

**CITATION:** Parker, David v. BlackBerry Limited, 2019, ONSC 3185

**COURT FILE NO.:** 17-71659(Ottawa)

**DATE:** 2019/05/27

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

David Parker, Plaintiff

AND

BlackBerry Limited, Defendant

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)  
) J. Payne/Andrew Montague-Reinholdt, for  
) the Plaintiff  
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) A. Sternberg and R. Lax - Counsel for  
) Defendant  
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) HEARD: April 29, 30 and May 1, 2019

*Proceeding Under the Class Proceedings Act, 1992*

**REASONS FOR DECISION**

**CHARBONNEAU, J.**

[1] The plaintiff brings this motion seeking the certification of these proceedings as a class proceeding pursuant to the provisions of the Class Proceedings Act (the “CPA”).

[2] The theory of the plaintiff is that BlackBerry needed to lay off a significant number of employees and wanted to avoid paying them their statutory, contractual and common law entitlements on termination.

[3] BlackBerry had been moving away from production of smart phones and was concentrating on production of software material. Ford was one of BlackBerry's clients. Ford was moving strongly into the domain of artificial intelligence and, in particular autonomous mobile systems, and was in need of qualified employees. BlackBerry had put together a team of engineers known as the "Silver Team". In the Fall of 2016, BlackBerry transferred nearly all its employees, which now form the proposed class (the "Class Employees"), to the Silver Team. The Silver Team would now work exclusively on engineering services for Ford in the aforementioned areas. The proposed class is defined as follows:

"All persons in Canada who were employees and/or defendant contractors BlackBerry Limited ("BlackBerry"), who worked for BlackBerry in Canada and who were offered and accepted employment with the Ford Motor Company of Canada ("Ford") between January 1, 2017 and April 30, 2017, while excluding BlackBerry employees who filed a complaint pursuant to section 96 of the Employment Standards Act, 2000 seeking termination pay and/or severance pay and did not withdraw that complaint within two weeks".

[4] BlackBerry and Ford entered into a written agreement whereby Ford would make offers of employment to the class employees. This was communicated to the class employees at two Town Hall meetings held on December 8 and 9, 2016. Subsequently, Ford made the offers. The class members were told by BlackBerry that if they refused Ford's offer, BlackBerry would make serious efforts to redeploy them in other tasks at BlackBerry but there was no guarantee that they would be employed. Ford told the class employees that if they accepted Ford's offer they would not be entitled to retain their seniority, or any benefits and entitlements that they had acquired during their years of service with BlackBerry.

[5] Nine employees, (the "managers") were hired by Ford in December 2016. They were immediately tasked to successfully bring about the transfer of the class members from BlackBerry to Ford. The proposed class members comprised all the BlackBerry employees who accepted an offer of employment from Ford after January 1, 2017.

### **The position of the parties**

#### The plaintiff's position

The common issue

[6] The main common issue put forward by the plaintiff is: “Does BlackBerry’s conduct amount to a termination of the class Employees’ employment?” The other proposed common issues deal with calculation and quantum of damages should the trial judge find there was termination. There are three groups of employees for the calculation of damages namely those with a contractual formula to calculate entitlements, those entitled to statutory notice and severance and those who may be entitled to common laws damages. At a minimum each member would be entitled to Employment Standard Act benefits.

[7] The plaintiff submits that the court will only need to look at the scheme put in place by BlackBerry to find whether or not there was a termination by BlackBerry. No individual assessment will be required only the actions of BlackBerry towards the class members between mid-2016 until they each received their respective offers from Ford.

[8] The plaintiff further submits that if BlackBerry terminated the class members’ employment then BlackBerry had to pay severance in one of the three ways mentioned above and the resolution of the common issue will significantly advance the litigation and would be a success for all on that issue. Moreover it will advance the three goals of the CPA namely access to justice, judicial economy and behavior modification.

The defendant’s position

[9] The defendant makes several submissions in an attempt to convince the Court that the proposed common issues relating to the damages issues do not meet common issues requirement on the basis that there would be a requirement for an individual assessment for each employee. However, class proceedings with remaining individual damages issues are often certified. Moreover, the determination for damages for each of the three types of severance entitlement will be a relatively easy task. The proposed common issues are common to one or other severance group and in some cases common to all three. Their resolution will advance significantly the litigation. Even if some individual finding might be required they do not overwhelm the common aspect of each and every issue.

[10] The defendant also submits that the class definition does not meet class proceedings standard. I disagree. All class members are easily identifiable and success of the common issue relative to termination will be success for all of these individuals. The class definition is not too narrow because it excludes the nine managers in view of their particular position. Similarly the excluded employees who sought relief under the ESA are excluded for good juristic reason.

[11] The defendant's main objection to certification is that the threshold common issue cannot be decided as a common issue.

[12] The defendant submits that once the Ford's offer was in each individual's hands, he or she had an option to either resign from BlackBerry or accept the offer. The defendant points to evidence from employees who chose to stay with BlackBerry and evidence from employees who chose to accept Ford's offer and say they were very happy with Ford's offer and knew they had to resign. Different individuals had different reasons to choose to accept the offer and resign or stay with BlackBerry according to the defendant. Different individuals took different steps to find out the best information available in order to make their own decision.

[13] In support of its position the defendant has filed affidavits of individuals who have accepted Ford's offer or who have remained with BlackBerry for their own individual reasons. Therefore in each case, the defendant submits, the trial judge will have to decide whether there was resignation or termination for that particular employee. There is therefore no communality between the members of the class and the proposed threshold common issue.

### Analysis

[14] As I have already indicated, I reject the defendant's objection to certification based on an improper class definition or the individual aspects of the damages issues.

[15] The defendant is right that if a distinct determination for each individual employee must be made on the threshold issue the action cannot be certified. However, the defendant's characterization of the proposed threshold issue has necessarily being one of termination versus resignation disregards the theory of the plaintiff's action. The plaintiff's theory is that BlackBerry devised an elaborate scheme to terminate the class employees without having to pay

them their severance entitlements. There is some basis in fact supporting this theory. There is evidence which supports the existence of the following facts:

1. The need of BlackBerry to reduce its work force.
2. The need of Ford for specialized employees in the area of AI and autonomous mobility and Ford's willingness to take on more employees in that field.
3. The fact that BlackBerry set up a special team to handle Ford's needs which team was then offered a job by Ford.
4. The elaborate written agreement between Ford and BlackBerry showing extensive planning and coordination.
5. The elaborate control of the message to the affected group of individuals.
6. The clear benefit to BlackBerry of proceeding in this fashion.
7. The fact BlackBerry divulged the details of each employees' human resources' file to Ford without the employees' knowledge.

[16] Although difficult to prove, the theory of the plaintiff is not without merit. It cannot be said that the plaintiff will definitely lose this action on the basis of wrongful dismissal if the trial judge finds BlackBerry deliberately carried out a scheme allowing it to terminate the employees without having to pay them severance.

[17] It must be remembered that the merits of the action are not an issue as long as there is a viable cause of action. The fact that the plaintiff may have difficulty finding success at trial is not an issue. The threshold liability issue is clearly one that should be determined in a common trial.

[18] An action in Superior Court of Justice is definitely the preferred procedure to decide this wrongful dismissal claim both on the issue of liability and damages. In fact, I cannot think of any other forum which could properly handle all the facets of the issues of this action.

[19] I am satisfied that Mr. Parker is an appropriate representative plaintiff. The litigation plan will have to be better particularized but that will be done during case conferences to follow certification as is often the case.

[20] For all of these reasons, I find that the plaintiff has satisfied the five criteria of s.5 of the Class Proceedings Act.

[21] Order accordingly.

[22] Counsel for the plaintiff may deliver brief written submissions on costs, within 20 days.

Defendants may provide a brief response within 15 days thereafter.



Charbonneau, J.

Released: May 27, 2019

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David Parker, Plaintiff

**- and -**

BlackBerry Limited, Defendant

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**REASONS FOR DECISION**

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Charbonneau, J.

**Released: May 27, 2019**