

Ciano v. York University

Between

Richard Ciano, on behalf of himself and all others similarly situated, plaintiff (appellant), and
York University and David Clipsham, on behalf of himself and all others similarly situated, defendants (respondents)

[2000] O.J. No. 3482
Court File No. C33718

Ontario Court of Appeal
Toronto, Ontario
Laskin, Goudge and Feldman J.J.A.

September 15, 2000.
(3 paras.)

Counsel:

J. Gardner Hodder, for the plaintiff (appellant).
No other counsel mentioned.

The judgment of the Court was delivered by

¶ 1 **GOUDGE J.A.** (endorsement):— Without endorsing the reasons for judgment of the motions judge in their entirety, in our view it was open to him in all the circumstances of this case to conclude that the appellant had advanced nothing to demonstrate that it would take any money to effectively put him in the same position he would have been in had there been no strike.

¶ 2 However, in our opinion this was an appropriate case in which to apply s. 31 of the Class Proceedings Act. The case could properly be said to raise a novel point of law.

¶ 3 We would therefore dismiss the appeal but without costs here and below.

GOUDGE J.A.

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Ciano v. York University

PROCEEDING UNDER the Class Proceedings Act, 1992

Between

Richard Ciano, plaintiff, and
York University, defendant

[2000] O.J. No. 681

Court File No. 97-CU-122189

Ontario Superior Court of Justice
Winkler J.

Heard: January 25, 2000.

Costs submissions received in writing following the hearing.

Judgment: March 6, 2000.

(12 paras.)

Counsel:

J. Gardner Hodder and Andrew Frei, for the plaintiff.

Elizabeth Stewart and David Leonard, for the defendant, York University.

¶ 1 **WINKLER J.** (endorsement):— In reasons released January 27, 2000, the defendant was successful in obtaining summary judgment dismissing the action pursuant to Rule 20 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194. The parties agreed that costs should be fixed and having considered their written submissions as to costs, my disposition is as follows.

¶ 2 The defendant seeks its costs and disbursements of this action on a party and party basis fixed in the amount of \$50 000.00. The defendant contends that it incurred significant legal fees in defending the action; that the action was complex and raised several distinct causes of action; and that the plaintiff was unwilling to settle the matter prior to the hearing of the motion for summary judgment. While the defendant is only seeking \$50 000.00 in costs and disbursements, it submits that it incurred actual legal fees and disbursements in excess of \$100 000.00. In preparation of this action, the defendant gathered and reviewed volumes of materials relating to the faculty strike, the manner in which York dealt with the strike and the impact of the strike on its students. The defendant also prepared extensive materials in preparation for and attendance at cross-examination of the plaintiff. Given the fact that the substantial sum of \$90 000 000.00 was being claimed on behalf of the proposed class, the defendant asserts that it was necessary to take the plaintiff's allegations seriously and defend them vigorously.

¶ 3 The plaintiff, on the other hand, asks the Court in the exercise of its discretion to order that no costs are payable. In the alternative, the plaintiff asks that the cost award be minimal. I cannot accede to either of these submissions.

¶ 4 The plaintiff argues that s. 31 of the Class Proceedings Act, 1992 should govern because the claims advanced raise a novel point of law, and are matters of public interest. It is also asserted that it is a test case because, as a class proceeding, similar cases depend on the outcome.

¶ 5 Section 31 of the Class Proceedings Act, 1992, S.O. 1992 c. 6 provides:

31(1) In exercising its discretion with respect to costs under subsection 131(1) of the Courts of Justice Act, the court may consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest.

¶ 6 There was nothing presented in the plaintiff's claim to suggest that he was raising either a novel point of law, or a matter of public interest. In essence the plaintiff was seeking damages for breach of contract for failure to make up for class time lost as a result of a faculty strike at the university. Moreover, there is no validity in the contention that this is a test case simply because it is a class proceeding. It does not automatically follow that because a claim is raised under the Class Proceedings Act it will be considered novel or a matter within the public interest or constitute a test case. Section 35 of the Act states that the "rules of court apply to class proceedings". Costs are governed by Rules 57 and 58 of the Rules of Civil Procedure, and the court has the discretion to award them pursuant to s. 131 of the Courts of Justice Act. The plaintiff is bound by the rules of court and, just as in any civil action, he risks the potential burden of an adverse cost disposition if unsuccessful. Costs normally follow the event.

¶ 7 In addition to relying on s. 31(1) of the Class Proceedings Act, the plaintiff argues that this Court should follow the decision of Justice Sharpe in *Mahar v. Rogers Cablesystem Ltd* (1995), 25 O.R. (3d) 690 (Gen. Div.). In *Mahar*, the respondent moved for dismissal of the action on the ground that the court did not have jurisdiction to deal with the matter. Despite allowing the motion, the Court declined to award costs to the moving party. The plaintiff urges

this Court to make a similar ruling since both cases involve a motion to dismiss a proceeding, while a certification motion is pending.

¶ 8 In my view Mahar is distinguishable from the present proceeding. There the issue was one of jurisdiction, and hence no determination was rendered regarding the merits of the claim. In this case, in contrast, the plaintiffs claim was dismissed because of the absence of an essential element in that he failed to adduce any evidence of damages.

¶ 9 The applicable principle is set out by Justice Sharpe in *Edwards v. Law Society of Upper Canada*, [1998] O.J. No. 6192, wherein he ordered costs as against the unsuccessful plaintiff to be assessed on a party-party scale. He concluded at paragraph 14 that where "none of the factors identified in s. 31(1) are present and no reason has been shown why the ordinary costs rules should not apply", the successful party is entitled to their costs on a party and party basis.

¶ 10 On January 28, 1998, the plaintiff served an Offer to Settle which proposed settlement of the action by means of payment to the purported members of the plaintiff class by York of \$3 500 000.00 plus pre-judgment interest and party and party costs. The defendant rejected this first Offer to Settle on February 11, 1998, and instead offered to settle the action by way of an order dismissing the action on consent without costs. The plaintiff did not accept this offer.

¶ 11 On November 29, 1999, the plaintiff served a second Offer to Settle in which Ciano would consent to a dismissal of the action in exchange for a payment by York to his solicitors of \$115 000.00. This sum was stated to represent part of the plaintiff's solicitor and client bill. York rejected this second Offer to Settle, and once again advised the plaintiff of its willingness to consent to a dismissal of the action without costs. This last offer was not accepted by the plaintiff.

¶ 12 In *Murano v. Bank of Montreal* (1998), 163 D.L.R. (4th) 21 (C.A.), Morden A.C.J.O. held that costs should only be fixed by the trial judge if the judge could do so fairly. Here, both parties agreed that I should fix costs. Having considered the written submissions of counsel and in accordance with the rules of court and s. 131 of the Courts of Justice Act, costs on the motion are fixed on a party and party basis in the amount of \$35 000.00 payable by the plaintiff to the defendant.

WINKLER J.

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Ciano v. York University

PROCEEDING UNDER the Class Proceedings Act, 1992

Between
Richard Ciano, plaintiff, and
York University, defendant

[2000] O.J. No. 183
Court File No. 97-CU-122189

**Ontario Superior Court of Justice
Winkler J.**

Heard: January 25, 2000.
Judgment: January 27, 2000.
(23 paras.)

Counsel:

J. Gardner Hodder and Andrew Frei, for the plaintiff.
Elizabeth Stewart and David Leonard, for York University.

WINKLER J:—

Introduction

¶ 1 The defendant, York University, in this intended class proceeding brings this motion for summary judgment pursuant to Rule 20 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194. The defendant maintains that there are no genuine issues for trial, and accordingly the action ought to be dismissed. While the action was commenced under the Class Proceedings Act, 1992, S.O. 1992, c. 6, the certification motion is still pending.

¶ 2 The proposed representative plaintiff, Richard Ciano, alleges that he suffered damages as a result of missed class time due to a faculty strike at York University, which occurred in the spring of 1997. The strike took place between March 19, 1997 and May 14, 1997, during which there was a complete cessation of the teaching and examination activities at York. The strike interrupted the last twelve days of scheduled classes for the regular undergraduate winter semester. In addition to instruction time interruption, examinations and the handing in of final essays and projects could not take place at the usual time in the academic year. The plaintiff

claims that he, and the proposed plaintiff class, are entitled to a return of a portion of tuition fees paid, as a result of the missed class time instruction.

¶ 3 Although the action originally named David Clipsham as a defendant in his capacity as a member of the York University Faculty Association ("YUFA"), the plaintiff discontinued his action as against him and other faculty members on February 24, 1998 by Notice of Discontinuance.

Background

¶ 4 York University was founded in 1959 as an institution of higher learning and research, and was continued by and pursuant to The York University Act, 1965. York maintains campuses at York Campus, 4700 Keele Street, Toronto, and Glendon Campus, 2275 Bayview Avenue, Toronto. The plaintiff was a registered full-time student in the Faculty of Arts at York in the 1996/1997 academic year and was in his fourth year of study toward a Bachelor of Arts degree. In the Winter 1997 term the plaintiff was registered in three half-year courses and one full year course, which he successfully completed and for which he received credit. In the fall of 1998, the plaintiff graduated from York with an Honours Bachelor of Arts degree.

¶ 5 All full-time professors on faculty at York and all librarians employed by York are represented by YUFA, their bargaining agent in collective bargaining with the university. The Collective Agreement between York and YUFA expired in April 1996. On March 20, 1997, YUFA members commenced a lawful strike at York and did not return to work until May 13, 1997 when the strike was settled.

¶ 6 Although classes and instruction were interrupted for the remaining teaching period of approximately three weeks during the six week period of the strike, the university made accommodation for students to ameliorate the effect of the strike, pursuant to its stated policy as set out in the 1988 Senate Policy on Academic Implications of Disruptions ... Due to Labour Disputes. This accommodation as implemented by York included providing information to students on the strike and how York would deal with its impact; providing guidelines to students setting out their options for completing the winter 1997 academic term once the strike was settled; allowing the students to opt out of writing their final-examinations and accept the mark they had to date in their courses if their examination was worth less than 35% of their final grade; extending the due date for final essays or other assignments until the start of the examination period in May 1997, providing optional make-up classes following the end of the strike; and assisting students applying to professional or graduate programs with grades and transcripts.

¶ 7 In his statement of claim, the plaintiff asserts a number of causes of action, and seeks damages from York in the aggregate amount of \$90 000 000.00 for himself and an as yet uncertified class of individuals, who were registered students at York at the time of the strike. The plaintiff asserts that the defendant breached its contract with each student. In addition, he asserts causes of action based on breach of statutory duty pursuant to the Business Practices Act, R.S.O. c. B.18; breach of fiduciary duty; and claims that the university was unjustly enriched. At the outset of argument on this motion, the plaintiff consented to summary judgment dismissing

all of these asserted causes of action, save for the claim based on breach of contract resulting from the university's failure to provide the remaining instructional hours in the term interrupted by the strike. For these hours the plaintiff seeks only a pro-rata refund of tuition fees without additional compensatory damages.

Issue Remaining and Relief Sought

¶ 8 The only claim remaining is that of breach of contract. The plaintiff argues that as a result of the breach, he suffered damages for classes cancelled for the three weeks remaining in the term. Specifically, the plaintiff seeks a return of a portion of the tuition he paid for the class time instruction he did not receive as a result of the strike. The plaintiff advances two methods of calculating the appropriate refund for the tuition fees paid. In the "Calendar method" the plaintiff applies a percentage value to the class time lost, and concludes that he is owed a refund of 20% of his tuition paid. In the "Instructional Day method", the plaintiff concludes that he lost out on 10% of the instructional days for which he contracted. He argues that on this basis he is entitled to 10% refund of his tuition. His claim, in a dollar amount, lies somewhere in the range of \$150.00 to \$300.00.

¶ 9 The defendant contends that an Important Notice clause contained in the Undergraduate Program Calendar, to the effect that the university is not liable for damages suffered by a student as a result of class interruption caused by a strike, provides a complete answer to the plaintiff's claim with the result that the action ought to be dismissed. It states further that, in any event, if the arrangement between the university and a student constitutes a contract, the contract does not include a commitment to provide a specific number of instructional hours or days, and hence there is no breach of the contract in these circumstances. For this reason, the claim ought to be dismissed. I cannot accede to these submissions. A disposition on this ground necessitates the determination of a number of factual issues, and in my view there are genuine issues for trial.

¶ 10 The defendant submits, however, that quite apart from the foregoing the plaintiff suffered no damages as a result of the interruption, and that since damages are an essential element of a claim for breach of contract and absent any evidence of damages, the action ought to be dismissed. I agree. My reasons follow.

Summary Judgment

¶ 11 Pursuant to r. 20.01(3), after the delivery of a statement of defence, a defendant may move for summary judgment to have all or part of the plaintiff's claim dismissed.

Rule 20.04(2) provides that:

20.04(2) Where the court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the court shall grant summary judgment accordingly.

¶ 12 On a summary judgment motion, the role of the court has been clearly set out in the decision of the Ontario Court of Appeal in *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161, at 173. Borins J.A., writing for the court stated that a court hearing a summary judgment motion should never "assess credibility, weigh the evidence, or find the facts. Instead, the court's role is narrowly limited to assessing the threshold issue of whether a genuine issue exists as to the material facts requiring a trial". Further, as Osbourne J.A. recently stated in *Transamerica Occidental Life Insurance v. TD. Bank* (1999), 118 O.A.C. 149 at 160:

A motions judge, on a rule 20 summary judgment motion, should not resolve issues of credibility, draw inferences from conflicting evidence, or from evidence that is not in conflict when more than one inference is reasonably available.

However, he further stated, at page 160 that the "mere existence of an issue of credibility will not defeat a motion for summary judgment. The issue of credibility must be a genuine issue".

¶ 13 While the court's role is to assess the issues and determine whether there is a need for trial, it is the moving party's onus to establish that there is no genuine issue for trial. The courts, however, have made it clear that it is up to the respondent to "put his best foot forward" and lead its best evidence on the motion. See *Kaighin Capital Inc. v. Canadian National Sportsmen's Show et al.* (1987), 17 C.P.C. (2d) 59 (Ont. H.C.J.); and *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225 (Gen. Div.).

¶ 13a Rule 20.04(1) provides that:

20.04(1) In response to affidavit material or other evidence supporting a motion for summary Judgment, a responding party may not rest on the mere allegations or denial of the party's pleadings but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial.

¶ 13b In *10611590 Ontario Ltd v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547 at 557 Osborne J.A. states:

The onus of establishing that there is no triable issue is on the moving party, in this case the purchaser. However, the respondent on a motion for summary judgment must lead trump or risk losing: see rule 20.04(1). Generally, if there is an issue of credibility which is material, a trial will be required.

[The Court did not number these paragraphs. Quicklaw has assigned the numbers 13a-13b.]

¶ 14 The defendant has satisfied me that there is no genuine issue for trial. The plaintiffs claim, which began as a rather complex set of causes of actions, can now, through the plaintiff's

own concessions, be narrowly focussed on the issue of breach of contract. While I am satisfied that there are a number of issues relating to the contract that cannot be determined on a motion for summary judgment, the plaintiff has failed to provide the court with any evidence of damages sustained as a result of the faculty strike at York University.

Breach of Contract

¶ 15 The defendant submits that the primary nature of the relationship between student and university is educational in nature, rather than contractual. I disagree. The relationship between student and university is contractual. Upon enrolment into classes, registration and tuition payment, the student enters into a contract with the university to provide higher education, access to resources and class instruction. York enters into contracts of enrolment with its students through the "Voice Response Enrolment System" and Lecture Schedule, which is provided to each student prior to registration. The Lecture Schedule specifies that in order to register via the Voice Response Enrolment System, students must acknowledge, by pressing certain keys on their telephone keypad, that they are entering into a contractual agreement with the University.

¶ 16 York points to the Important Notice found in the 1995-1997 Undergraduate Program Calendar as an absolute defence to any claim arising out of the strike. The Notice states that, "York shall incur no liability for loss or damage suffered or incurred by any student or third party as a result of delays in or termination of services, courses or classes by reason of: ... strikes". The defendant states that each student is made aware of the Calendar through a number of publications distributed during enrolment and registration. While the Calendar itself is not mass distributed, it is made available at the libraries and on the University's webpage. The defendant contends that if indeed there is a contract between the University and the students, the Calendar forms part of contract and the terms of the Important Notice act as a total bar to any claim advanced by the plaintiff.

¶ 17 However, in respect of the specific contractual defence asserted by the defendant, a number of issues arise. Does the Calendar and the Important Notice constitute a part of or a term in the contract between university and student? If so, is it superseded by the university's Senate Policy? The scope and extent of the contract in question raise a number of triable issues, including these, which cannot be determined on this motion. I turn, then, to the defendant's contention that there is a total absence of evidence of damages, and since this is an essential element of the claim sounding in breach of contract, the action ought to be dismissed.

Damages

¶ 18 Where a plaintiff cannot establish, in response to a motion for summary judgment, an essential element of the cause of action asserted, the action must fail and the motion for summary judgment must succeed. Therefore, in a claim for breach of contract, in the absence of an essential element, such as evidence of damages sustained by the plaintiff, a motion for summary judgment will succeed. As stated by Waddams in *Law of Damages, Second Edition* (Canada Law Book: Toronto, 1993 Looseleaf) at paragraph 13.70, "the basic principle is that the onus is on the plaintiff to prove its damages on a reasonable preponderance of credible evidence". The plaintiff relies entirely on the lost class instruction time as proof of damages, stating that he does

not advance a claim for consequential damages. With his usual, candour, counsel concedes that if the court does not accept the proposition that the loss of instructional time simpliciter constitutes evidence of damages, the defendant must succeed on this motion. I agree.

¶ 19 I cannot accede to the assertion that the loss of instructional time, in and of itself, taken in the context of the uncontested evidence, constitutes proof of damages. In fact, the plaintiff himself concedes that he, successfully completed the 1996/1997 academic term, and went on in the next year to complete the course of studies for the Honours Bachelor of Arts Degree, which was useful to him in obtaining full-time employment upon graduation. In order for the plaintiff to establish the essential elements of his claim, he must show that the instructional class time has value, and that the loss of such time results in damages. There is a total absence of such evidence before the court. The plaintiff completed his examinations successfully in the courses in which he was enrolled. He completed his degree, and he obtained employment based in part upon his academic achievement. There is no evidence that he suffered any disadvantage other than his assertion that he did not receive the full extent of the instruction that he says he paid for. This does not constitute evidence of damages for the purposes of establishing a breach of contract.

¶ 20 In addition to asking the court to find that the lost instruction time is evidence of damages ipse dixit, the plaintiff also asserts that the methods of accommodation implemented by the university in an attempt to make up for the lost time are inadequate and ought to be given no credence. The university mass distributed a letter to the students specifying the students, rights in relation to making up class time and receiving extensions for examinations. If the accommodation was unsatisfactory to the student, the program provided that the student could petition the university for alternative relief. The plaintiff made no use of the accommodation offered. His evidence is that he received no further instruction time and that the alternative accommodations were unsatisfactory. Despite this, the plaintiff submits that he did not avail himself of the petition process to obtain satisfactory accommodation. Plaintiff's counsel concedes in his oral submissions that his client, in not receiving something he contracted for, is "less educated" as a result. He further asserts that "education has a direct co-relation with instructional time given". In rejecting the accommodation program and asking the court to do likewise, the plaintiff is seeking a determination from the court on the quality of education received; that is something our courts cannot entertain.

¶ 21 It is clearly established in Canadian jurisprudence that the courts should not impede on an educational body's decisions regarding the nature and quality of education. See *Hicks v. Etobicoke (City) Board of Education*, [1988] O.J. No. 1900 (Ont. Dist. Ct.); *Gould v. Regina (East) School Division No. 77* (1996), 32 C.C.L.T. (2d) 150; and *Wong v. University of Toronto* (1992), 4 Admin. L.R. (2d) 95 (C.A.). While it may seem as though the request for a return of a portion of tuition fees is "quantitative" in nature, the plaintiff is attacking the educational adequacy of the proffered alternative in the form of the accommodation program.

Conclusion

¶ 22 It is not appropriate for the courts to engage in an analysis of the qualitative aspect of an educational program with the result that I am not in a position to reject the accommodation

program out of hand. Moreover, I cannot accept the proposition that the loss of the instructional time in the present circumstances is evidence of damages in and of itself. When the loss of instructional time is considered in the context of the accommodation made available to the plaintiff, which he did not take advantage of, any loss claimed is *de minimis non curat lex*. The essential element of damages is absent with result that the motion is granted, and the action for breach of contract is dismissed.

¶ 23 Counsel have agreed that costs ought to be fixed in this matter. Accordingly, I will receive written submissions as to costs.

WINKLER J.