



Date: 20191104

Docket: T-972-17

Citation: 2019 FC 1356

PROPOSED CLASS PROCEEDING

BETWEEN:

DOUGLAS JOST

Plaintiff

and

THE ATTORNEY GENERAL OF CANADA

Defendant

ORDER AND REASONS

O'REILLY J.:

I. Overview

[1] After he retired from the Canadian Armed Forces in 2015, Mr Douglas Jost waited several months before receiving his pension. Other retirees from the CAF, both in the Regular Forces and the Reserves, also experienced delays.

[2] Mr Jost seeks an order certifying this proceeding as a class action on behalf of retirees from the CAF. Mr Jost maintains that all of the required legal elements for certification have been met, namely, (i) that there is a reasonable cause of action; (ii) that there is an identifiable

class; (iii) that there are common questions of law; (iv) that certification is the preferred procedure; and (v) that Mr Jost is the appropriate representative of the class (Rule 334.16(1) of the *Federal Courts Rules*, SOR/98-106; see Annex for all enactments cited).

[3] The Attorney General of Canada (AGC) opposes certification of the class because Mr Jost has failed to meet those five necessary preconditions.

[4] The parties agree that the sole issue is whether this proceeding should be certified as a class action. Below, I address each of the five required elements.

[5] In my view, Mr Jost has satisfied the necessary requirements for certification. I will, therefore, grant this motion in his favour.

II. Background

[6] In the spring of 2015, when contemplating retirement from the CAF, Mr Jost was given a choice of receiving an Annual Allowance, a Deferred Annuity, or a Transfer Value (*ie*, a lump sum). He chose the Transfer Value option and was informed that that its worth was \$859,980.00.

[7] Mr Jost's release became effective on July 1, 2015. Some weeks later, he was told that his Transfer Value had been reduced to \$726,904.96. In October 2015, he was informed of a further reduction to \$703,180.00. He was originally told that he would start receiving pension benefits 8 to 12 weeks after his release, but payments did not begin to arrive until January 20, 2016, 29 weeks after his release.

III. First Element – Is there a reasonable cause of action?

[8] The AGC submits that it is plain and obvious that the causes of action relied on by Mr Jost have no reasonable prospect of success. I disagree.

[9] Mr Jost pleads three causes of action – negligence, breach of fiduciary duty, and breach of contract. For present purposes, I must assume that the facts relied on to support those causes of action are true.

[10] To make out a negligence claim, the plaintiff must prove the existence of a duty of care, a breach of the standard of care, damages, and causation.

[11] The AGC seriously disputes only the first criterion – the existence of a duty of care. According to the AGC, when the relationship between the parties arises from a statutory scheme, one must be guided by the provisions of the statute (*Haj Khalil v Canada*, 2007 FC 923 at para 182). In addition, policy considerations may negate the existence of a duty of care. Here, says the AGC, the CAF's pension plan is the product of a policy decision by the Government of Canada and, in the public interest, the amount of any payments made under the plan must be accurate. As a result, measures must be taken to ensure accuracy even if they take time.

[12] Further, the AGC notes, in this case, that the statute creating the plan contains its own remedies. In particular, the Minister can take remedial action in situations where a person has failed to make a pension election as a result of erroneous advice or administrative error; further,

persons who are dissatisfied with a decision affecting their benefits can request a reconsideration (*Canadian Forces Superannuation Act*, RSC 1985, c C-17, ss 92–93).

[13] I disagree with the AGC's submissions. The fact that the pension scheme is the product of a policy decision does not automatically relieve the Government of Canada from a duty of care toward members of the plan. Further, the statutory remedies cited by the AGC are no substitute for the claim in negligence. Mr Jost has pleaded each of the required elements of an action based in negligence and the AGC has not shown that it is plain and obvious that those elements cannot be proved. In effect, the AGC argues that the claim in negligence will ultimately fail, but that is not a sufficient basis, at this stage, to conclude that there is no reasonably viable cause of action.

[14] Mr Jost also alleges breach of a fiduciary duty to members of the proposed class based on Canada's undertaking to act in the best interest of class members. The AGC argues that the existence of a fiduciary duty has not been proved and the claim for such a duty will inevitably fail. Again, Mr Jost has pleaded the presence of the essential elements for a claim based on breach of a fiduciary duty, and it would not be appropriate on this motion to rule on the likelihood that those elements can or cannot be proved.

[15] Similarly, the AGC argues that Mr Jost cannot prove any breach of contract as pleaded in the statement of claim. Again, this is a matter of evidence and proof; it is not plain and obvious at this stage that there is no reasonable basis for that claim.

[16] Accordingly, I am satisfied that there exists a reasonable cause of action.

IV. Second Element – Is there an Identifiable Class?

[17] Mr Jost submits that the following persons should be recognized as members of the proposed class:

All members of the Canadian Forces – Reserve Force Pension Plan and the Canadian Forces – Regular Force Pension Plan who were entitled upon release to an Immediate Annuity, Transfer Value, Annual Allowance or Bridge Benefit between March 1, 2007 and present.

[18] Mr Jost argues that the members of this group are easily identifiable based on government records.

[19] The AGC argues that Regular Force members should not be included within the proposed class. Further, the AGC contends that the class should be limited to those who had their pension benefits calculated and signed their option form within six years of the commencement of the action (citing the limitation period in the *Federal Courts Act*, RSC 1985, c F-7, s 39(2)).

[20] I agree with the AGC that the class should be confined to Reserve Members. I have no evidence before me of problems experienced by Regular CAF members. However, I see no other reason to limit the members of the class. If there are members of the class whose claims fall outside the prescribed limitation period, their claims can be dealt with accordingly.

V. Third Element – Are there common questions of law or fact?

[21] The AGC submits that Mr Jost has not provided a basis in law for the existence of common legal issues such as negligence, breach of fiduciary duty, and breach of contract. I have already concluded that those issues represent reasonable causes of action.

[22] In addition, I find that those issues are common to the proposed members of the class. This is not to say that individual assessments will not be necessary – they probably will. But the legal and factual foundation of the claims will be common to class members.

[23] Further, issues such as the liability of Canada for damages and interest on delayed payments also represent common issues of fact and law, even though the actual calculation of relief for members of the class might have to be conducted individually.

[24] Accordingly, I am satisfied that this element has been met.

VI. Fourth Element – Is a class proceeding the preferred procedure?

[25] The AGC submits that many issues require individual assessment of any liability on the part of the Crown. It would be preferable, according to the AGC, for those claims to be determined one by one instead of by way of a class action. The issues are too complex and difficult to be determined together, says the AGC.

[26] I disagree with the AGC's submissions. The complexities in the law and the facts exist whether this matter proceeds as a class action or as a multitude of individual claims. The AGC has not identified any alternative remedy that would be more efficient or that would provide equivalent relief.

VII. Fifth Element – Is Mr Jost an appropriate representative of the class?

[27] The AGC argues that Mr Jost is not an appropriate representative because he received his benefits in a timely way.

[28] I disagree. Mr Jost has alleged a significant delay in the payment of his pension benefits. In addition, he has demonstrated an intention to pursue this action vigorously through able counsel on his own behalf and for the benefit of others similarly situated.

VIII. Conclusion and Disposition

[29] I find that Mr Jost has met the legal requirements for the certification of a class action on behalf of members of the Reserve Forces. Therefore, I will grant this application for certification.

ORDER IN T-972-17

THIS COURT ORDERS that the motion for certification is granted for the following

class:

All members of the Canadian Reserve Forces – Reserve Force Pension Plan– who were entitled upon release to an Immediate Annuity, Transfer Value, Annual Allowance or Bridge Benefit between March 1, 2007 and present.

"James W. O'Reilly"

Judge

OTTAWA, ONTARIO
November 4, 2019

<i>Federal Courts Rules,</i> SOR/98-106	Annex <i>Règles des Cours fédérales,</i> DORS/98-106
Certification	Autorisation
334.16 (1) Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if	334.16 (1) Sous réserve du paragraphe (3), le juge autorise une instance comme recours collectif si les conditions suivantes sont réunies :
(a) the pleadings disclose a reasonable cause of action;	a) les actes de procédure révèlent une cause d'action valable;
(b) there is an identifiable class of two or more persons;	b) il existe un groupe identifiable formé d'au moins deux personnes;
(c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;	c) les réclamations des membres du groupe soulèvent des points de droit ou de fait communs, que ceux-ci prédominent ou non sur ceux qui ne concernent qu'un membre;
(d) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and	d) le recours collectif est le meilleur moyen de régler, de façon juste et efficace, les points de droit ou de fait communs;
(e) there is a representative plaintiff or applicant who	e) il existe un représentant demandeur qui :
(i) would fairly and adequately represent the interests of the class,	(i) représenterait de façon équitable et adéquate les intérêts du groupe,
(ii) has prepared a plan for the	(ii) a élaboré un plan qui propose une

proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members as to how the proceeding is progressing,

méthode efficace pour poursuivre l'instance au nom du groupe et tenir les membres du groupe informés de son déroulement

(iii) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and

(iii) n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les points de droit ou de fait communs,

(iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.

(iv) communique un sommaire des conventions relatives aux honoraires et débours qui sont intervenues entre lui et l'avocat inscrit au dossier.

Canadian Forces Superannuation Act, RSC 1985, c C-17

Loi sur la pension de retraite des Forces canadiennes, LRC 1985, ch C-17

Remedial action in case of error

Mesures correctives en cas d'erreur

92. If the Minister is satisfied that, as a result of erroneous advice or administrative error in the administration of this Act, a person has failed to make an election or exercise an option under this Act, the Minister may take any remedial action that the Minister considers appropriate to permit that

92. Le ministre peut, s'il estime que la personne n'a pu effectuer un choix ou exercer une option prévu par la présente loi en raison d'un avis erroné ou d'une erreur administrative survenu dans le cadre de l'application de celle-ci, prendre les mesures correctives qu'il estime indiquées pour permettre à

person to make that election or exercise that option, as the case may be, on any terms and conditions that the Minister may determine, including as to the time for making the election or exercising the option and any amount payable in respect of the election.

celle-ci de le faire selon les conditions qu'il détermine, notamment en ce qui concerne le délai applicable et la somme à payer dans le cas d'un choix.

Request for reconsideration

Demande de révision

93. (1) A person who is dissatisfied with any decision made under this Act that affects their benefits, or their entitlement to benefits, under this Act may, within 90 days after the day on which the dissatisfied party was notified of the decision, or within any longer period that the Minister may either before or after the expiration of those 90 days allow, make a request to the Minister in the form and manner prescribed by regulation for a reconsideration of that decision.

93. (1) La personne qui est insatisfaite d'une décision, prise dans le cadre de l'application de la présente loi, concernant ses prestations au titre de cette loi — ou le droit à celles-ci — peut, dans les quatre-vingt-dix jours suivant sa notification ou dans le délai autorisé par le ministre avant ou après l'expiration de ces quatre-vingt-dix jours, demander à celui-ci, selon les modalités prévues par règlement, de réviser la décision.

Reconsideration by Minister

Décision du ministre

(2) The Minister shall reconsider any decision referred to in subsection (1) and may confirm or vary it and shall in writing notify the person who made the request under that subsection of the Minister's decision and of the reasons for it.

(2) Le ministre examine la décision, la confirme ou la modifie et notifie par écrit à la personne sa décision motivée.

Prescription and limitation on proceedings in the Court, not in province

39(2) A proceeding in the Federal Court of Appeal or the Federal Court in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.

Prescription — Fait non survenu dans la province

39 (2) Le délai de prescription est de six ans à compter du fait générateur lorsque celui-ci n'est pas survenu dans une province.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-972-17

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