Federal Court Cour fédérale

Date: 20160426

Docket: T-1010-15

Citation: 2016 FC 467

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, April 26, 2016

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

KOMI GRATIAS GLIGBE

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

JUDGMENT AND REASONS

[1] Komi Gratias Gligbe is claiming contract damages according to *common law* principles respecting labour law. Unfortunately for him, I am bound by well-established jurisprudence indicating that a member of the Canadian Armed Forces [CAF] is not bound to Her Majesty the Queen by an employment contract, but, instead, serves at pleasure. His statement of claim should be struck out in accordance with Rule 221 of the *Federal Courts Rules*. However, I am granting

the plaintiff time to file a new statement to more clearly support his claims regarding the *Canadian Charter of Rights and Freedoms*.

I. The facts

[2] The plaintiff joined the CAF on July 15, 2009. On May 7, 2012, the CAF decided to release the plaintiff. This decision took effect on June 18, 2012.

[3] On March 17, 2014, the Chief of the Defence Staff concluded that the plaintiff had been wronged by the release and that he would be awarded partial reparation. By so doing, he opened the door for the plaintiff to re-enlist. However, the plaintiff never re-enlisted in the CAF.

[4] On July 18, 2014, the plaintiff submitted an application for judicial review of the decision regarding his release (in Court file number T-1641-14). The application was discontinued on January 28, 2016.

[5] On June 17, 2015, the plaintiff instituted a second claim for damages related to his release.

[6] On November 12, 2015, in a detailed 52-paragraph order, Mr. Justice Annis ordered that the plaintiff's statement of claim be struck out on the grounds that this second claim did not present any reasonable cause of action (*Gligbe v. Canada*, 2015 FC 1265). Annis J. granted the plaintiff 60 days to file a new statement of claim presenting a different cause of action with more

relevant facts to support his claim of wrongful release, failing which he could not institute a new action based on the facts surrounding his release from the CAF without leave of the Court.

[7] The plaintiff, who is representing himself, filed a new statement of claim on December 30, 2015.

[8] The respondent now contends that this new claim presents no reasonable cause of action because the *National Defence Act* and jurisprudence prohibit a member or former member of the CAF from pursuing Her Majesty the Queen for wrongful dismissal.

II. Motion to strike

[9] Rule 221 of the *Federal Courts Rules* reads as follows:

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	d) qu'il risque de nuire à l'instruction équitable de

fair trial of the action,	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,	f) qu'il constitue autrement un abus de procédure.
and may order the action be dismissed or judgment entered accordingly.	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).

[10] The *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 decision establishes that a statement will be struck out if it is "plain and obvious" that the pleadings disclose no reasonable claim. It is not for the Court, at this stage, to weigh the plaintiff's chances of success (*Alani v. Canada (Prime Minister)*, 2015 FC 649, at paragraph 6, affirmed in 2016 FCA 22).

III. Analysis of the motion

[11] First, I note that some elements on which Annis J. based his analysis are no longer relevant. Specifically, the plaintiff discontinued his application for judicial review (Court file number T-1641-14).

[12] The *stare decisis* principle establishes that the court whose decision is appealed against must follow the decisions of higher courts. This is a basic tenet of our legal system (*Carter v.*

Canada (Attorney General), 2015 SCC 5, at paragraph 44). The Court must follow the clearly established legal rules.

[13] It is recognized that members of the CAF serve at pleasure. There are many examples of decisions, including one from the Federal Court of Appeal, confirming that they are not bound to Her Majesty the Queen by an employment contract (*Mitchell v. The Queen*, [1896] 1 QB 121 (UK) (QL); *Gallant v. The Queen in Right of Canada* (1978), 91 DLR (3d) 695 (FCT); *Sylvestre v. R* (1986), 30 DLR (4th) 639 (FCA); *McClennan v. Canada*, 2002 FCT 244, at paragraph 11; *Donoghue v. Canada (Minister of National Defence)*, 2004 FC 733, at paragraph 35; *MacLellan v. Canada (Attorney General)*, 2014 NSSC 280, at paragraph 59). I, myself, acknowledged this principle in *Bissonnette v. Canada*, 2007 FC 281, at paragraphs 7-8.

[14] Case law is well established and clear on the subject of the relationship between a soldier and Her Majesty the Queen. I am bound by this. Given the current state of the law, the plaintiff has no reasonable cause of action under *common law* for wrongful and unfair dismissal. The application in its present form cannot succeed.

[15] Trial courts may reconsider settled rulings of higher courts in certain situations, specifically, where a new legal issue is raised or where there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate" (*Carter*, at paragraph 44; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, at paragraph 42). In the context of a motion to strike, the Courts must be generous and, to the extent possible, err on the side of

permitting a novel but arguable claim to proceed to trial (*R v. Imperial Tobacco Canada Ltd.*, 2011 SCC 2, at paragraph 21). In my opinion, this does not constitute a change in circumstance.

[16] I recognize that *common law* is an evolving branch of law and that "stare decisis is not a straitjacket that condemns the law to stasis." (*Carter,* at paragraph 44). The Courts may make incremental changes to *common law* to further the requirements of justice and fairness (*Secunda Marine Services Ltd. v. Fabco Industries Ltd.*, 2005 FC 1565, at paragraph 49). Ignoring the established jurisprudence in this case would not constitute a "responsible, incremental change to the common law" but would, instead, completely throw into doubt the outcomes of previous cases, which Mr. Justice Stratas warns against in *Paradis Honey Ltd. v. Canada*, 2015 FCA 89, at paragraphs 116-118. In short, this is a question for the legislator, as acknowledged in *Gallant* and restated in *McClennan* (at paragraph 9).

[17] Therefore, I would allow the plaintiff's motion to strike.

IV. <u>Leave to amend</u>

[18] The Court may order striking out with or without leave to amend. The leave to amend will be rejected if the pleading involves a defect that cannot be cured by amendment (*Collins v. Canada*, 2011 FCA 140, at paragraph 26).

[19] The plaintiff contends that he has a valid argument based on the *Canadian Charter of Rights and Freedoms*. However, the *Charter* is only mentioned in passing in paragraphs 69, 76 and 81 of his statement of claim filed on December 30, 2015. His response to the defendant's

motion to strike implies that he plans to base his recourse on section 15 and subsection 24(1) of the *Charter* He also refers to the *Canadian Human Rights Act* and the *Employment Equity Act*.

[20] A new argument based on *Charter* provisions could constitute a new legal issue (*Bedford,* at paragraph 42). The argument based on the *Charter* was addressed by the Federal Court of Appeal in *Sylvestre*, above. In this case, a former CAF member claimed that her release violated the rights provided for in section 7 of the *Charter*. The Court of Appeal ruled that section 7 did not apply in this case, but did not rule on the application of section 15 of the *Charter*.

[21] In short, I am not satisfied that the plaintiff has fully and accurately presented his arguments based on the *Canadian Charter of Rights and Freedoms*. Having regard to the circumstances, the defendant was unable to address the *Charter* and the Court is unable to determine whether it is plain and obvious that this motion would have no chance of success.

[22] Therefore, I am granting the plaintiff 30 days to file, if he wishes, a new statement of claim based on the *Canadian Charter of Rights and Freedoms* and including all the relevant facts to support his claims, without prejudice to the defendant's rights to object or not to this new statement of claim. Only then will the Court be able to consider whether the plaintiff's rights were violated and if he can obtain the requested reparation.

[23] I suggest the plaintiff familiarize himself with the rules on formulating constitutional questions, specifically, section 57 of the *Federal Courts Act*, if this becomes necessary given the assumption that Acts of the federal Parliament follow the Canadian constitution. It would also be

advisable that the plaintiff consult the rules regarding layout and the appropriate font for documents submitted to the Court.

[24] Although it is appropriate to accord some latitude to someone who is representing himself, the Court is not a faculty of law. The defendant is entitled to costs.

JUDGMENT

THIS COURT RULES that:

1. The motion to strike is allowed.
2. The plaintiff may file a new statement of claim in accordance with the instructions provided in this decision within 30 days of this judgment.
3. If the plaintiff files another statement of claim, the defendant will be able to contest it within the usual time frame.
4. The defendant is entitled to costs in this motion.

"Sean Harrington"

Judge

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*

JUDGMENT AND REASONS: HARRINGTON J.

DATED: APRIL 26, 2016

WRITTEN REPRESENTATIONS BY:

Komi Gratias Gligbe — FOR THE PLAINTIFF (ON HIS OWN BEHALF)

Antoine Lippé — FOR THE DEFENDANT

SOLICITORS OF RECORD:

William F. Pentney
Deputy Attorney General of Canada
Montréal, Quebec — FOR THE DEFENDANT