Court File No. 17-71659
Divisional Court File No. 333/19

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

B E T W E E N:

DAVID PARKER

Plaintiff

- and -

BLACKBERRY LIMITED

Defendant

Proceeding Under The *Class Proceedings Act, 1992*

REPLY FACTUM OF THE MOVING PARTY, BLACKBERRY LIMITED (MOTION FOR LEAVE TO APPEAL)

August 22, 2019

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1. In his responding factum, Mr. Parker has recast his legal theory in an attempt to support the motions judge's decision, and in a way that is even more at odds with established employment law principles. Mr. Parker submits that (i) the Ford-BlackBerry Agreement was a "disguised termination", amounting to a wrongful dismissal, and (ii) this "disguised termination" occurred when Ford offered (and by virtue of it offering) alternate employment to the employees in mid-January 2017. By contrast, however, in his statement of claim Mr. Parker alleges more broadly that "BlackBerry's actions, taken as a whole, amount to a wrongful termination of the Plaintiffs' employment" – and he relies on various additional factors (beyond the Ford-BlackBerry Agreement), including various communications by BlackBerry to employees and

various facts which took place after Ford had offered employment to the employees.[1] In his notice of motion for certification, Mr. Parker in fact put forward six alternative proposed termination dates, five of them being after Ford made its offers of employment.[2] BlackBerry briefly replies below to this revised (and novel) legal theory and the new issues to which it gives rise.

Mr. Parker's Theory that the Ford-BlackBerry Agreement is a "Disguised Termination"

2. In his factum, Mr. Parker submits that the Ford-BlackBerry Agreement (which he refers to as the "scheme") was a "disguised termination" that at law amounts to a wrongful dismissal.[3] This legal theory gives rise to the following issue: whether an agreement between an employer (BlackBerry) and a different, independent company (Ford) can (alone) amount to a "disguised termination of employment" and constitute a wrongful dismissal? This theory ignores established employment law principles, is manifestly wrong at law and would have far reaching implications.

3. To begin with, Mr. Parker's summary of and submissions in respect to the Ford-BlackBerry Agreement are misleading. While the agreement provides that BlackBerry was not to take steps to "dissuade" employees from accepting an offer of employment from Ford, it did not "contractually prohibit BlackBerry from assuring the Class Employees that they would continue to be employed at BlackBerry," as asserted in paragraph 29 of Mr. Parker's factum.[4] There was no prohibition on BlackBerry continuing to employ the employees or on it advising employees they would continue to have a job at BlackBerry. In fact, a number of affiants confirm that they

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[1] Amended statement of claim, paras. 54-55 (and also prior paragraphs: 18-27, 31-53), Motion Record of the Defendant for Leave to Appeal ["DMR"], Tab 5, pp. 34-43; notice of action, paras. 4-5, DMR, Tab 5, p. 27.
[2] Amended notice of motion for certification, Common Issues – Annex 1, para. 2, DMR, Tab 4, pp. 22-23.
[3] Parker Factum, paras. 2, 5, 13, 44 and 52.
[4] Parker Factum, para. 29; Ford-BlackBerry Agreement, section 1.1 (pp. 1-4), DMR, Tab 35(B), pp. 1188-1191.

were told (and they understood) that they would continue to be employed by BlackBerry if they chose to decline their Ford offer (although which specific project or team they would be placed on after the completion of Project Silver was not yet known and could not be guaranteed in advance). Also, all employees who actually declined the Ford offer continued to be employed by BlackBerry, notwithstanding that on Mr. Parker's legal theory they were terminated.[5]

4. Second, the law does not recognize a "disguised termination" as now asserted by Mr. Parker. A termination for purposes of a wrongful dismissal claim must either be clear and express or a constructive dismissal, both of which have well-established tests. While Mr. Parker makes passing acknowledgement of the test for termination in paragraph 42 of his factum, the argument he then advances in subsequent paragraphs is contrary to the test – he effectively seeks to create a new form of termination or a revised legal test.

5. Although the established termination test expressly requires the court to consider "the employer's words and actions" and the surrounding circumstances, Mr. Parker submits in paragraph 44 that "a court need only consider the BlackBerry Scheme [*i.e.* the Ford-BlackBerry Agreement] to find that a termination of employment occurred on the date the [*sic*] Ford offer the Class Employees employment." That submission is not only contrary to the test, but contradicts his allegations in the statement of claim (referred to at paragraph 1 above).

6. In paragraph 45, Mr. Parker then submits that "to the extent the legal test for termination does not fully capture the BlackBerry Scheme", "policy considerations permit flexibility" in respect of the test. In this regard, he seeks to rely on the *Downtown Eatery* case. That case does

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[5] Landry Affidavit, paras. 5-6, DMR, Tab 14, p. 393; Mullin Affidavit, para. 6, DMR, Tab 15, p. 398; Lee Affidavit, para. 6, DMR, Tab 21, p. 455; Watson Affidavit, paras. 5-6, DMR, Tab 22, p. 466; Mackie Affidavit, paras. 5-6, DMR, Tab 23, p. 469. See also: Graham Affidavit, para. 55, DMR, Tab 7, p. 163; Carswell Affidavit, para. 10, DMR, Tab 9, p. 361; Mascarin Affidavit, para. 11, DMR, Tab 10, p. 370.

not support Mr. Parker's position and is irrelevant to the issues here. It is a case on a very different issue: the common employer doctrine (*i.e.* whether more than one corporate entity in a corporate group can be considered to be the employer and thus owe the employer obligations to employees, grounded in a provision of the *Employment Standards Act*).[6]

7. Mr. Parker also seeks in his factum to distinguish the alleged termination here from a constructive dismissal, which was the issue in *Kafka v. AllState Insurance Company of Canada*. Specifically, Mr. Parker seeks to distinguish *Kafka* by submitting that termination was not at issue in that case. However, the liability issue in *Kafka* was precisely whether or not the employees had been terminated for purposes of a wrongful dismissal claim (*i.e.* whether they had been constructively dismissed). Like the situation here, there had been no express termination by the employer in *Kafka*. The Court in *Kafka* refused to certify the action because the constructive dismissal issue would require individual enquiry for each employee, as the claim here does.[7]

8. Any change Mr. Parker seeks to make to the legal test for termination or to the established categories of wrongful dismissal would have far-reaching implications, well beyond the interests of the two parties, thus highlighting how this proposed appeal gives rise to matters of substantial importance.

The Plaintiff's Submission of One Termination Date

9. Mr. Parker definitively submits that the alleged termination occurred when Ford gave the employees offers of employment. He does so in a flawed effort to avoid relevant factual differences amongst employees after the offers were made (including in respect of individual

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[6] Parker Factum, para. 45; *Downtown Eatery (1993) Ltd. v. Ontario*, [2001] O.J. No. 1879 (ONCA) at paras. 1-2, Plaintiff's Book of Authorities, Tab 10.
[7] Parker Factum, para. 48; *Kafka v. Allstate Insurance*, 2011 ONSC 2305 at paras. 142, 150-162, Defendant's Book of Authorities ["DBOA"], Tab 1.

communications that took place), and in order to argue (in paragraphs 1 and 49 of his factum) that "employees cannot resign their employment if their employer has already terminated them." That position and submission is inconsistent with Mr. Parker's notice of motion and the law.

10. In his notice of motion, Mr. Parker's second proposed common issue is: "If BlackBerry's conduct amounts to a termination of employment, is the date of termination for purposes of calculating notice requirements: [six specific alternative termination dates are listed, plus 'another date to be determined by this Honourable Court']".[8] Not only are five of those dates after Ford made its offers of employment, but at least two of those date were after many employees had submitted resignation letters confirming they were resigning. As examples, the record includes seven resignation letters from employees between February 2 to 15, 2017, all of which predate two of the termination dates proposed by Mr. Parker.[9]

11. BlackBerry's position (supported by case law referred to in our main factum) is that the issue of termination and resignation must be considered together, and as part of the same test.[10] However, on Mr. Parker's view of the law in his responding factum – *i.e.* that the issues are to be considered separately – if an employee cannot resign after already being terminated (as Mr. Parker submits), it must similarly follow that an employee cannot be terminated after already resigning. Therefore, even on Mr. Parker's view of the law (with which we disagree), the court

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[8] Amended notice of motion for certification, Common Issues – Annex 1 to notice of motion, DMR, Tab 4, pp. 22-23

[9] Those final two dates were February 22, 2017 and the date employees started working at Ford, which was March 1, 2017.

[10] The established law in cases where the issue is termination versus resignation requires the court to consider – at the same time and as part of the same test – all of the circumstances and assess whether the employee was involuntarily terminated or instead voluntarily resigned. This point and the case law are addressed at paragraphs 53 to 58 of BlackBerry's main factum.

would have to consider whether an employee resigned and, if so, its timing to assess whether it occurred prior to the alleged termination – which necessarily requires an individual analysis.[11]

12. Finally, Mr. Parker's factum contains a number of factual statements that we submit are misleading or not entirely accurate, but given the limited scope of this reply factum we do not propose to address them here.[12]

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of August 2019.

Arlen K. Sternberg

Ryan Lax

[11] Example Resignation Letters, DMR, Tabs 7GG to 7JJ, 21B, 22A, and 23A; Parker Affidavit, para. 36(b), DMR, Tab 6, p. 54.

[12] Just as one example: Mr. Parker refers to the January 6, 2017 email from Mr. Chen to Mobility Solutions employees, and says that this email "communicated to employees that they should not attempt to stay with BlackBerry." In fact, the final portion of that email (to which Mr. Parker did not refer) expressly stated that "for those in-scope employees who are not extended employment offers or decline a role at Ford or TCL, your manager and HRBP [Human Resources Business Partner] will evaluate internal opportunities to redeploy you within BlackBerry as much as possible," and the email encouraged people to speak with their manager or HRBP if they had questions. (Parker Factum, para. 25; January 6 email, DMR, Tab 6(E), pp. 110-112).

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