Federal Court  Cour fédérale

Date: 20180706

Docket: T-1885-17

Citation: 2018 FC 697

Ottawa, Ontario, July 6, 2018

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

ALAN DOUCETTE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Defendant brings this motion to strike the Plaintiff's Statement of Claim [SOC] without leave to amend pursuant to Rule 221(1) of the *Federal Court's Rules* [Rules] on the ground of lack of jurisdiction, or alternatively a failure to disclose a reasonable cause of action.

[2] For the reasons that follow, the motion is allowed with costs.

II. Facts

[3] The Plaintiff, Alan Doucette, was a full-time naval officer of the Canadian Armed Forces [CAF] between 2002 and 2012 until his release in October 2012 on medical grounds.

[4] In his SOC, the Plaintiff alleges that while working on navy ships between 2004 and 2009 he developed a permanent lung sensitivity medical condition due to exposure to black mold diagnosed as Hyper-Reactive Airway Disease.

[5] He claims that unnamed Crown servants individually or collectively were "systemically negligent" in allowing the black mold condition to occur on navy ships without addressing the known health risk that it created and by continuing to allow him to work in harmful conditions.

[6] The Plaintiff alleges that the Defendant knew or ought to have known about the workplace mold condition and the negative health effects it would cause him from exposure over a long period of time.

[7] As a result of the effects of exposure to black mold, the Plaintiff claims that he sustained significant personal health injuries for which he seeks compensatory general and special damages. He further alleges that the Defendant breached its fiduciary duty owed to the Plaintiff and acted maliciously towards its members, thereby requiring deterrence and denunciation from the Court in the form of an award of punitive damages.

[8] The Defendant has introduced the evidence of two witnesses to supplement his motion. The deponent, Cheryl Murnagehan, is the National Program Manager for the Disability Adjudication unit within the Benefit Operations Directorate, Centralized Operations Division of the Service Delivery Branch with the Department of Veterans Affairs. Her duties include processing applications for disability benefits under the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, S.C. 2005 C. 21, [CFMVRCA].

[9] Ms. Murnagehan swears in her affidavit that the CFMVRCA includes an extensive suite of benefits and services designed to enable CAF veterans, including disability awards that may provide separate and distinct benefits to recognize the monetary and non-monetary (pain and suffering etc.) impacts associated with service-related injury or illness.

[10] Among the array of disability related awards are those providing lump-sum critical injury benefits, rehabilitation services and vocational assistance, earnings loss benefits, career impact allowances, supplementary retirement benefits, retirement income security benefits, Canadian Forces income support, family caregiver relief benefits, in addition to other services and programs.

[11] Based on records maintained by Veterans Affairs Canada [VAC], Ms. Murnagehan indicates that the Plaintiff applied for disability benefits and received a favourable decision on July 19, 2011 for his lung condition as a result of his exposure to volatile organic compounds while working on naval ships.

[12] His disability was assessed at 2%, for which he received an award in the amount of $1600.18. In August 2014, pursuant to reconsideration provisions under the CFMVRCA, his disability was reassessed at 10%, for which he received an award of $20,437.86. Ms. Murnagehan indicates that there is no record of an appeal of either decision.

[13] The affidavit of Ms. Murnagehan attaches the letter of August 17, 2016 from VAC that is mentioned in the Plaintiff's SOC. The letter describes a decision dated August 7, 2012 of the Directorate of Military Careers Administration and Resource Management advising the Plaintiff that he no longer met all the *bona fide* occupational requirements for his position due to his permanent medical limitations. As a result, it was stated that he would be released from regular service no later than February 2013. The letter further indicates that on October 21, 2016 the Plaintiff was officially released from service, some two months after the August 17, 2016 letter advising of its pending occurrence.

[14] The second deponent, Gordon Prieur, providing evidence on behalf of the Defendant, is the Knowledge Management Officer at the Canadian Forces Director General Grievance Authority [DGCFGA]. He swears to have familiarity with the internal complaint mechanisms within the CAF, and in particular the grievance system that is initiated pursuant to section 29 of the *National Defense Act*, R.S. 1985, c. N-5 [the NDA].

[15] Mr. Prieur deposes that pursuant to section 29 of the NDA an officer or non-commissioned member of the CAF who has been aggrieved by any decision, act or omission in the administration of the affairs of the CAF for which no other process for redress is provided

under the NDA is entitled to submit a grievance, subject to certain limits, none of which are relevant in this matter.

[16] Mr. Prieur further states that normally complaints relating to release and release items including due to service health conditions in CAF, can fall within the purview of grievances conducted under section 29 of the NDA. In adjudicating grievance complaints, an applicant may obtain a wide variety of remedies, which may include the power to rectify a situation where a policy has not been interpreted correctly resulting in a grievor losing entitlement to pay and/or benefits.

III. Issues

[17] The issue on this motion is whether the statement of claim should be struck out in its entirety, without leave to amend.

A. *Admissibility of the Defendant's affidavits*

[18] Rule 221 (1) permits a court to strike pleadings and dismiss an action, in this instance, on the ground that the pleadings failed to disclose a reasonable cause of action. Based on the facts in the pleading, which are assumed to be true, a statement of claim will only be struck if it is plain and obvious that the pleading discloses no reasonable cause of action, or that it presents no reasonable prospect of success (*R v. Imperial Tobacco Canada Limited*, [2011] 3 SCR 45, at para 17).

[19] The Defendant submits that evidence may be introduced in a motion to strike where issues of abuse of process arise. These would extend to issues of jurisdiction and a failure to exhaust alternative statutory remedies, (*Vaughan v. Canada*, 2005 SCC 11, at para 39 [*Vaughan*], (*Sandiford v Canada*, 2007 FC 225, at paras 26, 28-29, and 34; *Graham v Canada*, 2007 FC 210 at paras 19, 22, 23; *Moodie v Canada (National Defence)*, 2010 FCA 6, at paras 5-6), *Veltri v.The Department of National Defence Canada*, unpublished decision, January 4, 2018, T-1400-17, para 11 [*Veltri*]).

[20] The Court agrees that the primary question before the Court concerns its jurisdiction, including that relating to alternative statutory remedies which were not exhausted. Accordingly the affidavits are admitted into evidence.

IV. Analysis

[21] The Plaintiff brings this action seeking indemnification for damages alleged to arise from the negligent care provided by the Respondent in failing to maintain a healthy workplace environment, and by assigning him to work in such conditions with the knowledge of the risk of injury that could result.

[22] The Court finds that the SOC is entirely related to service-related facts, which is not denied by the Plaintiff. Parliament has established two separate regimes intended to provide compensation and other remedies for service-related claims of the nature raised by the Plaintiff in his claim, both of which raise issues concerning the Court's jurisdiction to hear this matter.

[23] The first difficulty with the Plaintiff's claim is that he applied for and obtained benefits under the CFMVRCA. In doing so, he has brought into play section 9 of the *Crown Liability and Proceedings Act*, R.S.C., 1985, c. C-50 which bars actions based on the same facts relied on to receive government benefits. It reads as follows:

No proceedings lie where pension payable	**Incompatibilité entre recours et droit à une pension ou indemnité**
9 No proceedings lie against the Crown or a servant of the Crown in respect of a claim if a pension or compensation has been paid or is payable out of the Consolidated Revenue Fund or out of any funds administered by an agency of the Crown in respect of the death, injury, damage or loss in respect of which the claim is made.	9 Ni l'État ni ses préposés ne sont susceptibles de poursuites pour toute perte — notamment décès, blessure ou dommage — ouvrant droit au paiement d'une pension ou indemnité sur le Trésor ou sur des fonds gérés par un organisme mandataire de l'État.

[24] In *Sarvanis v. Canada*, [2002] 1 S.C.R. 9 the Supreme Court broadly interpreted the application of section 9 at paragraphs 19 to 30, and in particular at paragraph 28, as follows:

> 28 In my view, the language in s. 9 of the *Crown Liability and Proceedings Act*, though broad, nonetheless requires that such a pension or compensation paid or payable as will bar an action against the Crown be made on the same factual basis as the action thereby barred. In other words, s. 9 reflects the sensible desire of Parliament to prevent double recovery for the same claim where the government is liable for misconduct but has already made a payment in respect thereof. That is to say, the section does not require that the pension or payment be in consideration or settlement of the relevant event, only that it be on the specific basis of the occurrence of that event that the payment is made.
>
> [Emphasis added]

[25] Inasmuch as the SOC is formulated entirely on service-related facts upon which his disability payments were paid, any claim for compensation in the SOC is barred.

[26] In response, the Plaintiff alleges that the failure to take action in respect of the harmful work place conditions was malicious in supporting a claim for punitive damages. However, this claim is unsupported by facts. In any event, section 9 has broad application so long as the facts raised in the claim are the same as those which provide for the award of the benefit. This was the case for the Plaintiff's illness alleged to have been caused by workplace conditions.

[27] Additionally, the Plaintiff did not exhaust his appeal rights under the CFMVRCA. This represents a further bar to bringing an action. Not having exhausted these rights, the Court is without jurisdiction and without good cause as to why the statutory process was not applied (*Vaughan* and the cases cited above).

[28] The second limitation on the Court's jurisdiction to entertain the SOC arises from the failure of the Plaintiff to seek a remedy for his termination pursuant to CAF grievance process established under the NDA. It provides that members of the CAF are entitled to bring grievances pursuant to section 29 (1). It reads as follows:

Right to grieve	**Droit de déposer des griefs**
29 (1) An officer or non-commissioned member who has been aggrieved by any decision, act or omission in the administration of the affairs of the Canadian Forces for which no other process for redress is provided under this Act is	29 (1) Tout officier ou militaire du rang qui s'estime lésé par une décision, un acte ou une omission dans les affaires des Forces canadiennes a le droit de déposer un grief dans le cas où aucun autre recours de

entitled to submit a grievance.	réparation ne lui est ouvert sous le régime de la présente loi.

[29] The scope of the grievance procedure has been described by the courts as the "broadest possible" and "exhaustively comprehensive". The procedure has consistently been held to constitute an adequate alternative remedy that must be exhausted before an individual can turn to the Courts for redress (*Veltri*, supra, and the cases cited at paras 11 & 13 thereof).

[30] Although terminated on grounds of medical unsuitability, the Plaintiff similarly failed to file a grievance in respect of his medical termination of employment. Again, any cause of action arising out of the Plaintiff's SOC is entirely service-related, and was therefore subject to the grievance process established under section 29 of the NDA.

[31] The Plaintiff advances three counter submissions to justify not accessing the grievance process: that it was not accessible to him because he was no longer a member of the CAF, that it is not obligatory, and that in any event, it is not an adequate alternative remedy.

[32] The Defendant's response to his argument that he lost his status to file a grievance upon the termination of his service is that he was forewarned of his imminent termination by some two months and did not grieve his dismissal within the time allotted pursuant to the procedures governing grievances. The Court agrees that an opportunity was provided to the Plaintiff to file a grievance which he failed to employ.

[33] The Plaintiff relies upon the Ontario Superior Court decision in *Paquet v. Canada (Attorney General)* [2001] O.J. No. 1468 [*Paquet*] to support his second submission that the grievance procedure was permissive, thereby not requiring him to grieve his termination. The Court in *Paquet* dismissed a motion to strike where the alternative grievance remedy was not accepted by concluding that the wording of section 29 (1) in the use of the term "may" was permissive in nature. The wording of the provision has been modified and now states that the member "is entitled to submit a grievance".

[34] An entitlement to submit a grievance could perhaps also be described as permissive. But, the important point that appears to have been overlooked in *Paquet* is that once the statutory procedure is established by Parliament that applies to the facts at hand, whether resorted to or not by an applicant, its existence prevents recourse to the civil courts, unless there is good reason not to have recourse to it, per *Vaughen supra*.

[35] This issue does not appear to have been argued in front of the Ontario Superior Court. Numerous decisions of the Federal Courts have consistently ruled that section 29 stands as a bar to commencing the present action (see *Veltri* and the list of cases cited therein).

[36] The Court is more sympathetic to the Plaintiff's third argument that it cannot achieve an adequate remedy under the grievance process. This was an issue that I considered in a motion to strike in *Gligbe v. Canada*, 2015 FC 1265 [*Gligbe*] involving a member of the CAF. He had been terminated and had filed a grievance which was largely upheld but did not provide the means for a damage award under the grievance process. I was prepared to allow the plaintiff to amend his

SOC to plead a claim in contract despite the alternative remedy on the basis that remedies under the grievance process were inadequate.

[37] I relied on two published articles in allowing the matter to proceed as a novel consideration: R. J. Stokes, “Sergeant Dunsmuir: The Crown-Soldier Relationship in Canada” (2011) 24 Can J Admin L & Prac 57, and R.G. Fowler, “The Canadian Forces Grievance Process: How Adequate an Alternative Remedy Is It?” (2014) 27 Can J Admin L & Prac 277.

[38] The Stokes article made the case that following the *Dunsmuir v New Brunswick,* [2008] 1 S.C.R. 190 and other decisions that imposed contract principles on Government in Counsel at pleasure appointees, a modern reassessment of the Crown–Canadian Forces member relationship was required by the courts based on contract principles. The Fowler article raised concerns about the remedial inadequacies when among other things the authorities in a grievance process are unable to award damages. He rhetorically stated “how could the grievance process ever be an adequate alternative remedy to an action for damages?”

[39] *Gligbe* was a wrongful dismissal form of complaint, not one in negligence. As such, it concerned different issues regarding the right to bring a civil action when the member was appointed at the pleasure of the *Crown (Gallant v R.*, 1978 CanLII 2084 (FC), 91 D.L.R. (3d) 695 (F.C.T.D.), 1978 CarswellNat 560). Nevertheless, the issue of the inadequacy of the remedy to award damages remains the same in either case. Justice Harrington, in the follow-up decision of *Gligbe c. Canada,* 2016 CF 467, dismissed the amended statement of claim based on the inadequacy of the pleadings. However, he was also the view that only Parliament could change

the nature of relationship between a member of the CAF and the Crown and would not have permitted the action to proceed on that basis as well.

[40] In any event, whatever sliver of light that may exist for an argument of the inadequacy of the remedy in a grievance process that cannot award damages, this issue event been covered off by section 9 of the *Crown Proceedings Act*, which the Court finds is a complete bar to the Plaintiff's claim for the reasons described above.

[41] Accordingly, the SOC is struck in its entirety, without the right to amend.

[42] The Defendant is entitled to its costs. If they cannot be agreed upon by the parties, short submissions should be submitted to the Court for their determination.

JUDGMENT in T-1885-17

THIS COURT'S JUDGMENT is that the Plaintiff's Statement of Claim is struck in its entirety without leave to amend. Costs are awarded to the Defendant to be agreed upon or assessed.

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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