Court of King's Bench of Alberta

Citation: Arsenault v Big Rock Brewery Limited Partnership by its general partner Big Rock Brewery Operations Corp. and Big Rock Brewery Operations Corp, 2024 ABKB 387

Date: 20240627
Docket: 2301 02115
Registry: Calgary

Between:

Wayne Arsenault

Applicant

- and -

Big Rock Brewery Limited Partnership by its general partner Big Rock Brewery Operations Corp and Big Rock Brewery Operations Corp

Respondents

Reasons for Decision
of the
Honourable Justice R.W. Armstrong

Introduction to the Action

[1] The Applicant, Wayne Arsenault commenced an action against the Defendants, Big Rock Brewery Limited Partnership, by its general partner Big Rock Brewery Operations Corp, and Big Rock Brewery Operations Corp ("Big Rock") by way of a Statement of Claim filed on February 15, 2023. The claim alleges that Big Rock terminated Mr. Arsenault's employment as President and Chief Executive Officer without just cause or pay in lieu of reasonable notice. Mr. Arsenault seeks severance in the amount of $261,621.15. He also seeks aggravated and punitive damages in the amount of $200,000 on the basis that Big Rock breached a duty of good faith to him.

[2] Big Rock defended the claim in a Statement of Defence filed on March 31, 2023. Big Rock alleges that it terminated Mr. Arsenault's employment with just cause. Big Rock's claim of just cause is based on the following alleged acts or omissions by Mr. Arsenault:

(a) a) disobeying or failing to comply with Board directives and other wilful misconduct;

(b) b) gross negligence, or, alternatively, gross, or serious incompetence in the performance of his duties and responsibilities;

(c) c) misrepresentations or misstatements of financial information;

(d) d) concealing or failing to disclose material information to the Board of Directors;

(e) e) dishonesty, insubordination, neglect, or dereliction of duty, failing to provide effective leadership and a breakdown in the relationship of trust between the employer and the employee.

[3] Affidavits of records have been exchanged by the parties, but questioning has not yet commenced.

[4] In accordance with the new streamlined trial rules, Mr. Arsenault, brings this application for a streamlined trial in his wrongful dismissal action. Big Rock objects to the necessity and utility of a streamlined trial in this matter.

Background to the Streamlined Trial Rules

[5] In 2014, the Supreme Court of Canada called upon the trial courts and litigants to undergo a "culture change" to promote "timely and affordable access to the civil justice system": ***Hryniak v Mauldin***, 2014 SCC 7 at para 2. This call for a fundamental shift in the way civil litigation is conducted was in response to the ever-increasing expense and delay associated with getting a civil matter to a full trial. Civil litigation was becoming cost prohibitive and the delays inherent in the process of getting to a trial were becoming unacceptable to litigants in search of timely determination of their disputes.

[6] In Alberta, the response to the Supreme Court of Canada's call for a culture change included the proliferation of summary judgment applications and summary trials. Summary judgment is available where there is no defence to a claim or part of it, there is no merit to a claim or part of it, or when the only real issue is the amount to be awarded: Alberta *Rules of Court* 7.3. Prior to the amendment of the *Rules* to include streamlined trials, summary trials were available for the determination of an issue, a question, or an action generally: Alberta *Rules of Court* 7.5.

[7] The Court of Appeal of Alberta identified summary dispositions by way of summary judgment or summary trial as essential tools in achieving "the overriding goal of 'proportionality' in civil procedure recognized by R. 1.2 of the Alberta *Rules of Court*" and in ensuring that civil disputes are resolved in a "timely" and "cost-effective" manner with a process that is "proportionate to the importance and complexity of the issues.": ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA at para 26.

[8] While the summary trial gained some favor in the years following the decisions in ***Hyrniak*** and ***Weir-Jones***, the summary trial process was flawed and it had the potential to cause

additional delay and expense to parties, contrary to the intent to provide a timely and cost-effective process for the determination of claims.

[9] To invoke the summary trial process, a party was required to file the application for a summary trial, accompanied by an affidavit containing all the evidence to be relied on in the summary trial. If a respondent objected to the summary trial process, they were still required to file and serve the affidavit evidence on which they intended to rely at the summary trial. The summary trial would proceed and the first issue for determination would be whether the matter was suitable for summary trial and whether the summary trial would facilitate the resolution of the claim or a part of it.

[10] If the summary trial judge was not convinced the matter was suitable for summary trial or determined that the evidence was insufficient for the necessary findings of fact to be made, the judge could dismiss the application for summary trial. Both parties would have gone to considerable time and expense preparing for the summary trial with no resulting determination. The litigation would have to continue to a full trial.

[11] In January 2024, the Alberta *Rules of Court* were amended, and the summary trial process set out in Rule 7.5 was repealed and replaced with the streamlined trial rules. Rule 8.25 says:

> 8.25(1) The Court, on application by a party or on the Court's own motion, may order or direct that a court action be resolved by a streamlined trial if the Court is satisfied that
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> > (a) it is necessary for the purpose of the action to be fairly and justly resolved, and
> >
> > (b) it is proportionate to the importance and complexity of the issues, the amounts involved and the resources that can reasonably be allocated to resolving the dispute.
>
> (2) An order of direction under subrule (1) may be made at any time, including in chambers, at a case conference meeting or case management meeting, at an application for judgment or any other appearance.
>
> (3) A streamlined trial shall not be considered as a disproportionate process solely because
>
> > (a) issues of credibility may arise,
> >
> > (b) some oral evidence may be required at the trial,
> >
> > (c) cross-examination of some witnesses may be required, or
> >
> > (d) expert evidence may be introduced.

[12] Rule 8.26 sets out the process for applying for a streamlined trial and rule 8.27(1) sets out the way a dispute over the mode of trial shall be determined. It says:

> 8.27(1) Any dispute about the mode of trial shall be resolved in a summary manner, relying on
>
> > (a) the pleadings,
> >
> > (b) statements by the parties of the issues to be resolved at the streamlined trial,

(c) outlines of the evidence that would be called at the streamlined trial, and

(d) other relevant information, if any.

[13] The Notice to the Profession and Public issued by the Court of King's Bench of Alberta in conjunction with the release of the new streamlined trial rules confirms that the new rules do not require the litigants to file affidavits addressing why the matter is suitable for a streamlined trial. The determination regarding the appropriate mode of trial is made based on the pleadings and the submissions of the parties.

[14] The new streamlined trial rules eliminate the biggest issue that existed with summary trials. Rather than putting the parties into the summary process and then determining at the end whether that process was suitable such that judgment can be rendered, the streamlined trial process requires the court to decide up front on the suitability of the streamlined trial process. Once the streamlined trial has been determined suitable, it proceeds on the merits and the trial judge hearing it must grant judgment at the conclusion of the trial: Alberta *Rules of Court* 8.31(2).

[15] While there will necessarily be less information available to the judge when making the suitability determination (the trial judge will not have the benefit of seeing the evidence of the parties), that is more than made up for by the benefits of an early determination on suitability and the promise of judgment at the end of the streamlined trial. If the matter is determined not to be suitable for a streamlined trial, the parties have not wasted significant time and resources getting that determination.

Analysis and Reasons for Decision

[16] The two-part test for a streamlined trial is set out in Rule 8.25(1). The Court must be satisfied that:

1) A streamlined trial is necessary for the purpose of the action to be fairly and justly resolved; and

2) The streamlined trial must be proportionate to the importance and complexity of the issues, the amounts involved and the resources that can reasonably be allocated to resolving the dispute.

[17] Streamlined trials represent a compromise between the benefits of a full trial and the expediency of an alternative, truncated process. In a full trial, the presentation of evidence through live witnesses gives a judge the opportunity to assess witnesses as they testify. This enhances the fact-finding process. That benefit must be balanced with the need for more efficient and less costly means of resolving disputes in appropriate cases.

[18] The party applying for a streamlined trial bears the onus of establishing, on balance, that the streamlined trial is a necessary and proportionate means of resolving the dispute in question.

[19] The test for a streamlined trial differs from the test under the old summary trial rules. A summary trial could be granted where the court was satisfied that it could decide disputed questions of fact on affidavits or by other proceedings authorized by the rules for summary trial and where it would not be unjust to decide the issues by way of summary trial: ***SHN Grundstuecksverwaltungsgesellschaft MBH & Co v Hanne***, 2014 ABCA 168 at para 9.

[20] The test for a streamlined trial is no longer whether the matter can be decided using a streamlined process; it is whether it is necessary to use a streamlined process to have the matter fairly and justly resolved. The use of the word "necessary" in the new streamlined trial rule reinforces that the default process will be a regular trial unless the party moving for a streamlined trial is able to establish that the streamlined process is required or essential for the action to be fairly and justly resolved.

[21] The determination of whether a streamlined trial process is necessary for an action to be fairly and justly resolved is a discretionary decision that will be based on the record as set out in Rule 8.27; that is, the pleadings, the parties' statements of the issues to be resolved, outlines of the evidence that would be called at the streamlined trial and any other relevant information provided by the parties.

[22] Some of the circumstances in which a streamlined trial may be found necessary include:

1. Where the streamlined trial will create a more efficient process by eliminating unnecessary steps and reducing overall delay in the resolution of the dispute.
2. Where the streamlined trial will result in a more cost-effective process for the parties.
3. Where the streamlined trial will enhance the administration of justice by making more efficient use of court resources and provide litigants with a more accessible and timely dispute resolution process.
4. Where the streamlined trial will result in a more sharply focussed process and the elimination of complexities in the form of interim applications that do not bear on the ultimate resolution of the real issues in dispute.
5. Where it would be unjust to require the parties to proceed to a full trial, considering the value and complexity of the dispute.
6. Where the streamlined trial process will simplify the proceeding to make it easier for the parties to assess the strengths and weaknesses of their positions and thereby potentially reach a resolution without the need for a trial.

[23] This is not intended to be an exhaustive list and there may be other circumstances in which a streamlined trial will be found necessary depending on the issues that must be determined and the evidence that will be required for the court to make a fair and just determination of those issues.

[24] In the present case, I am not persuaded that the streamlined trial is necessary for the wrongful dismissal action to be fairly and justly resolved.

[25] The parties provided an outline of the evidence that will be required to determine the action. Given the allegations of financial misrepresentations and mismanagement, there will be a significant number of financial records in issue. Big Rock anticipates it will require a minimum of 5 witnesses, including the Chair of the Audit Committee, the former Chair of the Board who took over as President after Mr. Arsenault's employment was terminated, and the Chief Financial Officer, to prove its allegations of just cause.

[26] Proceeding by way of a streamlined trial would require all those individuals, plus any other witnesses, to file and serve affidavits and then Mr. Arsenault would be entitled to question

each of the witnesses on their affidavits. This would result in multiple days of questioning and very likely a great deal of overlap in the questioning, as each witness is likely to cover some common ground.

[27] If the parties were to proceed to a standard trial, questioning by Mr. Arsenault would, at least initially, be limited to the corporate representative and one corporate officer or employee. If Mr. Arsenault was of the view that he had to question additional officers or employees of Big Rock in accordance with Rule 5.17, he would be responsible for the costs associated with any additional questioning beyond the first officer or employee. This restraint would help ensure the questioning was completed in an efficient manner with a view to minimizing repetitive or otherwise unnecessary questioning. Similar restraints would not be present in the streamlined process.

[28] Adducing affidavit evidence from Mr. Arseneault and the 5 witnesses for the Defendants and then conducting questioning of each witness on the affidavits will likely be a less efficient and more costly process than if the parties simply conducted questioning.

[29] In addition to looking at the steps required to get a matter ready for trial (streamlined or standard), I must also consider the conduct of the trial itself. The resources required for a trial to be fairly and justly decided include both the trial time itself and the time required for a judge to properly prepare for the trial. Preparing for a standard trial is relatively straightforward. A judge will typically review the pleadings, including any pre-trial orders that might affect the conduct of the trial and, if necessary, review the pertinent law.

[30] Preparing for a streamlined trial when there are multiple affidavits and transcripts of questioning on those affidavits is a very intensive process that requires significant judicial time. In addition to the steps required to prepare for a standard trial, the judge must review all the affidavits and questioning transcripts. In more complex matters, such as the present one, this can amount to many hundreds, if not thousands, of pages of material. Page limits on affidavits can ameliorate this somewhat; however, caution must be exercised so as not to unduly constrain parties to accommodate a streamlined trial such that the fairness of the trial is compromised.

[31] Once the streamlined trial begins, there may be additional oral evidence presented or cross examinations conducted to complete the evidentiary record. The draft streamline trial order prepared by Mr. Arsenault as part of his application materials contemplated the parties calling oral evidence at the streamlined trial. At a minimum, two days of trial time would be required to complete the streamlined trial.

[32] While there may be a savings of two or three days of trial time with a streamlined trial, that savings will be more than offset by the additional pre-trial steps that will be required for a streamlined trial in this case and by the considerable time the judge must spend reviewing all the evidence in advance of a streamlined trial. The parties, having spent considerable time and money preparing multiple affidavits and attending questioning on those affidavits will then still be required to attend the streamlined trial to give additional oral evidence. There are no efficiencies to be had in this case when the process is looked at wholistically, from beginning to end.

[33] If it is not readily apparent to the judge hearing an application for a streamlined trial that the streamlined trial is necessary to achieve a fair and just result through a more efficient or cost-effective process for the parties or a more efficient use of judicial resources, it should not

typically be allowed. A cursory assessment of the number of trial days that may be required for a standard trial versus a streamlined trial is not a sufficient analysis. The overall fairness, efficiency, cost-effectiveness, and impact on the allocation of court resources ought to be considered. If a streamlined trial will serve to achieve any, some or all these objectives, or if it would be unjust to require the parties to undertake a standard trial, then a streamlined trial should be allowed. In the absence of any such benefits, a streamlined trial will not generally be necessary, and the parties should be directed to a standard trial, perhaps with the benefit of a procedural order.

[34] It is implicit in the test for a streamlined trial that if invoking that process would be less efficient and more costly than a regular trial, it is not necessary for the action to be fairly and justly resolved. I find that to be the case here given the nature of the allegations in Big Rock's Statement of Defence, the number of witnesses that will likely be required and the nature of the evidence that will be led. By the time the witnesses all file affidavits and are then questioned on their affidavits, the parties could complete questioning and undertakings and be ready for a standard trial. The conduct of the standard trial would also be more efficient in that all the evidence would be presented in a single cohesive package for the judge rather than the judge having to review volumes of affidavit and transcript evidence before hearing additional oral evidence from the parties.

[35] Given my finding that a streamlined trial is not necessary in this case, there is no need for me to consider the second branch of the test. However, in the event I am wrong on the issue of necessity, I will proceed to the second branch of the test: proportionality.

[36] Once a court is satisfied that a streamlined trial is necessary pursuant to Rule 8.25(1)(a), it must go on to consider Rule 8.25(1)(b) and whether a streamlined trial would be proportionate to the importance and complexity of the issues, the amounts involved and the resources that can reasonably be allocated to resolving the dispute.

[37] Stage two of the test for a streamlined trial has expressly imported the concept of proportionality from the foundational rules set out in *Rule* 1.2.

[38] The foundational rules were succinctly summarized in ***Attila Dogan Construction and Installation Co. v AMEC Americas Ltd.***, 2015 ABQB 120 at para 128:

> Enhancing a fair resolution of a dispute by viewing the process through the lens of proportionality, the avoidance of delay and cost, at the same time preserving fairness, is an embedded premise in the new *Alberta Rules of Court* since November 1st, 2010.

[39] At this stage of the analysis, some of the jurisprudence relating to summary trials can be instructive. When considering whether a streamlined trial is a proportionate process, many of the factors that were considered in relation to the suitability of a summary trial are applicable. These factors include the amount involved, the complexity of the matter, the urgency, any prejudice likely to arise by reason of delay, the cost of a trial, the course of the proceedings, the need to cross examine witnesses in court, the necessity of questioning for discovery and whether resolution of the matter will depend on findings of credibility: ***Manson Insulation Products Ltd. v Crossroads C&I Distributors***, 2013 ABQB 702 at para 23; ***Duff v Oshust***, 2005 ABQB 117 at para. 24.

[40] These factors must be considered in light of s 8.25(3) of the *Rules of Court* which expressly states that a streamlined trial shall not be considered a disproportionate process solely because issues of credibility may arise, some oral evidence may be required at the streamlined trial, cross-examination of some witnesses may be required, or expert evidence may be adduced. These factors are relevant considerations but the mere existence of any one or more of these factors should not, in and if itself, preclude the granting of a streamlined trial.

[41] In the present case, the amount of the claim involved is not very large and the calculation of the losses arising from a wrongful dismissal, should Mr. Arsenault be successful in his claim, is not a matter of significant contention. Neither the size of the claim or the calculation of damages would preclude this matter from being heard as a streamlined trial.

[42] There is some considerable complexity to this matter. The defence of just cause does not arise from a discrete event or single course of conduct. Big Rock alleges multiple grounds for cause, including grounds relating to financial reporting and forecasting. These allegations necessitate evidence coming from multiple witnesses where credibility will be an issue. Much of the evidence relating to the allegation of just cause will also be in the form of financial records. The nature of this action, with its requirement for multiple affidavits and the need for questioning on those affidavits, likely makes it unsuitable for a streamlined trial.

[43] No urgency has been identified by either party, nor has either party alleged they would be prejudiced by any delay. Having said that, I am not satisfied that a standard trial will result in any delay over and above what would be required to get the matter ready for a streamlined trial. If the parties promptly proceed to questioning, there is no reason they cannot be ready for a standard trial as quickly and efficiently as they could be ready for a streamlined trial.

[44] With respect to cost, I am not satisfied that there will be any savings for the parties by ordering a streamlined trial. Multiple affidavits will be required. There will be questioning on those affidavits. It is very likely that at least some, if not all, of the witnesses may be required to give evidence and be cross examined at a streamlined trial to ensure the judge has all the relevant financial information and understands the implications of that information in the context of Mr. Arsenault's role and responsibilities and the allegation of just cause.

[45] Even if there is some savings in actual trial time by having some evidence contained in affidavits or agreed statements of facts, those savings will be offset by the additional pre-trial steps that will be required and the inefficiency associated with the judge having to review all the affidavits and transcripts in addition to still hearing 2 days of evidence (assuming Mr. Arsenault's estimate of 2 days for a streamlined trial as set out in the draft order he provided is accurate – it may, in fact, underestimate the time required). Considering the process from start to finish, there are no apparent cost savings. Furthermore, the streamlined process in these circumstances would not result in the more effective or efficient use of judicial resources.

[46] The course of these proceedings to date is unremarkable. The parties have exchanged affidavits of records and can proceed to questioning under part 5 of the *Rules of Court*.

[47] Credibility issues may certainly be resolved at a streamlined trial, particularly where the streamlined trial order provides for some oral evidence and cross examination. However, in this case, it is not the credibility of 1 or 2 witnesses that will be at issue. The allegations of cause raised by Big Rock will require an assessment of the credibility of all the witnesses so that the judge hearing the matter can fairly assess the evidence and come to a just decision. While a

Streamlined Trial Order could facilitate oral evidence from all the witnesses, the result would be, in essence, a full trial.

[48] Where a streamlined trial order is likely to complicate, prolong or otherwise impede the path to a final determination of a matter, it will not be a proportionate process.

[49] Considering all the relevant factors, I find it is more likely than not that a streamlined trial will result in a lengthier pre-trial process, a duplication of efforts to adduce evidence by way of affidavit and then again at a streamlined trial and it will result in a less efficient use of judicial resources. In this case, the proportionate process is a standard trial. That is the process that is most likely to facilitate the quickest means of resolving the case at the least expense and make the most efficient use of publicly funded Court resources.

Summary and Conclusion

[50] The Applicant has failed to establish, on balance, that a streamlined trial is necessary for his wrongful dismissal action to be fairly and justly resolved.

[51] The Applicant has not established that a streamlined trial is proportionate to the importance and complexity of the issues. It is expected that the Defendant's case will require evidence consisting of a large amount of financial information. That evidence will come from multiple witnesses and credibility will be a consideration throughout. This is not a case where the evidence can be readily distilled into affidavit form with limited oral evidence and cross examination at trial to permit the trial judge to resolve credibility issues in a streamlined process.

[52] Given the nature of the allegations in this case, the evidence that will be adduced and the fact that there are no apparent efficiencies or economies to be gained from a streamlined trial process, I am of the view that it would do a disservice to both parties and impede the court's ability to fairly and justly decide this case if a streamlined trial were granted. The Application for a streamlined trial is dismissed.

Heard on the 27th day of May 2024.
Dated at the City of Calgary, Alberta this 27th day of June 2024.

R.W. Armstrong
J.C.K.B.A.

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