Citation: 2025 NBKB 034

Date: 2025-02-19

Docket: FC-331-2023

IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF FREDERICTON

BETWEEN:

GREGORY BILLINGS

Plaintiff (Respondent on Motion)

– and –

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS LOCAL 1053

Defendant (Respondent on Motion)

- and –

THE CITY OF FREDERICTON

Third Party (Applicant on Motion)

RULING ON MOTION

Date of Motion:	January 31, 2025
Date of Decision:	February 19, 2025
Subject Matter:	Strike a Claim/Duty of Fair Representation
Before:	Justice E. Thomas Christie
At:	Burton, New Brunswick

Appearances:	Sean McManus and Jennifer Ingraham for the International Association of Fire Fighters Local 1053
	Jamie Eddy, K.C. and Jenna Smith for The City of Fredericton
	No one for the Plaintiff

Christie, J.

[1] In this Motion, the Third Party, the City of Fredericton (City), seeks to have the Third Party claim against it, brought by the Defendant, International Association of Firefighters, Local 1053 (Union), dismissed. The Plaintiff, Gregory Billings, was a firefighter employed by the City and was a member of the Union. He had retired in December 2021 but, had a change of heart after he determined that his decision had been based on what he believed to be misrepresentations given to him by the City. He asked the City to reinstate him, but the City refused. He went to the Union seeking that a grievance be filed and pursued. The Union refused to do so. Mr. Billings then filed the within action against the Union alleging that it breached its duty of fair representation to him. Mr. Billings, in his original claim, had named the City as a Defendant. He subsequently dropped his claim against the City. The Union and the City are parties to a collective agreement which governed the terms and conditions of Mr. Billings employment.

[2] Despite the City being removed as a defendant by the Plaintiff, the Union determined that it would then pursue a Third Party claim against the City. The substance of the Union's claim is, that if Mr. Billings is successful in his claim against the Union, the City should be responsible to cover any damages that are ordered, or at least be apportioned between them. Furthermore, if a court was to issue an order that Mr. Billings' grievance proceed to arbitration, then it would be prudent, the Union argues, to have the City participate in the civil proceedings.

[3] Of course, it is to be noted, that Mr. Billings does not seek an Order that the matter be remitted to arbitration. Nor does the Union, in its Statement of Defence, ask for such relief. Such relief is referenced only in the Third Party claim.

ARGUMENT

[4] During argument, counsel for the Union made no secret that the prime purpose behind its Third Party claim is that it wants the City to be on the hook for some undefined share of damages to which Mr. Billings may be entitled if he succeeds against the Union in the underlying action. Para. 4-6 of the Third Party Claim identifies the issue facing the Union:

> 4. As per the terms of the Collective Agreement, the Plaintiff could have requested the Association grieve his resignation, but did not do so. The time provided under the Collective Agreement to grieve the Plaintiff's resignation has expired and the Association is unable to grieve the resignation of the Plaintiff or refer a grievance to arbitration for the resignation of the Plaintiff.
>
> 5. The Plaintiff's action unfairly and unjustly superseded the terms of the Collective Agreement.
>
> 6. In the event that the Defendant is found liable to the Plaintiff, which liability is not admitted but specifically denied, against the Third Party the Defendant claims:
>
> > (a) an Order that Third Party be ordered to accept a grievance from the Plaintiff under the grievance procedure set out in Article 8.02 of the Collective Agreement between the Third Party and the Defendant, and permit the grievance to proceed through each step of the grievance procedure to arbitration under Article 9 of the Collective Agreement, without reliance on any time limit defence set out in the Collective Agreement or at common law. The Third Party shall be bound in law by the decision of the arbitrator, as awarded under Article 9.

[5] I note that with respect to para. 4 above, the Union pleads that "…*The Plaintiff could have requested the Association grieve his resignation, but did not do so."* During argument before me, counsel for the Union acknowledged that, in fact, Mr. Billings had asked the Union to file a grievance on his behalf, but it refused to do so because certain time limits had expired.

[6] The Union argues that *Rule* 30.01 necessitates the inclusion of the City in the underlying claim. *Rule* 30.01 provides that:

> 30.01 Where available
>
> (1) A defendant may issue a Third Party Claim (Form 27I) against a person who is not a party to the action, and who
>
> > (a) is, or may be, liable to him for all or part of the claim of the plaintiff,
> >
> > (b) is, or may be, liable to him for any other relief relating to the subject matter of the main action;
> >
> > (c) should be bound by the determination of some issue arising between the plaintiff and the defendant.

[7] In support of its position, the Union, at para. 5 of its pre-hearing brief, writes:

> The Association submits that the City's involvement as a Third Party is necessary to ensure a complete and effective adjudication of the matter. The remedy typically granted in duty of fair representation cases – referral of a grievance to arbitration – would directly impact the City's legal interests …
>
> [emphasis added]

[8] The Union also relies on *Rule* 5.01(2), suggesting that the City is a necessary party to resolving the legal action against the Union. The *Rule* provides that:

> 5.01(2) Everyone whose presence is necessary to enable the court to adjudicate effectively and completely the matter before it, must be joined as a party.

[9] Let me say at this point that I am not convinced that *Rule* 5.01(2) is helpful to the Union, in so far as the City's participation as a party can be characterized as being *necessary* for effective adjudication of the underlying matter. The underlying action of Mr. Billings makes no claim against the City. Nor, frankly, does the Third Party claim allege that the City did anything wrong. It may well be that there are City employees who may need to be witnesses during Mr. Billings' trial. But that does not, in my view, necessitate the City's participation as a party.

[10] The Union, in its argument, relies on the case of *Stewart et al v. Toronto Professional Fire Fighters' Association, Local 3888 and the City of Toronto*, 2004 CarswellOnt 1083 as an example of a case where the City was directed by a court to remain a party to an underlying duty of fair representation action. While I will say more on *Stewart* later, I note that in *Stewart*, the Union had pled an identifiable cause of action against the City of Toronto:

> 2. … The TPFFA has claimed against Toronto for contribution and indemnity with respect to any damages award on the basis of unjust enrichment.
>
> [emphasis added]

[11] The Union also points to an issue of fairness in that, should Mr. Billings prevail against the Union, it would be unfair for the Union to be left with the financial obligation to make Mr. Billings whole. Afterall, the Union submits, if the City breached its collective agreement obligations to the Plaintiff, why should the Union be, 'on the hook'? As it writes at para. 5 of it brief:

> If the City's position is accepted by this Court, and the Court finds that the Association breached its duty of fair representation, the City would escape all liability for its own misconduct. This outcome would unfairly shift the entire burden of Mr. Billings' losses onto the Association, despite the City's role in the underlying dispute. Such a result is both inequitable and inconsistent with established principles aimed at holding all responsible parties accountable.

[12] During argument, the Union acknowledged that the Third Party claim against the City does not disclose a 'reasonable cause of action', as that phrase is typically understood.

[13] The City is of the view that the third-party claim seeks to draw it back into a grievance and arbitration process which, by the Union's own admission, is spent - being long out of time. In the present Motion, the City seeks an Order that the Union's action against it be dismissed. The cited grounds in the Motion for the requested relief include that the Union's claim against it

does not disclose a reasonable cause of action. In its brief (p. 8), the City frames the central question as follows:

> Does the Third Party Claim against the City of Fredericton, with respect to the defence of the allegations of the IAFF Local 1053's liability regarding its duty of fair representation to represent Billings, disclose a reasonable cause of action and/or is it scandalous, frivolous or vexatious?

[14] The City relies on *Rule* 23.01(1) as providing the authority for dismissing a pleading which does not disclose a reasonable cause of action. The City quotes the words of Drapeau, C.J.N.B., as he then was, in *Sewell v. ING Insurance Company of Canada*, 2007 NBCA 42 where, at para. 26, is found the following:

> The principles that inform the determination of a defendant's motion to strike under Rule 23.01(1)(b) are well settled and can be summarized as follows: (1) the only question for judicial resolution is whether it is plain and obvious that the Statement of Claim fails to disclose the essential elements of a cause of action tenable at law.

[15] That statement of the law is followed by the proviso that such a finding should be reached *only in the clearest of cases* (para. 26). This, the City argues, is one of those clearest of cases. There is no allegation that the City breached a contract. No allegation that the City had a duty of fair representation. No allegation that the City acted in breach of a statute. No allegation that the City committed a tort. No allegation that the City committed any actionable wrong.

[16] Moreover, and perhaps more to the point, the City argues that the relief sought by the Union is beyond the jurisdiction of the court. The Supreme Court of Canada, most recently in *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42, has directed that, where there is a legislatively mandated arbitration scheme (as here) such a scheme is to be considered as the exclusive forum for resolving disputes arising from a collective agreement.

[17] The City argues that New Brunswick jurisprudence indicates that the duty of fair representation involves obligations exclusive as between the employee and the Union (*Burns v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada Local 219 et al)*, 2012 NBCA 13. There is no place, the City argues, for the employer in such claims. Therefore, no third party claim against it can arise in such circumstances.

ANALYSIS

[18] The Union, in its submission, refers to the remedies it seeks in its claim against the City (referral to arbitration and shared damages if ordered) as being the *typical remedies* for court orders arising from a finding that a union violated it duty of fair representation to a member. The Union refers to a variety of labour board rulings wherein a union has been found to have violated its duty of fair representation and the board would have ordered the grievance to be referred to a hearing, despite time limits being missed. If, in such circumstances, the employee was successful, then the union's exposure would be limited to any delay occasioned by the refusal to process the grievance and not damages arising from the employer's breach of the collective agreement. That loss would be on the employer.

[19] That is not the New Brunswick experience. No cases were presented to support the existence of such *typical* remedies in New Brunswick. The authorities cited by the Union did indicate that, in jurisdictions where a union's duty of fair representation has been crystalized in a legislative scheme, such relief may be appropriate. Of course, that is not the legal landscape in New Brunswick. The Union acknowledges this reality. In its Statement of Defence the Union makes no mention of a statutory scheme and pleads:

> 23. At all material times, the Association complied with its common law duty of fair representation to the Plaintiff.
>
> [emphasis added]

[20] Furthermore, even if there was such a thing as a *typical* remedy in such cases, the Statement of Defence does not ask for it. It asks that the action of Mr. Billings be dismissed. Similarly, the Third Party Claim says nothing about seeking an Order directing an apportionment of damages between the Union and the City. It asks two things: (1) that the City be ordered to accept a grievance and; (2) that there be no defence to it based on missed time limits. In other words, the Union is asking the court to interject itself into a collective agreement process by resurrecting a grievance that the Union did not see fit to originally pursue *and*, to remove a defence that may well be fatal to the Union's grievance. The requested relief in the Third Party claim seeks an invasive Order by the court into the collective bargaining regime, where the court's influence is intended to be limited. The Union is seeking a court-ordered, 'do-over'.

[21] As I have noted earlier in these reasons, in addition to the labour board rulings cited by the Union, it also relies on *Stewart* as an example of a court doing just as the Union here suggests. In *Stewart*, the Plaintiffs were a group of unionized firefighters who felt aggrieved by their union in relation to the outcome of an interest arbitration. The Plaintiffs had been awarded a lower wage schedule than another group of firefighters with whom they had just merged bargaining units. Firefighters were not subject to the *Ontario Labour Relations Act* which had within it a scheme dealing with duty of fair representation matters. The Plaintiffs in *Stewart* argued that, while they did not have the protections found in the *Ontario Labour Relations Act* (as it pertained to the duty of fair representation provisions):

> … they [we]re protected by the common law duty of fair representation. The common law duty is substantially similar to the statutory obligation which is routinely adjudicated by provincial and federal labour boards. [para. 5 of *Stewart*]

[22] Within the reasons in *Stewart* (at para. 15) is a quote from the decision of the Ontario Labour Relations Board in *McCormack, Re.* [2001] O.L.R.D. No 2719 (Ont. L.R.B.) which captures the principled point the Union here makes:

> However, even if the Board were to reach such a conclusion [that the union violated its duty of fair representation], it is highly unlikely that the Board would order the union to reimburse the

> applicant's dental fees. Trade unions are not guarantors of the benefits that employers are obligated to provide under collective agreements. Or, put another way, the employer's failure or refusal to pay does not mean the union has to pay for it.
>
> [emphasis added]

[23] Similarly, at para. 17 of *Stewart,* is found the following from *Leach v. C.U.P.E., Local 1978*, [1982] 3 Can. L.R.B.D. 463 (Can L.R.B.) where the Board had noted:

> In a situation where the union has caused the employee's damages to be greater by reason of a breach of s. 7, the union is liable for that portion of the damages. The employer would normally remain liable for the portion of the damages which it would have had to pay had there been no breach of s. 7 by the union.
>
> [emphasis added]

[24] Finally, in *Stewart*, are the following concluding paragraphs:

> 26. Given that the law is unsettled as to the remedies available for common law breach of the duty of fair representation, it is possible that, should the plaintiffs succeed in establishing that the TPFFA violated its duty of fair representation that the City of Toronto will be held liable for the damages that ensure (*sic*) or will be required to participate in a continuation of the Teplitsky Board arbitration. Toronto has not demonstrated that the law is so clear that it is plain and obvious that the trial judge cannot order Toronto and the TPFFA to return to the Teplitsky Board. As such Toronto must remain a party to this Action.
>
> 27. Toronto has not demonstrated that it is plain and obvious that Toronto could not be affected by a damages order.
>
> [emphasis added]

[25] It appears to me that in *Stewart*, there was a desire by the court to leave open the possibility that the court could 'mirror' the remedies that existed under the legislated regime for certain unionized employees. Firefighters, being legislatively excluded from the statutory regime, could only look to the common law for relief. In the present case, any remedy arising from Mr. Billings' claim against the Union will be in the form of a common law remedy as there

is no parallel statutory scheme in New Brunswick dealing with duty of fair representation claims. No party has put before me a New Brunswick case where the relief here sought in the Union's Third Party claim has been awarded.

[26] I want to be clear, in as much as distinctions can be found in the facts in *Stewart* and the present case, at its core, I do not share the Union's view that there exists in New Brunswick a common law remedy of the sort sought in the Third Party claim. Unions carry a heavy burden in relation to their members – a burden arising from the exclusive statutory rights and duties of representation they are given to exercise on behalf of their members. It would be difficult to imagine that there would ever be an obligation on the union to share its dues revenue with the employer. With that said, one may rhetorically ask, why then should the employer be called upon to share a union's loss occasioned by its decision not to pursue a grievance (if that decision is found to reflect a failure in the duty of fair representation from which damages would flow)?

[27] The City cites the ruling of the Supreme Court of Nova Scotia, Appeal Division (as it then was) in *Nova Scotia Nurses Union v. Paruch*, 1992 CanLII 2446. The facts, as set out in the reasons of the court of first instance (*Paruch v. Nova Scotia Nurses' Union*, 1991 CanLII 13813 (NS SC)), noted that the Nurses' Union refused to advance a grievance by a member nurse in relation to a posting that had been awarded in a manner inconsistent with the collective agreement. Ms. Paruch sought an order in the nature of mandamus to require the matter be processed to arbitration. The *Nurses Union* argued as follows against Ms. Paruch's request of the court:

> 6. The application is opposed by the N.S.N.U. and it is argued that the court has no jurisdiction to make the order requested. It is argued that to do so would interfere with the Collective Bargaining process provided by Statute. It was agreed that the grievor was entitled to fair representation which was afforded by the common law.

[28] The trial court found that the Nurses' Union knowingly ignored the rights of Ms. Paruch and other nurses. In deciding it had jurisdiction to impose a remedy the trial court wrote, at para. 31, the following:

> The law has surely advanced to the position that where a tribunal, a labour union or any organization which has statutory status, does not act in good faith in the interest of its members, that as Dickson, J., said, it is not only permissible but requisite for the court to intervene in the public interest.

[29] On appeal, and in taking a different view, the Appeal Division wrote:

> The court should not interfere so as to negate the clear provisions of the Collective Agreement for dealing with grievances. The appropriate remedy in these circumstances is for an employee to sue the union for damages for alleged failure to provide fair representation.
>
> [emphasis added]

[30] In my view, the Appeal Division reasons best reflect the current state of the common law in New Brunswick. While it is undoubtedly a decision, now over 30 years old, it does reflect a legal sentiment that has continued to evolve. In my view, it is now settled law, that the court has a limited role in matters pertaining to the processing and determination of grievances under a collective agreement. Cases like *Paruch* through *Weber v. Ontario Hydro*, [1995] 2 S.C.R. and to *Horrocks*, illustrate that such disputes are to be resolved outside of the court system. This is not only in conformity with the applicable common law principles but is also mandated by statute – here the *Industrial Relations Act*, RSNB 1973, c I-4. As is required by the provisions of the *Act*, the collective agreement contains *the* mechanism to address grievances through to arbitration. It is, one might say, intended to be a 'closed system'. It does not have a role for a court in determining merits of a grievance other than through the limited function of judicial review. More to the point, the court does not have a role in resurrecting a grievance the Union chose not to pursue. The relief sought by the Union in its Third Party claim is beyond the scope of the court.

[31] The Union, by way of its Third Party claim, seeks to engage the City in a civil action that arises wholly from the Union's common law duty to Mr. Billings. Mr. Billings' claim of this type does not engage any duty that rests on the City in relation to duty of fair representation matters. The Third Party claim does not allege that the City did anything wrong *vis a vis* the Union. It discloses no cause of action and, on that basis alone, its Third Party claim against the City is dismissed. Moreover, the relief it seeks in the Third Party claim is not relief available to it under the current New Brunswick common law.

[32] For the above reasons, the City's Motion is granted. The Union's claim against it is struck. The City is entitled to costs from the Union of $2,000.00 plus HST.

_____
Justice E. Thomas Christie
Court of King's Bench of
New Brunswick, Trial
Division