

Federal Court



Cour fédérale

Date: 20210621

Docket: T-217-20

Citation: 2021 FC 645

St. John's, Newfoundland and Labrador, June 21, 2021

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

PAUL BURKE

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS

[1] By a Statement of Claim issued on February 12, 2020, Mr. Paul Burke (the “Plaintiff”) commenced an action against Her Majesty the Queen (the “Defendant”) seeking the recovery of damages in the amount of \$10,000.00, together with interest and costs. The Plaintiff commenced his action as a Simplified Proceeding pursuant to the *Federal Courts Rules*, SOR 98/106 (the “Rules”).

[2] Service of the Statement of Claim upon the Defendant was effected on February 12, 2020.

[3] The Plaintiff is an inmate at Mission Institution. In his Statement of Claim consisting of 59 paragraphs, he challenges his segregation from the general prison population, following a lockdown on October 2, 2019.

[4] The Plaintiff complains that his segregation from the general prison population is unlawful under the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (and the *Corrections and Conditional Release Regulations*, S.O.R./92-620 (the “Regulations”), and breaches his rights to liberty and security as guaranteed by the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), c. 11 (the “Charter”).

[5] The Statement of Claim sets out the Plaintiff’s allegations about the Defendant’s failure to provide him with adequate, or any, disclosure of the allegations justifying his initial and continued placement in segregation, the Defendant’s failure to meet statutory requirements pursuant to the CCRA in placing him in administrative segregation, and the alleged breaches of his rights under the Charter.

[6] The Plaintiff seeks recovery of general damages in the amount of \$10,000.00, together with pre-judgment interest and post-judgment interest and the costs of his action.

[7] By a Notice of Motion dated March 12, 2020, the Defendant moved to strike the Plaintiff's Statement of Claim. The Defendant sought adjudication of her Motion without personal appearance, that is pursuant to Rule 369 of the Rules.

[8] According to the affidavit of service of Natasha Fitter sworn on March 12, 2020, on behalf of the Defendant, the Plaintiff was served with the Notice of Motion on March 12, 2020. By letter dated March 23, 2020, the Plaintiff requested an extension of six months within which to respond to the Defendant's Notice of Motion.

[9] By an Order of the Court, issued on April 8, 2020, the Plaintiff was granted an extension of thirty days after the lifting of the Suspension Period imposed after the commencement of the Covid-19 pandemic. The Suspension Period was lifted for the Court's operations in British Columbia effective June 15, 2020.

[10] According to the Index of Recorded Entries for this file, the Plaintiff did not file any response to the Defendant's Notice of Motion.

[11] The Defendant submits that the Plaintiff fails to identify any tort in his Statement of Claim but rather, alleges breaches of various statutes, regulations and policies.

[12] The Defendant also argues that the Plaintiff fails to plead material facts in support of any alleged breach of his Charter rights.

[13] The Defendant also submits that the allegations raised are more appropriately the subject of an application for judicial review. She notes that the Plaintiff was aware of the lockdown decision in October 2019 and that the time for seeking judicial review of that decision has expired.

[14] I agree with the submissions of the Defendant that the Statement of Claim discloses no reasonable cause of action.

[15] In a motion to strike on the grounds that the Statement of Claim discloses no reasonable cause of action, pursuant to Rule 221(1)(a) of the Rules, no evidence can be submitted; see Rule 221(2). The Court is to accept that the allegations that are capable of being proven, are true; see *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959. That principle does not apply to allegations based on speculation and assumptions; see *Operation Dismantle Inc. v. The Queen* (1985), 18 D.L.R. (4th) 481 (S.C.C.) at pages 486-487 and 490-491.

[16] Insofar as the Plaintiff tries to ground an action upon breach of a statute, the allegations must fail. There is no such thing as a right of action for breach of legislation, as discussed by the Supreme Court of Canada in *Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205 at page 225 as follows:

For all of the above reasons I would be adverse to the recognition in Canada of a nominate tort of statutory breach. Breach of statute, where it has an effect upon civil liability, should be considered in the context of the general law of negligence. Negligence and its common law duty of care have become pervasive enough to serve the purpose invoked for the existence of the action for statutory breach.

[17] In order to obtain a remedy for any alleged statutory breach, the Plaintiff must establish a breach of the common law duty of care. The criteria for advancing a claim in negligence against the Defendant was addressed in *Childs et al v. Desormeaux*, [2006] 1 S.C.R. 643 when the Supreme Court of Canada stated the Canadian view of the “*Anns*” test for determining whether a duty of care is made out as follows:

- 1) is there “a sufficiently close relationship between the parties” or “proximity” to justify imposition of a duty and, if so,
- 2) are there policy considerations which ought to negative or limit the scope of the duty, the class of persons to whom it is owed or the damages to which breach may give rise.

[18] A claim for Charter damages cannot be entertained in the absence of adequate factual allegations. I refer to the decisions in *MacKay v. Manitoba*, [1989] 2 S.C.R. 357 and *Danson v. Ontario (Attorney General)* (1987), 60 O.R. (2d) 676 (C.A.).

[19] No material facts are pleaded to support a cause of action for any breach of Charter rights.

[20] I agree with the contentions of the Defendant that the “claims” in the Plaintiff’s Statement of Claim “sound” like challenges to administrative decisions. His claims about breaches of procedural fairness are similar to arguments made in the context of applications for judicial review.

[21] There is no evidence that the Plaintiff filed an application for judicial review within the time limited for such a proceeding. Subsection 18.1(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, provides as follows:

Time limitation

18.1 (2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

Délai de présentation

18.1 (2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

[22] There is no evidence that the Plaintiff sought an extension of time within which to file an application for judicial review.

[23] I am satisfied that the Defendant's objections to the Plaintiff's Statement of Claim are well grounded. I agree that the Statement of Claim discloses no cause of action and should be struck out, in its entirety, without leave to amend.

[24] The Defendant seeks costs in the amount of \$150.00, if successful upon her motion.

[25] Pursuant to the discretion afforded by Rule 400 of the Rules, that costs lie wholly within the discretion of the Court, I award costs to the Defendant in the amount of \$75.00.

ORDER in T-217-20

THIS COURT'S ORDER is that the Motion is granted, the Statement of Claim is struck out without leave to amend, with costs to the Defendant in the amount of \$75.00.

“E. Heneghan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-217-20

STYLE OF CAUSE: PAUL BURKE v. HER MAJESTY THE QUEEN

**MOTION IN WRITING CONSIDERED AT ST. JOHN'S, NEWFOUNDLAND AND
LABRADOR PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES***

ORDER AND REASONS: HENEGHAN J.

DATED: JUNE 21, 2021

WRITTEN REPRESENTATIONS BY:

No written representations from
the Plaintiff

Courtenay Landsiedel

FOR THE PLAINTIFF
(ON HIS OWN BEHALF)

FOR THE DEFENDANT

SOLICITORS OF RECORD:

Attorney General of Canada
Vancouver, British Columbia

FOR THE DEFENDANT