Federal Court  Cour fédérale

Date: 20170324

Docket: T-1010-15

Citation: 2017 FC 311

[ENGLISH TRANSLATION]

Ottawa, Ontario, March 24, 2017

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

KOMI GRATIAS GLIGBE

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is a motion to strike Komi Gratias Gligbe's statement of claim under rule 221 of the *Federal Courts Rules*, SOR/98-106 (the Rules). The defendant is seeking to strike in its entirety, without leave to amend, the plaintiff's action alleging that he was unfairly released from the Canadian Armed Forces and is therefore claiming contractual damages under of section 15 and

subsection 24(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, which is Schedule B of the *Canada Act (UK) 1982*, c 11.

[2] This is the third motion to strike filed by the defendant, again on the grounds that the plaintiff's action contains no reasonable cause of action, the first two having been allowed with leave to amend.

[3] Because the plaintiff has failed to substantiate his claim under section 15 of the *Charter*, and because he is not citing any alleged or analogous grounds within the meaning of that provision, I am of the view that the plaintiff's third statement of claim should be struck out, this time without leave to amend.

II. Facts

A. *Background*

[4] The plaintiff joined the Forces on July 15, 2009, and began training as a Personnel Selection Officer. He successfully completed several stages prior to his training course, but owing to personal problems, he failed three times in a row in February 2011. Corrective action was initiated against him as a result of these failures, which eventually led to the recommendation that he be released from the Forces.

[5] The plaintiff used the grievance process provided for in the *National Defence Act*, RSC 1985, c. N-5 (NDA), and at the final level the Chief of the Defence Staff (CDS) found that

the plaintiff had been aggrieved, and therefore a partial remedy would be granted. This remedy included the removal of a corrective action from his record and a favourable reference regarding possible re-enrolment. The plaintiff never attempted to re-enrol in the Forces.

B. *Previous proceedings*

[6] The plaintiff first filed an application for judicial review of the decision to release him from the Forces, which he withdrew in January 2016.

[7] However, prior to this discontinuance, he filed a first statement of claim seeking damages for his forced release.

[8] In a judgment rendered in 2015 FC 1265, Justice Annis of this Court allowed the defendant's first motion to strike, arguing that there was no reasonable cause of action in the application. Because the plaintiff was representing himself at the time, Justice Annis refused to strike the statement of claim on the basis that it did not identify the individuals at fault or provide a more complete context. However, he accepted the defendant's argument that the actions alleged against the defendant, although they may provide grounds for an application for judicial review, are not likely to incur liability. Justice Annis expressed surprise, given a long line of authorities dating back to *Mitchell v. R*, [1896] 1 QB 121 (QB England), that if the defendant did not plead as a member of the Forces, the plaintiff was not entitled to compensation in the civil courts. Although the courts have clearly recognized that the relationship between the Crown and a member of the Canadian Forces (CF) is not a contractual one, but rather a "unilateral commitment in return for which the Queen assumes no obligation" and that "in no way [gives]

rise to a remedy in the civil Courts" (*Gallant v. R*, 91 DLR (3d) 695 (F.C.T.D.), 1978 CarswellNat 560), Justice Annis was of the view that it is possible to consider a modern reassessment of the Crown–CF member relationship. He therefore granted the plaintiff 60 days to file a new statement of claim in which he could articulate a novel cause of action for unjust dismissal and a claim for contractual damages in accordance with common law labour law principles. Since the plaintiff is a Quebec resident, I believe that Justice Annis should have referred to the provisions of the *Civil Code of Québec* regarding employment contracts. However, this has no bearing in this case.

[9] The plaintiff filed a new action seeking contractual damages in accordance with common law labour law principles, and the defendant filed a new motion to strike on the basis that the statement of claim did not disclose a reasonable cause of action.

[10] For the reasons reported in 2016 FC 467, Justice Harrington allowed the defendant's motion and ordered that the statement of claim be struck out. In his view, the case law clearly indicates 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. For this reason alone, the plaintiff has no reasonable cause of action under common law for wrongful and unfair dismissal – again, reference should have been made to Quebec civil law.

[11] However, also recognizing that the plaintiff was representing himself at the time and in light of the reference made, in his second statement of claim, to section 15 and subsection 24(1) of the *Charter*, Justice Harrington granted him 30 days to file a new statement of claim in which

he would articulate this claim. Justice Harrington did not find that such a claim would necessarily be viable. Rather, since the plaintiff did not fully and accurately present his arguments based on the *Charter*, the Court was unable to determine whether it was plain and obvious that this motion would have no chance of success.

[12] The plaintiff therefore filed his third statement of claim, which is the subject of this motion to strike.

C. *The statement of claim*

[13] In his new statement of claim, the plaintiff relied on section 15 and subsection 24(1) of the *Charter* and claimed $328,501.46 in damages for wrongful and unfair release from the Forces.

[14] A comparative reading between the plaintiff's second and third statements of claim shows that the chronology of the facts and the alleged faults are the same. However, the plaintiff replaced paragraph 66 of the previous version, which read as follows:

> [TRANSLATION]
>
> All of the foregoing shows that my release from the CAF was premeditated, orchestrated and unfair. This constitutes an arbitrary breach of the service contract binding me to the CAF and contravenes my rights to justice and fairness as guaranteed under the *Charter*.

with paragraph 45 of the new version, which reads as follows:

> [TRANSLATION]

> All of the foregoing shows that my release from the CAF was premeditated, orchestrated, unfair and contravenes my rights to justice and fairness as guaranteed under the *Charter*.

[15] The essence of the plaintiff's *Charter* claim is at paragraph 56:

> [TRANSLATION]
>
> The defendant's argument that "members of the CF are not bound to Her Majesty by a contract of employment and serve at pleasure" contravenes the principles of fundamental justice for all guaranteed by sections 15 and 24(1) of the *Canadian Charter of Rights and Freedoms*.

[16] In addition to this general allegation, the rest of the additions to the plaintiff's third statement of claim essentially involve the failure to comply with the principles of procedural fairness and natural justice in the grievance process under the NDA, which cannot support a remedy for damages for discrimination on a ground prohibited by the *Charter*.

D. *Legislative framework*

[17] Rule 221 of the 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 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,	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).

III. Issue

[18] This motion to strike raises the following issues:

A. *Does the plaintiff's amended statement of claim disclose a reasonable cause of action?*

B. *If not, should the plaintiff be granted leave to amend?*

IV. Analysis

A. *Does the plaintiff's amended statement of claim disclose a reasonable cause of action?*

[19] In order for a motion to strike to put an end to the litigation at a preliminary stage, it must be plain and obvious, beyond all doubt, that the plaintiff's action is certain to fail because it contains a radical defect (*Hunt v. Carey Canada Inc*, [1990] 2 SCR 959; *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 SCR 263). The facts are to be taken as pleaded, and the burden on the defendant is a heavy one.

[20] The plaintiff was represented by counsel at the hearing of his motion, but apparently not when his third statement of claim was written. Be that as it may, the statement of claim must be interpreted generously. Counsel for the plaintiff, without admitting that the statement of claim was deficient, referred the Court to paragraphs 22 to 31 of his Response to the motion to strike, which he said adequately expressed the plaintiff's cause of action under section 15 of the *Charter* (references to the evidence are omitted):

> [TRANSLATION]
>
> 22. The CDS awarded partial relief for the damages I suffered. The unwarranted corrective action ordered against me on March 4, 2011, was removed from my military record. Also, my re-enrolment in the CAF was authorized and facilitated.
>
> 23. The Director, Military Careers Administration (DMCA) believes that I had been released, inter alia, because the Training Development Officer position, my first career choice, was closed. The CDS also reiterated this fact, pointing out that, because this career was closed, as was my second career choice, Military Police Officer, "all options were exhausted." Therefore, my release was not "illogical."
>
> 24. As I always maintained, my first career choice was not closed. The defendant finally acknowledged this in his memorandum of fact and law.
>
> 25. However, the defendant continued by providing a rationale for my release, arguing that "this error is not fatal [...] in the absence of an academic waiver" (paragraph 72). However, the Personnel Selection Officer (PSO) who had assessed me did not initiate, as

required and as she had stated in her letter in evidence in the Judicial Review file, the process for assessing my eligibility for a waiver by the competent authorities, the Director, Military Careers DMilC-7.

26. Despite the dynamic nature of open careers, my first career choice, Training Development Officer, remained open during the entire process, as finally acknowledged by the defendant in his memorandum at points 70 and 71: 70: "The defendant admits that the CDS erred in fact as to whether or not the first career chosen by the plaintiff, Training Development Officer, was open"; 71: "It appears from the record and all the evidence that this career was open, but that the plaintiff's second career choice, Military Police Officer, was closed."

27. This is what the plaintiff has always said and reiterated throughout the process and has always been ignored by his Commanding Officer, the Commandant, Canadian Forces Support Unit (Ottawa) (Cmdt CFSU (Ottawa)) who supported the recommendation for release and sent this incorrect information to the Director Military Careers Administration (DMCA) who made the decision to release me based on the fact that my career choices were closed. This is the same argument that the CDS made in his decision in which he wrote: "It is reasonable to believe that the need to hire resources to assess an academic waiver request was pointless since this career was no longer open," and that the PSO's decision to recommend my release "was not illogical" (Exhibit 5, page 60 at paragraph 4).

28. This erroneous fact was rather decisive in his judgment regarding the fair and equitable nature of the plaintiff's release.

29. The plaintiff did not recognize the non-decisive nature of the defendant's allegation as he maintained in point 72 of his memorandum:

> "The recommendation to release the member when all options are exhausted is in the best interest of the CAF" (Tab 5, p. 140 at paragraph 4).
>
> "[…] I am of the view that the PSO's decision was fair and equitable because the careers you wanted were closed during the mandatory reassignment process and you were not interested in the other choices offered to you. I find that your release was not hasty and unreasonable because it is in

> > accordance with CANFORGEN 257/10" (Tab 5, page 141 at paragraph 1).
>
> 30. The plaintiff amply demonstrated in his memorandum of fact and law that he is not a member of the category of military personnel described in CANFORGEN 257/10.
>
> 31. On the issue of the academic waiver, the plaintiff submitted that the defendant made an error in interpreting the facts. At paragraph 84 of his memorandum, the defendant wrote in particular:
>
> > "... the PSA indicates that you were not eligible for an academic waiver for your first career choice, 00211 – Training Development, following an assessment of your academic results, work experience and military performance. This report, however, fails to specify by whom and when this assessment was performed" (Exhibit 5, page 60 at paragraph 3).

[21] First, I will ignore the allegations in the statement of claim, which repeat the causes of action already dismissed by my colleagues, namely the legality of the decision to release the plaintiff from the Forces, compliance with the rules of procedural fairness in the context of the grievance filed under the NDA and the contractual relationship that allegedly existed between the plaintiff and the Forces. These reasons only concern the plaintiff's new cause of action based on section 15.

[22] Even if the plaintiff's statement of claim was enhanced by the above-mentioned excerpt, I am of the opinion that his *Charter* argument is at the centre of a factual vacuum. The plaintiff had the burden of circumstantiating this argument, which he did not do. His appeal is therefore, without a shadow of a doubt, doomed to failure.

[23] The plaintiff merely states his position differently that he was not treated fairly in his grievance and the fact that he does not have access to a civil remedy for wrongful dismissal, which also happens to apply to all members of the Forces, therefore denies him access to full and fair justice. Section 15 of the *Charter* does not guarantee the right to procedural fairness or access to full and fair justice in the broad sense. It provides constitutional protection against discrimination on a ground prohibited by the *Charter*. It reads as follows:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[24] The plaintiff does not identify the enumerated or analogous ground that is specific to him.

[25] Even assuming, by a generous reading of the statement of claim, that the alleged ground of discrimination is based on the plaintiff's military status, this argument does not stand up to the scrutiny of a remedy based on section 15. There are two distinct steps in this analysis: it must be determined whether (1) the law makes a distinction based on an enumerated or analogous ground; and (2) this distinction is discriminatory (*Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497).

[26] In the context of a motion to strike, the Federal Court of Appeal determined that in order to establish a violation of section 15 of the *Charter*, the plaintiff must, at a minimum,

demonstrate that he or she has been discriminated against on the basis of an enumerated or analogous ground (*Mancuso v. Canada (National Health and Welfare)*, 2015 FCA 227 at paragraph 24).

[27] It is clear that the plaintiff's military status is not one of the enumerated grounds of discrimination. It is also clear that all these grounds are based on characteristics closely related to the physical person.

[28] Moreover, an analogous ground must be similar to the enumerated grounds in that it often identifies a basis for stereotypical decision making or a group that has historically suffered discrimination. It must be linked to personal characteristics that are immutable and that are changeable only at unacceptable cost to personal identity.

[29] In order to determine whether the plaintiff's military status may, in his own particular circumstances, constitute an analogous ground of discrimination, a number of decisions must be reviewed.

[30] First, in *R. v. Généreux*, [1992] 1 SCR 259, the Supreme Court clearly indicated that the members of the Forces do not, per se and in general, constitute a class of persons who may invoke an analogous ground (*Généreux*, above, at pages 310-311). However, the Court recognized that in exceptional circumstances, military personnel can "be the objects of disadvantage or discrimination in a manner that could bring them within the meaning of s. 15 of the *Charter*." For example (at p. 311):

> […] after a period of massive demobilization at the end of hostilities, returning military personnel may well suffer from disadvantages and discrimination peculiar to their status, and I do not preclude that members of the Armed Forces might constitute a class of persons analogous to those enumerated in s. 15(1).

[31] As an additional example and precedent, counsel for the plaintiff referred the Court to its decision in *Duplessis v. Canada*, [2000] FCJ No. 1917 (affirmed on appeal 2002 FCA 338). After having served in the Canadian military for almost 20 years and having participated in the armed conflict in Croatia and Bosnia, Mr. Duplessis suffered from post-traumatic stress disorder. Alleging that he did not receive the medical and psychological assistance to which he was entitled, he brought an action based, in particular, on section 15 of the *Charter*. He argued that he had been discriminated against based on race (Mr. Duplessis is an Afro-Canadian) and mental disability. Because both of these grounds are specifically enumerated in section 15, the defendant's motion to strike, correctly, did not challenge that cause of action.

[32] The plaintiff also referred us to the Supreme Court of Canada's decision in *Manuge v. Canada*, [2010] 3 SCR 672. The issue in that case was whether the plaintiff could bring a class action for damages against the Forces without first seeking judicial review. This class action, based in particular on section 15 of the *Charter*, and instituted on behalf of members of the Forces who were injured before April 1, 2006, argued that the *Pension Act*, RSC 1985, c. P-6 or the Service Income Security Insurance Plan – Long Term Disability Plan adopted pursuant to the Act, subjected them to discriminatory and less advantageous treatment than members of the Forces injured after that date.

[33] First, the question of whether Justice Barnes of this Court erred in concluding that the "allegations of unlawfulness, *ultra vires* and a breach of subsection 15(1) of the Charter easily meet the legal threshold of a reasonable cause of action" was not at issue before the Supreme Court. The question was whether Mr. Manuge's claims for damages disclosed "only a thin pretence to a private wrong" (*Manuge*, above, at paragraph 20). It is in this context that Justice Abella pointed out the following:

> [21] At their core, Mr. Manuge's claims are less about assessing the exercise of delegated statutory authority or the decision-making process that led to the promulgation or "monthly application" of s. 24(a)(iv), and more about s. 15(1) of *Charter*. He pleads that the scheme violates s. 15(1) of the *Charter* because it draws a distinction, based on the degree and extent of disability, between the claimants who are allegedly adversely affected because they are unable to continue to serve and are thus subject to the s. 24(a)(iv) deduction — and those who are able to continue to serve and who are not subject to the deduction. He also alleges that the scheme violates s. 15(1) by subjecting those injured prior to April 1, 2006, to less advantageous treatment than those injured on or after April 1, 2006. It is essentially for these alleged breaches that Mr. Manuge seeks constitutional remedies and damages. As *TeleZone* states, "[i]f the plaintiff has a valid cause of action for damages, he or she is normally entitled to pursue it" (citation omitted).

[34] Without commenting on the merits of the issue, Justice Abella noted that the argument was set forth in the statement of claim, and she implicitly stated that discrimination based on the degree and extent of an individual's disability may be based on a similar ground to those enumerated in section 15. It is easy to agree with this, because this is an immutable personal characteristic that cannot be changed, even at an unacceptable cost to personal identity. This ground is in fact so close to physical disability that it could even constitute an enumerated ground.

[35] The plaintiff is not in an exceptional situation as described by the Supreme Court in *Généreux*, and his case is fundamentally different from that of Mr. Duplessis or Mr. Manuge and his group. The plaintiff was a member of the Forces for a period of two years, mainly in training. He used the grievance process provided for in the NDA and was partially successful in that the grievance process recognized that the plaintiff's right to procedural fairness had been violated. This violation was corrected, and he was provided with a favourable reference for possible re-enrolment in the Forces.

[36] Membership in the group of military personnel is voluntary and can easily be changed at will by the plaintiff or any member of this group.

[37] An individual's professional status or employment status has never been recognized by the courts, per se, as an analogous ground (*Delisle v. Canada (Deputy Attorney General)*, [1999] 2 SCR 989; *Baier v. Alberta*, [2007] 2 SCR 673; *Health Services and Support - Facilities Subsector Bargaining Assn v. British Columbia*, [2007] 2 SCR 391).

[38] In *Delisle*, the Supreme Court concluded that the exclusion of members of the Royal Canadian Mounted Police (RCMP) from the legislative scheme of the *Public Service Labour Relations Act*, RSC 1985, c P-35, does not constitute discrimination against them within the meaning of section 15. This conclusion is warranted even if the Act provides them with different and less advantageous treatment. The Court added that it was open to Parliament to set RCMP members apart because of the crucial role they play in maintaining order.

[39] In *Baier*, the Supreme Court considered an amendment by the Province of Alberta to its municipal and school election law. The appellant argued that under this amendment school employees would be treated differently from municipal employees. The Court found that this differential treatment was not based on an enumerated or analogous ground, because neither the occupational status of school employees nor that of teachers had been shown to be immutable or constructively immutable characteristics.

[40] That same year, the Supreme Court rendered its decision in *Health Services and Support* and again found that the distinctions created by a British Columbia statute governing the group scheme in the health care sector were essentially the result of the differences that exist between sectors of employment. This is consistent with the long-standing practice in labour regulation of creating legislation specific to particular segments of the labour force. The differential and adverse effects of the legislation on some groups of workers relate essentially to the type of work they do, and not to the persons they are. According to the Court, nor does the evidence disclose that the Act under consideration reflects a stereotypical application of group or personal characteristics.

[41] The same reasoning applies to the plaintiff's status as a member of the military, whose remedies in the event of forced release are governed by the NDA.

[42] Since the plaintiff did not argue how status as a member of the military would be an analogous ground within the meaning of section 15 of the *Charter*, and since discrimination based on a status that the plaintiff has chosen is not a ground of discrimination within the

meaning of section 15 of the *Charter*, his action is unfounded and cannot succeed (*Public Service Alliance of Canada v. Canada*, [2002] 1 FCR 342 at paragraph 22; *Delisle*, above, at pages 1024-1025).

B. *Should the plaintiff be granted leave to amend?*

[43] When ordering that a pleading be struck, this Court must determine whether the pleading is to be struck with or without leave to amend. Rule 221 of the Rules requires that this issue be considered (*Simon v. Canada*, 2011 FCA 6 at paragraph 14; *Collins v. Canada*, 2011 FCA 140 at paragraph 25; *Bashi v. Canada*, 2004 FC 80 at paragraph 13).

[44] For a claim to be struck out without leave to amend there must be no glimmering or scintilla of a legitimate cause of action (*Yearsley v. The Queen*, 2001 FTR 732 at paragraph 17; *McMillan v. Canada*, (1996) 108 FTR 32 at p. 8; *Kiely v. Canada*, 1987 CarswellNat 236, 10 FTR 10 at p. 2; *Bashi*, above, at paragraph 13; *Larden v. Canada*, [1998] FCJ No 445 at paragraph 26; *Sivak v. Canada*, 2012 FC 272 at paragraph 94).

[45] The plaintiff had the opportunity to amend his statement of claim to support a section 15 *Charter* argument, but failed to do so. Even if the extract from his Respondent's motion record prepared by his new counsel were added by amendment, I would come to the conclusion that this amended claim does not disclose any reasonable cause of action.

[46] In these circumstances, it is just and appropriate to strike out the plaintiff's third statement of claim, without leave to amend (*Benaissa v. Canada (Attorney General)*, 2005 FC 1220 at paragraph 45).

[47] Judicial resources are scarce, and it is appropriate to put a summary end to an action unfounded in law that is certain to fail.

V. Conclusion

[48] The plaintiff's motion will be struck out without leave to amend.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The defendant's motion to strike is allowed;
2. The plaintiff's motion is struck out in its entirety without leave to amend;
3. The plaintiff's action is dismissed;
4. Costs in the amount of $500 are awarded to the defendant.

"Jocelyne Gagné"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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DATE OF HEARING:	FEBRUARY 20, 2017
JUDGMENT AND REASONS:	GAGNÉ J.
DATED:	MARCH 24, 2017

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