Federal Court of Appeal	 CANADA	Cour d'appel fédérale

Date: 20100111

Docket: A-588-08

Citation: 2010 FCA 6

CORAM: **LÉTOURNEAU J.A.**
NOËL J.A.
TRUDEL J.A.

BETWEEN:

ANTHONY MOODIE

Appellant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
AS REPRESENTED BY THE MINISTER OF NATIONAL DEFENCE

Respondent

Heard at Toronto, Ontario, on January 11, 2010.

Judgment delivered from the Bench at Toronto, Ontario, on January 11, 2010.

REASONS FOR JUDGMENT OF THE COURT BY: LÉTOURNEAU J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on January 11, 2010)

LÉTOURNEAU J.A.

[1] This appeal is from a decision of Mosley J. (judge) of the Federal Court whereby he dismissed the appellant's appeal from a decision of Prothonotary Milczynski. In her decision, the prothonotary struck the appellant's Amended Statement of Claim and dismissed with costs his action for damages.

[2] The appellant erroneously submits that the issue on this appeal is whether, as a plaintiff, he can sue the Federal Crown for damages as a result of administrative action or whether he must first proceed by way of judicial review in the Federal Court: see paragraph 3 of his memorandum of fact and law.

[3] We say erroneously because the judge dismissed the appeal on the basis that the appellant failed to exhaust the adequate administrative remedies available to him under the Canadian Armed Forces statutory grievance procedure (see paragraphs 26 to 30 of the reasons for judgment) and, therefore, that his action was premature: *ibidem*, at paragraphs 37 to 41.

[4] In addition, the judge found that the appellant's action "is a disguised grievance and discrimination complaint": *ibidem*, at paragraph 41.

[5] We see no error in the judge's finding that the primary remedy sought by the appellant is a declaration that he has been wrongfully released from office and an order restoring him to office in the Canadian Armed Forces: *ibidem*, at paragraph 38. We agree with the judge that this "is clearly a form of redress that he could obtain through the grievance process": *ibidem*.

[6] There was ample and cogent evidence to support the judge's finding that the appellant's action is a disguised grievance and discrimination complaint and, consequently, an attempt to circumvent the grievance process. As the judge found, the true substance of the appellant's claim is not the alleged Charter breaches, but rather the alleged incidents which arose directly out of the appellant's employment with the Canadian Armed Forces: *ibidem*, at paragraph 30.

[7] In our view, the judge properly applied the law when he looked to the true nature of the dispute rather than to the appellant's own characterization of the alleged wrong. Addressing a similar issue, the Supreme Court of Canada in *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, at paragraph 93, wrote:

> The fact that the respondent Vaid claims violations of his human rights does not automatically steer the case to the Canadian Human Rights Commission because "one must look not to the legal characterization of the wrong, but to the facts giving rise to the dispute".

[8] Our Court applied a similar approach on a motion to strike in *Roitman v. Canada*, 2006 FCA 266 where at paragraph 16 our colleague Décary J.A. wrote:

> A statement of claim is not to be blindly read at its face meaning. The judge has to look beyond the words used, the facts alleged and the remedy sought and ensure himself that the statement of claim is not a disguised attempt to reach before the Federal Court a result otherwise unreachable in that Court.

[9] Décary J.A. went on to paraphrase the Supreme Court of Canada in *Vaughan v. Canada*, [2005] 1 S.C.R. 146, at paragraph 11 and our Court in *Prentice v. Canada (Royal Canadian Mounted Police)*, 2005 FCA 395, at paragraph 24 (leave to appeal to the Supreme Court of Canada denied, [2006] S.C.C.A. No. 26, May 19, 2006) and said "a plaintiff is not allowed to frame his action, with a degree of artificiality, in the tort of negligence to circumvent the application of a statute": *ibidem*; see also *Donovan v. Canada (Attorney General)* (2008), 273 Nfld. & P.E.I. R. 116, at paragraph 13 (Nfld. C.A.); and *Genge v. Canada (Attorney General)* (2007), 270 Nfld. & P.E.I. R. 182, at paragraph 40 (Nfld. C.A.).

[10] In dismissing the appeal, the judge reasserted the possibility for the appellant to pursue his grievances, to seek judicial review of the resulting decisions and, if necessary, to then renew his action for damages: see paragraph 47 of the reasons for judgment.

[11] That the appellant's action is premature is also evidenced by the fact that even if the appellant's action were authorized to go forward, it would be impossible for the Trial judge to assess the additional compensation that the appellant could be entitled to receive because the compensation that he seeks is already recoverable, at least in large part, under various federal statutes: see *Prentice*, *supra*, at paragraphs 74 and 75.

[12] This appeal misstated the issue raised by the judge's decision. However, when the proper issue is considered, it becomes obvious that this appeal cannot succeed. Consequently, it will be dismissed with costs.

"Gilles Létourneau"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

(APPEAL FROM AN ORDER OF JUSTICE MOSELY, DATED NOVEMBER 6, 2008 IN DOCKET NO. T-1248-07)

DOCKET:	A-588-08
STYLE OF CAUSE:	ANTHONY MOODIE v. HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF NATIONAL DEFENCE
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 11, 2010
REASONS FOR JUDGMENT OF THE COURT BY:	LÉTOURNEAU J.A. NOËL J.A. TRUDEL J.A.
DELIVERED FROM THE BENCH BY:	LÉTOURNEAU J.A.

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