Federal Court Cour fédérale

Date: 20151112

Docket: T-1010-15

Citation: 2015 FC 1265

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, November 12, 2015

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

KOMI GRATIAS GLIGBE

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS

I. Introduction

[1] This is a motion to strike a statement under 221 and 369 of the *Federal Courts Rules*, SOR/98-106 [the Rules]. The defendant is seeking to strike in its entirety, without leave to amend, the statement of claim of the plaintiff, who is seeking damages following his release from the Canadian Forces [CF].

[2] Upon considering the parties' written submissions, the Court allows the application and authorizes the filing of a new statement of claim for the reasons set out below.

II. Facts

[1] The plaintiff enrolled with the CF on July 15, 2009.

[2] On April 23, 2010, after he had completed his Basic Military Qualification course, the plaintiff was assigned to the personnel development section in the CF Support Unit in Ottawa. By February 22, 2011, the plaintiff had completed Modules 1 and 2 of his training.

[3] On April 5, 2011, the plaintiff was in training, and, during this time, the Progress Review Board [the Board] concluded that the plaintiff should be ordered to cease training. He was removed from the Personnel Selection Officer's course, and the Board recommended a compulsory occupation reassignment.

[4] On May 6, 2011, the officer responsible for reviewing the plaintiff's file substituted a recommendation for compulsory release for the compulsory occupation reassignment.

[5] On September 21, 2011, the commanding officer of the CF Support Unit supported the Board's recommendation for compulsory release.

[6] On February 2, 2012, the plaintiff filed a grievance against the cessation of his training and the recommendation to release him from the CF.

[7] On May 12, 2012, the plaintiff received a notification of release from the Director Military Careers Administration [DMCA]. This decision became effective on June 18, 2012.

[8] On July 3, 2013, upon review of the plaintiff's file, the Military Grievances External Review Committee [MGERC] recommended that his grievance be allowed in part. Paragraph 16 of the statement of claim describes this decision in the following manner:

> [TRANSLATION]
>
> 16. On July 3, 2013, the Military Grievances External Review Committee (MGERC), which investigated my grievance, issued its Findings and Recommendations, which it transmitted to the Chief of the Defence Staff (CDS) and to me. The Committee identified several violations of my rights on the part of the Progress Review Board (PRB), writing that [TRANSLATION] ". . . there have been significant violations of the principles of procedural fairness". The MGERC recommended, among other things, that an unwarranted remedial measure be withdrawn from my military record (first warning on March 22, 2011). The Committee found the 18-month forced separation from my family (imposed restriction) to be excessive ([TRANSLATION] "incredibly long"); determined that the questioning of my integrity was unfounded and considered the argument of the PSO [personnel selection officer] who evaluated me and questioned whether I was truly interested in being a member of the Canadian Forces to be [TRANSLATION] "unreasonable". The Board also questioned whether an effective assessment was performed in order for the Training Development Support Section to grant an academic waiver for my first choice of trade, that of military police officer. Lastly, the Committee concluded that my compulsory release was [TRANSLATION] "unreasonable" as it was [TRANSLATION] "based on hasty conclusions and on factors taken out of context". The Committee recommended that my re-enrolment in the Canadian Forces be facilitated.

[9] The MGERC's recommendations were then transmitted to the Chief of the Defence Staff [CDS]. On March 17, 2014, the CDS reviewed the file *de novo* and found that the plaintiff had

been aggrieved and that he would be granted partial redress. This redress was to include the withdrawal of a remedial measure dated March 22, 2011, from the plaintiff's record and a positive reference from the Chief of the Defence Staff regarding the plaintiff's [TRANSLATION] "re-enrollment". Paragraph 17 of the statement describes this decision in the following manner:

> [TRANSLATION]
>
> 17. On March 17, 2014, the Chief of the Defence Staff issued his decision on the grievance and on the Committee's Findings and Recommendations. He recognized the many violations of my fundamental rights, ordered that the unwarranted remedial measure (first warning of March 22, 2011) be removed from my military record and authorized that I be re-enrolled in the Canadian Forces in way of partial redress of the damage I had suffered. The CDS did note that the decision to release me was [TRANSLATION] "not illogical". I feel, however, that the decision was the result of my being hounded and many serious procedural errors, as well as being based on proven and established incorrect facts. This was not merely a matter of an isolated incident of procedural unfairness. It was a string of nine systematic violations of my fundamental rights during the Progress Review Board and the release processes, demonstrating the determination to precipitate my release from the Canadian Forces. One of the basic errors of fact is that incorrect information was sent to the Chief of the Defence Staff, namely that my first choice was definite. This led the CDS to conclude that since all avenues had been exhausted, it was not illogical for me to be released. This is an error in fact and in law.

[10] On July 18, 2014, the plaintiff filed an application for judicial review before the Federal Court. The case was stayed on May 13, 2015, to allow the parties to enter into mediation.

[11] It is in this context that the plaintiff filed a statement of claim in order to institute an action for damages that is distinct from that application for judicial review. He again sets out the steps that resulted in his release, as described in paragraphs 16 and 17 of his statement of claim.

Furthermore, in paragraph 20 of his statement of claim, the plaintiff criticized the alleged errors of the Chief of the Defence Staff:

> [TRANSLATION]
>
> 20. . . . I submit that the Chief of the Defence Staff erred in fact and in law in not finding the decision to release me to be unfair and unreasonable, resulting in the total redress.

[12] The plaintiff provides the following explanation for his civil proceeding in paragraph 21:

> 21. I am filing this civil action because I cannot claim the damages caused by my arbitrary release in a judicial review proceeding.

[13] Lastly, the plaintiff sets out the monetary damages he suffered as a result of his release. These damages are broken down into categories and amount to $275,533.26.

III. Legislative framework

Motion to strike	*Requête en radiation*
221. (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it	**221**. (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d’un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :
(a) discloses no reasonable cause of action or defence, as the case may be,	a) qu’il ne révèle aucune cause d’action ou de défense valable;
(b) is immaterial or redundant,	b) qu’il n’est pas pertinent ou qu’il est redondant;

(c) is scandalous, frivolous or vexatious,	c) qu'il est scandaleux, frivole ou vexatoire;
(d) may prejudice or delay the fair trial of the action,	d) qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;
(e) constitutes a departure from a previous pleading, or	e) qu'il diverge d'un acte de procédure antérieur;
(f) is otherwise an abuse of the process of the Court, and may order the action be dismissed or judgment entered accordingly.	f) qu'il constitue autrement un abus de procédure. Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.
Evidence	*Preuve*
(2) No evidence shall be heard on a motion for an order under paragraph (1)(a).	(2) Aucune preuve n'est admissible dans le cadre d'une requête invoquant le motif visé à l'alinéa (1)a).

IV. Issues

[14] The issues are as follows:

1. Does the plaintiff's statement of claim disclose a reasonable cause of action?

2. Is the plaintiff's statement of claim frivolous or vexatious?

3. Does the plaintiff's statement of claim constitute abuse of process?

4. Should the plaintiff be granted leave to amend his statement of claim?

V. Analysis

A. *Does the statement of claim disclose a reasonable cause of action? [Rule 221(1)(a)]*

[15] A statement of claim is struck for the reason given in paragraph 221(1)(*a*) of the Rules if the plaintiff demonstrates that it is "plain and obvious" that the action has no chance of success, according to the well-established test for reasonable cause of action, as set out in *Hunt v Carey Canada Inc*, [1990] 2 S.C.R. 959, at pages 979-980, and reiterated in *Canada (Attorney General) v Anglehart*, 2009 FCA 241, at paragraph 4. In its analysis, the Court must take the facts contained in the statement of claim and in the record to be true (*Sauvé v Canada*, 2011 FCA 141, at paragraph 8), and no evidence shall be heard under subsection 221(2) of the Rules.

[16] In order for a statement of claim to disclose a cause of action, it must (1) allege facts that are capable of giving rise to a cause of action; (2) disclose the nature of the action which is to be founded on those facts; and (3) indicate the relief sought, which must be of a type that the action could produce and that the Court has jurisdiction to grant: *Oleynik v Canada (Attorney General)*, 2014 FC 896, para 5.

[17] The defendant submits that the plaintiff's statement of claim does not disclose a reasonable cause of action since he did not present any material facts; among other things, he did not identify any servant of the defendant or describe the context in which a servant of the defendant may have been at fault. The defendant further submits that the criticism regarding the Chief of the Defence Staff's response during the grievance process with respect to the plaintiff's release cannot be directed at the defendant. The absence of the facts of the fault in the plaintiff's

statement of claim eliminates the possibility of establishing a causal link with the alleged damages.

[18] I will not strike the statement of claim on the basis that it does not identify any individuals or provide a more complete context, as the defendant suggests I do. The plaintiff is not represented, and, in such circumstances, a litigant such as he must be given some leeway with respect to his pleadings. The pleadings allege sufficient general facts regarding the MGERC's findings to suggest that more specific material facts exist. It would suffice therefore to argue and introduce the allegations of abuse that were presented before the MGERC.

[19] However, I agree that the allegations in the statement of claim do not disclose a reasonable cause of action. In fact, the plaintiff is seeking to obtain the damages that would result from a favourable decision in the administrative grievance settlement process, mainly damages relating to the period between the date of his release from the CF and that of his reinstatement.

[20] Litigants are not allowed to seek relief in an action, in this case an action for damages, arising from a cause of action based on facts relating to statutory administrative rights and concerning the lawfulness of a decision that could be judicially reviewed under sections 18 and 18.1 of the *Federal Courts Act*. Litigants may therefore not present facts supporting a claim to set aside an administrative decision as the basis for their action for damages.

[21] Under section 17 of the *Federal Courts Act*, the Federal Court does not have original jurisdiction with respect to proceedings or relief available under administrative law, such as

reinstatement. There is no causal link between the cause of action the plaintiff is attempting to argue and the relief he is seeking.

[22] In *Radil Bros. Fishing Co v Canada (Department of Fisheries and Oceans)* (2000), 197 FTR 169 [*Radil 2000*], Justice McKeown noted that "[a]n action based only on the availability of judicial review does not disclose any cause of action known in law" (*Radil 2000*, para 30). Even though the Federal Court of Appeal reversed this decision in part (*Radil Bros Fishing Co Ltd v Canada (Department of Fisheries and Oceans)*, 2001 FCA 317) [*Radil 2001*], it did so because it found that the judge appeared "to have misunderstood the true nature of the cause of action alleged by [the plaintiff] in its claim for damages against the Crown" (*Radil 2001*, para 34). The judge's error was therefore "to have based his decision on the understanding that the cause of action was the illegality of the decision of the Minister, rather than the duty of care owed to [the plaintiff], whatever the legality of the decision" (*Radil 2001*, para 36). In the matter at bar, the alleged facts concern the grievance settlement process, which does not seem to entail a duty of care towards the plaintiff.

B. *Is the statement of claim frivolous or vexatious? [Rule 221(1)(c)]*

[23] A action is characterized as frivolous or vexatious when it reveals so few facts that the defendant simply does not know how to answer the claim and that it makes it impossible for a court to regulate the proceedings: *Pellikaan v Canada*, [2002] 4 F.C. 169, para 15.

[24] Termination of employment is generally a serious affair, and when there are reasons to believe that the termination was unjustified, a statement of claim may not, usually, be dismissed

as being frivolous or vexatious. As I indicated above, regardless of any jurisdiction-related impediments with respect to the institution of this action, I would allow the plaintiff to amend his statement of claim to provide the material facts establishing the alleged unjustified termination—because these facts do seem to exist based on my reading of the pleadings—as arising from the MGERC's findings on the mistreatment of the plaintiff.

[25] Consequently, I would not conclude that the application is frivolous or vexatious before giving the plaintiff an opportunity to present additional material facts assuming that the statement of claim is not struck and leave to amend is granted.

C. *Does the statement of claim constitute abuse of process?*

[26] The Supreme Court gave effect to the common law doctrine of abuse of process, which makes it possible to preclude relitigation in circumstances where the strict requirements of issue estoppel are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice: *Toronto (City) v C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, para 37.

[27] The defendant submits that the statement of claim and the application for judicial review filed by the plaintiff raise the same questions of law and fact, which creates a situation of *lis pendens*. By instituting two distinct proceedings, the plaintiff is also abusing the judicial system.

[28] The plaintiff justifies his action before this Court in paragraph 21 of his statement of claim, where he states that he is seeking full redress for the damages he suffered following his

allegedly unjustified release from the CF, redress that [TRANSLATION] “[cannot be claimed] in an application for judicial review”.

[29] The plaintiff did not provide any reasons to support his conclusion that he is unable to obtain damages through an application for judicial review. There are, however, reasons to suggest that the plaintiff is right and that he may not be able to recover through the grievance settlement process what he lost as a result of his unjustified release. This at least is the provisional conclusion of author R.G. Fowler in his recent article entitled “The Canadian Forces Grievance Process: How Adequate an Alternative Remedy Is It?” (2014) 27 Can J Admin L & Prac 277. Fowler submits that neither reinstatement nor damages are necessarily awarded to CF members when their rights have been violated.

[30] The author generally condemns the entire grievance process, including the endemic delays. Two of the author’s observations, in particular, concern the fact that the administrative authorities do not have comprehensive remedial powers and are unable to award damages, points he addresses in the following manner in the introduction to his article, at page 278 (footnotes omitted):

> Secondly, CF grievance authorities lack comprehensive remedial powers. With one exception, they do not possess additional remedial powers apart from the powers vested in their positions independent of the grievance process. Particularly, none has the power to award damages. Consequently, how could the grievance process ever be an adequate alternative remedy to an action for damages?
>
> Finally, notwithstanding evolution in the courts’ perception of the power of administrative tribunals to act as courts of competent jurisdiction pursuant to s. 24 of the *Charter*, the unanimous judgment from *R. v. Conway* does not impart upon administrative

> tribunals the power to award damages where such tribunals cannot trace such power back to their enabling statute.

[31] Fowler also makes the following analysis (footnotes omitted) of the obstacles the plaintiff probably faced in seeking proper relief for the violation of his rights:

> Notwithstanding that the Supreme Court of Canada has held that dismissal from public service should be examined through the lens of contract, the Victorian perception of the unique nature of the Crown-soldier relationship persists. CF personnel are precluded from seeking damages for wrongful dismissal, because they are not in privity of contract with Her Majesty. They are entitled only to a procedurally fair release. Where a release does not comply with the mandatory regulatory regime, the grievance process can be procedurally curative. Where reasons for the release are insufficient, and the grievor is still a member of the CF when the grievance is determined, the grievance process can be substantively curative—the release is cancelled.
>
> But such simplicity assumes that the grievance is determined before the release is completed. If the grievance process takes longer than release proceedings, as is typically the case, then a grievor will become a civilian by the time the grievance is determined. The available remedies will be diminished.
>
> Presently, the sole remedy where a grievor has been released is an offer to re-enrol in the CF. Bill C-15, which received Royal Assent 19 June 2013, proposes to broaden the CDS's [Chief of the Defence Staff's] powers of reinstatement. Currently, the CDS may order reinstatement only where a sentence to dismissal from the CF under the Code of Service Discipline is overturned on appeal. The proposed amendment would permit the CDS to cancel any release, with the consent of the member, that the CDS is satisfied was improper. A CF member who is reinstated is deemed never to have been released, and is thus deemed to have had unbroken service.
>
> However, even once these amended provisions enter into force, it is uncertain that a member would be entitled to payment of salary for any period of time between "improper release" and reinstatement. The pay of a member of the CF may be forfeited if no service is rendered. The *Financial Administration Act* bars payment where service has not been rendered. Although members of the CF are not part of the Federal Public Administration, absent

> a regulation granting payment for the period where service was not rendered, forfeiture would be consistent with the practices relating to the Federal Public Administration. It would be much more predictable—and less arbitrary—to create specific regulations or instructions concerning eligibility for pay and benefits in light of reinstatement.

[32] It is said that the doctrine supports the inherent power of a court to take action to prevent abuses of its process that would bring the administration of justice into disrepute. Given the apparent shortfalls of the redress offered to the plaintiff under the grievance process, I do not feel that an attempt to obtain relief in a court where damages could be awarded can be seen as being an abuse of process, even if the statement of claim, as it is drafted, does not disclose a reasonable cause of action.

D. *Is there no possibility of amendment?*

[33] This Court reiterated that when there is "neither a possibility of a curative amendment, nor any indication that the action could be instituted again in an acceptable form", the plaintiff's pleadings should be struck out, without leave to amend: *'Maitreya' Isis Maryjane Blackshear v Canada*, 2013 FC 590, para 14.

[34] As to whether the plaintiff should be allowed to amend his statement of claim, this depends on whether the application for leave to amend is made on a basis other than the fact that the cause of action is based on the outcome of a grievance process. Of course, if amendment were allowed, it would have to be by way of a new statement of claim, given the fact that the

plaintiff would have to argue a different cause of action based on the facts related to his release from CF.

[35] In this respect, the Court notes that the defendant is not seeking to have the statement of claim struck on the ground that the plaintiff, as a member of the CF, is not entitled to relief before the civilian courts. This would have been the argument I would have expected in light of a long line of judicial decisions dating back to *Mitchell v The Queen*, [1896] 1 Q.B. 121 (Q.B. England) [*Mitchell*]. This decision was first applied in Canada in *Cooke v R.*, [1929] Ex. C.R. 20, and later in a series of more modern decisions, starting with *Gallant v R.*, 91 D.L.R. (3d) 695 (F.C.T.D.), 1978 CarswellNat 560 [*Gallant*].

[36] In *Gallant*, Justice Marceau struck the statement of claim of a CF member seeking damages. He stated at paragraph 4 of *Gallant* that the Court had no jurisdiction in the matter since the relationship between the Crown and a member of the CF was not a contractual one, but was based on an imperfect obligation that amounted to "a unilateral commitment in return for which the Queen assumes no obligations, and that . . . in no way [gives] rise to a remedy in the civil Courts". The courts have applied the *Gallant* decision systematically to applications dealing with unjust dismissal: *Hainsworth v Canada*, [2003] O.J. No. 6162; *McClennan v Canada (Minister of National Defence)*, 2002 FCT 244.

[37] There are however good reasons for concluding that the *Mitchell* decision and the series of Canadian decisions in which it was applied may no longer be valid precedents. This may

explain the defendant's decision not to directly challenge the statement of claim by arguing that members of the CF may not sue the Crown for damages before the civilian courts.

[38] In his recent article entitled "Sergeant Dunsmuir: The Crown-Soldier Relationship in Canada" (2011) 24 Can J Admin L & Prac 57, R. J. Stokes deals with this subject and concludes that, in light of the Supreme Court of Canada's decision in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], a modern reassessment of the Crown–CF member relationship is required by the courts and the CF. In line with a previous decision, *Wells v Newfoundland*, [1999] 3 S.C.R. 199 [*Wells*], the Supreme Court established in *Dunsmuir* that, with few exceptions, any termination of employment of a public servant must be reviewed through the lens of contract law. This means that, unless any exceptions apply, public servants who believe to have been unjustly terminated must seek a private law remedy under contract law (*Dunsmuir*, para 95).

[39] I do not propose examining the persuasive, very thorough arguments set out by Stokes in his article in favour of recognizing a contractual cause of action for CF members who find themselves in a situation akin to an unjust termination. This is unnecessary when dealing with a motion to strike a statement of claim. It is enough to acknowledge that there is a novel, legitimate claim. It is recognized that, when dealing with a motion to strike for not disclosing a reasonable cause of action, the approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial: *R. v Imperial Tobacco Ltd.*, 2011 SCC 42, para 21.

[40] In light of *Dunsmuir* and Stokes' highly persuasive article, I conclude that the statement of claim sets out sufficient material facts describing a possible basis for a cause of action for unjust dismissal in contract such that the plaintiff could be awarded contractual damages in accordance with common law labour law principles.

[41] Consequently, I am willing to allow the plaintiff to file a new statement of claim under the same styles of cause and docket number of this Court, subject to two conditions.

[42] First, as described above, the statement of claim should raise a different cause of action, namely, a cause of action that gives rise to an action for unjust termination according to the principles of contract law.

[43] Given that the plaintiff is not represented, I emphasize that, in unjust termination law, based on contractual law principles, the issues are generally whether the plaintiff's termination (in this case, the plaintiff's release) was justified and, if not, what damages may be claimed in the circumstances. The amount of the damages is usually based on salary and benefits in lieu of reasonable notice to allow the employee to find a new job. Moreover, an additional amount may be claimed if the court finds that the unjust termination was made in bad faith.

[44] Second, the statement of claim should contain more material facts to support the action for unjust release than the current statement of claim does. Another decision-maker's findings are usually not relevant, except when the facts underlying these findings can be used to establish that the plaintiff's release was unjust. The statement of claim must describe, in general terms,

without citing evidence to support the facts, the Crown's conduct establishing that the release was unjust or was ordered in bad faith, should bad faith be one of the plaintiff's allegations.

[45] The claim for damages must be broken down according to the categories of damages admissible in unjust termination law, without it being necessary, however, to provide many material facts—much in the same way as it was done in the current statement of claim, as long as the defendant is given an idea of the nature of the damages sought and the amounts claimed. In this respect, the plaintiff must understand that reinstatement and the recovery of salary and benefits lost in the meantime are not remedies that can be obtained in contract law.

[46] Moreover, since I am granting him leave to file a new statement of claim, the plaintiff should not be surprised if he has to respond to a new challenge from the defendant since the issues such a pleading will raise are novel. The new statement of claim will provide the parties with an opportunity to fully deal with the questions raised by the new pleading, which is not possible if the proper cause of action is not argued.

[47] Other than the striking of the statement of claim without leave to amend, the defendant asked, in the alternative, that the present action be stayed until a decision is rendered in the application for judicial review under docket No. T-1641-14 of this Court. I understand that this proceeding will conclude soon.

[48] I see no reason why a new statement claim could not be filed, if that is what the plaintiff intends to do, given that delays should generally be avoided. I will, however, extend the deadline

by which the defendant must file a statement of defence in reply to the new statement of claim by 30 days after judgment in docket No. T-1641-14 is rendered.

[49] Since the plaintiff is not represented and may need time to seek counsel on these matters, or to perform further research himself, the Court shall grant him 60 days to file a new statement of claim. If a new statement of claim is not filed within this time, the plaintiff may not institute a new action based on the facts surrounding his release without the authorization of this Court.

[50] Neither party sought costs, and none will be awarded.

JUDGMENT

FOR THESE REASONS, THE COURT ORDERS that

1. The statement of claim is struck out;

2. The plaintiff may file a new statement of claim within 60 days of this order in accordance with the instructions provided in the reasons, failing which the plaintiff may not institute a new action based on the facts surrounding his release without the authorization of this Court;

3. If the plaintiff files a new statement of claim within this time period, the time for the defendant to file its statement of defence is extended to at least 30 days after judgment is handed down in the application for judicial review under docket No. T-1614-14, should an extension be required.

4. The parties shall bear their own costs.

"Peter Annis"

Judge

Certified true translation
Johanna Kratz, Translator

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET:	T-1010-15
STYLE OF CAUSE:	KOMI GRATIAS GLIGBE v. HER MAJESTY THE QUEEN

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO, PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	ANNIS J.
DATED:	NOVEMBER 12

WRITTEN REPRESENTATIONS BY:

Komi Gratias Gligbe	FOR THE PLAINTIFF (ON HIS OWN BEHALF)
Chantal Sauriol	FOR THE DEFENDANT

SOLICITORS OF RECORD:

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