the dispute beyond the scope of the Collective Agreement.

[30] The plaintiff's claim that the Bay maliciously prosecuted her in the criminal courts lay outside the scope of the Collective Agreement.

The Bay itself had gone outside the collective bargaining regime when it resorted to the criminal process. Once it took its dispute with Piko to the criminal courts, the dispute was no longer just a labour relations dispute. Having gone outside the collective bargaining regime, the Bay could not turn around and take refuge in the Collective Agreement when it was sued for maliciously instituting criminal proceedings against Piko.

[31] The court concluded, in summary, that a dispute centered on an employer's instigation of criminal proceedings against an employee, even for a workplace wrong, is not a dispute which in its essential character arises from the interpretation, application, administration or violation of the Collective Agreement.

[32] In ***Ancheta v. Joe et. al.*** 2003 B.C.S.C. 93, Mr. Justice Sigurdson applied the principles of ***Piko***, *supra*. In this case, as in ***Piko***, the allegation of malicious prosecution arose from the Employer's actions that culminated in criminal proceedings that were dismissed. Sigurdson J. held at para. 78 that the initiation of criminal proceedings was neither a prerequisite nor a necessary consequence of the investigation into the employee's conduct, or his dismissal. Accordingly, the claim for malicious prosecution was held not to arise out of the Collective Agreement and the Court retained jurisdiction.

[33] There is a fundamental distinction between the circumstances of this case and those of ***Piko*** and ***Ancheta***. The defendant in this case did not invoke the criminal process. He invoked the provisions of the Collective Agreement. His conduct did not take the matter outside the scope of the Collective Agreement. Accordingly, in my view, the essential character of this dispute did not change. It remained a matter falling within the scope of the Collective Agreement. As such, the Court does not have jurisdiction and the claim for malicious prosecution must be dismissed. To do otherwise would be to countenance the very sort of collateral attack upon the arbitration process that the policy of ***Weber*** was intended to prevent.

Elements Malicious Prosecution

[34] There is another related, and in my view, fatal flaw with respect to this claim. The elements of the tort of malicious prosecution are:

(a) the initiation of criminal or disciplinary proceedings by the defendant against the plaintiff;

(b) the termination of those proceedings in favour of the plaintiff;

(c) the absence of reasonable and probable cause; and,

(d) malice or an improper purpose: ***Nelles v. Ontario*** [1989] 2 S.C.R. 170 at para. 42.

[35] Thus one necessary element of such a claim is that the proceedings were terminated in favor of the plaintiff. The policy which underlies this element is that an action for malicious prosecution is not a forum to retry the prosecution, see Kim Kreutzer Work, *Remedies in Tort, Volume I,* ch. 15, at para. 14.

[36] Plaintiff's counsel made several submissions with respect to the element of termination in favor of the plaintiff. The first submission was that the issue of successful termination is an evidentiary issue that should go to trial. This was joined with a submission that in fact the proceedings had terminated in favour of the plaintiff.

[37] I find that there is no issue here that should go to trial. I find further that the proceedings were not terminated in favor of the plaintiff. It is plain and obvious that Mr. Kinzie found that the plaintiff had breached the provisions of the Collective Agreement. This is analogous to a conviction in a criminal proceeding. The fact that no further discipline was imposed in light of the warning that had been made in writing by letter dated September 4, 2001, is to my mind irrelevant.

[38] The plaintiff also submits, in the alternative, that the outcome partly favored the plaintiff and partly the defendant, relying upon ***Banks v. Bliefernich*** (1988), 24 B.C.L.R. (2d) 397 (B.C.C.A.) as support for the proposition that in such circumstances the action should be allowed to proceed. ***Banks***, *supra*, dealt with the circumstance in which the plaintiff had been charged with multiple counts, pled guilty to one charge with the rest being stayed. The action was permitted to proceed with respect to those charges which had been disposed of by a stay of proceedings. In the case at bar, there was only one "count" or allegation - the allegation of harassment. That allegation has not been disposed of favorably to the plaintiff. Rather the investigator found that the plaintiff had been guilty of harassment. The principles of the ***Banks*** decision accordingly have no application.

[39] The plaintiff submits, on the authority of ***Palad v. Pantaleon,*** [1989] O.J. No. 985 (Ont. Dist. Ct.) that 'it remains an open question whether the Court may look at the reason the proceedings terminated'. Counsel submits that at trial the plaintiff would argue that Mr. Kinzie erred in his findings and analysis. In ***Palad***, *supra*, the Court noted that the trier of fact in a civil action might look at the basis of the termination in relation to the question of whether there were reasonable and probable grounds for the prosecution. The Court, however, found in that case that the proceedings had been terminated in favor of the plaintiff, on however, a shaky and possibly flawed premise. The case is not authority for the proposition that the requirement for successful termination can be dispensed with or circumvented through the route of retrying the original decision at the trial of the malicious prosecution action.

[40] Finally counsel submits that Mr. Kinzie was not really an arbitrator and hence, made no decision. Thus the proceedings were not capable of being terminated in favor of the plaintiff. He submits that:

If this matter were to proceed to trial, the Plaintiff would argue on all the evidence and circumstances, including Mr. Kinzie's appointment and role in relation to the collective bargaining unit, that Mr. Kinzie is more of an investigator than a tribunal or arbitrator, notwithstanding the powers given to him. Since Mr. Kinzie is only an investigator and he made no recommendations in this case, the proceedings were not resolved in anyone's favour. Indeed, looking at his role under the collective agreement, he was not in a position to decide anything.

[41] In fact, the proceedings on the motion were adjourned in order to give counsel the opportunity to adduce additional evidence and to make further submissions with respect to the question of the termination of the proceedings before Mr. Kinzie. Therefore, this was the time to make such arguments and introduce such evidence. In any event, the Collective Agreement is, in my view, clear that the Investigator will have the same powers as an arbitrator. Further, while the Investigator does not have the authority to amend the Collective Agreement or to make recommendations with respect to systemic issues, such matters are not an issue in this case. The Collective Agreement provides that the recommendations of the Investigator for the purpose of resolving issues between the complainant and the respondent will be implemented by the Employer and will constitute a final resolution of the complaint, binding on all parties.

[42] In short, a necessary element of the claim of malicious prosecution cannot be made out. The proceedings were not terminated in favour of the plaintiff. The claim for malicious prosecution must be dismissed.

Abuse of Process

[43] Counsel has argued in the alternative that the plaintiff should be given leave to amend his pleadings to substitute a claim for the tort of abuse of process, which does not have as an essential element the termination of proceedings in favor of the plaintiff.

[44] One difficulty is that it is doubtful if a claim for abuse of process is available with respect to process other than the invocation of the Court process. In other words, could such a claim be advanced at all with respect to the initiation of a grievance under the Collective Agreement? In ***Tsiopoulos v. Commercial Union Assurance Co.*** (1986), 32 D.L.R. (4th) 614 (Ont. High Court) at 616-617, Henry J. stated:

It is well settled that there is at law a tort known as abuse of process. This cause of action arises when the processes of law are used for an ulterior or collateral purpose. It is defined as the misusing of the process of the courts to coerce someone in some way entirely outside the ambit of the legal claim upon which the court is asked to adjudicate. It occurs when the process of the court is used for an improper purpose and where there is a definite act or threat in furtherance of such purpose: *Grainger v. Hill et al.* (1838), 4 Bing. (N.C.) 212, 132 E.R. 769; *Guilford Industries Ltd. v. Hankinson Services Ltd. et al.* (1973), 40 D.L.R. (3d) 398, [1974] 1 W.W.R. 141; *Atland Containers Ltd. v. Macs Corp. Ltd. et al.* (1974),7 O.R. (2d) 107, 54 D.L.R. (3d) 363, 17 C.P.R. (2d) 16; *Unterreiner v. Wilson et al.* (1982), 40 O.R. (2d) 197, 142 D.L.R. (3d) 588, 24 C.C.L.T. 54, (H.C.J.); affirmed 41 O.R. (2d) 472, 146 D.L.R. (3d) 322 (C.A.).

[45] The definition of the cause of action was cited with approval in ***Home Equity Development v. Crow*** 2002 B.C.S.C. 1747, at para. 25, a decision of Madam Justice Quijano.

[46] There is however, in my view, a more fundamental problem which relates back to the ***Weber*** doctrine of exclusive jurisdiction. The Collective Agreement provides in clause 31.03(f)(v)

that:

(v) An employee who files a written complaint which would be seen by a reasonable person to be frivolous, vindictive or vexatious may be subject to disciplinary action. Disciplinary action taken may be grieved pursuant to Article 9 – Grievance Procedure.

[47] Thus the issue of complaints made that are frivolous, vindictive or vexatious, such as alleged here, is specifically dealt with in the Collective Agreement. Therefore, the proposed amendment suffers from the same difficulty with respect to the exclusive jurisdiction issue as did the claim for malicious prosecution.

DISPOSITION

[48] In the result, paragraph 5 of the Statement of Claim, together with the references to 'malicious prosecution' in paragraphs 6, 7, 8 and 9 of the Statement of Claim, are to be struck out. The defendant has appropriately conceded that if those provisions of the Statement of Claim are struck, the Counterclaim of the defendant should also be struck out and that is so ordered. The plaintiff is denied leave to amend the Statement of Claim to allege the tort of abuse of process.

"C. Ross, J."
The Honourable Madam Justice C. Ross