Date: 20080317

Docket: T-702-07

Citation: 2008 FC 356

Toronto, Ontario, March 17, 2008

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

MOHAMMAD ASLAM CHAUDHRY

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Mohammad Aslam Chaudhry (the "Plaintiff") appeals from the Order of Prothonotary Aalto. In the Order dated July 11, 2007, the Prothonotary dismissed the Plaintiff's motion for the entry of default judgment against Her Majesty the Queen (the "Defendant"), as well as the Plaintiff's action in its entirety.

[2] The Plaintiff was employed with Correctional Service Canada ("CSC") as a probationary employee, beginning on February 17, 2003. He began his employment at Bath Institution and was later transferred to Millhaven Institution. Following a Performance Evaluation Report, a recommendation was made on February 6, 2004 that his continued employment on probation be rejected for cause on or before February 16, 2004. That recommendation was made by Ms. Susan Sly, Acting Chief of Administrative Services.

[3] By Memorandum dated February 6, 2004, Mr. Jim Marshall, Warden of Millhaven Institution, advised the Plaintiff that he would be rejected as a probationary employee for cause, effective February 6, 2004.

[4] The Plaintiff subsequently filed a grievance pursuant to the *Public Service Staff Relations Act*, R.S.C. 1985 (the "PSSRA"), c. P-35, as rep. by *Public Service Modernization Act*, S.C. 2003, c. 22, s. 285, and the matter was referred to adjudication. A hearing was held in June 2005 and a written decision was delivered by the Adjudicator on July 13, 2005. In that decision, Adjudicator Ian Mackenzie reviewed the allegations made by the Plaintiff, the evidence submitted and the arguments as presented by both the Plaintiff and his employer. The Adjudicator concluded that he lacked jurisdiction to entertain the complaints and grievance because the Plaintiff had failed to prove his burden that his rejection on probation was "a sham, a camouflage or in bad faith."

[5] The Plaintiff sought judicial review of the decision of the Adjudicator cause number T-374-06. In a decision dated April 13, 2007, Justice Simpson dismissed the application for judicial review.

[6] On April 26, 2007, the Plaintiff issued a Statement of Claim, alleging that he had been the victim of tortious acts by Ms. Susan Sly, Mr. Jim Stevenson and Mr. Jim Marshall during the period of his probationary employment with CSC. Ms. Sly was the Acting Chief of Administrative Services at Millhaven Institution, Mr. Stevenson was the Assistant Warden, Management Services at Millhaven and Mr. Marshall was the Warden at Millhaven.

[7] According to the Motion Record filed by the Defendant on July 3, 2007, service of the Statement of Claim upon the Defendant was admitted on April 27, 2007.

[8] By letter dated May 31, 2007, Counsel for the Defendant advised the Plaintiff that his Statement of Claim raised the same issue that was raised in his grievance and complaint under the PSSRA, and that the Defendant, relying on the decision of the Supreme Court of Canada in *Vaughan v. Canada*, [2005] 1 S.C.R. 146, took the position that the Courts have no jurisdiction to deal with the type of action commenced here. Further, Counsel advised that if the Plaintiff voluntarily discontinued his action at this stage, the Defendant would not seek costs against him. If he failed to discontinue his action, the Defendant would move to strike the action.

[9] The Plaintiff did not discontinue his action. Rather, on June 20, 2007, he submitted a Notice of Motion seeking the entry of default judgment pursuant to the *Federal Courts Rules*, SOR/98-106 (the "Rules"). The Prothonotary dismissed this motion, on the grounds that the Statement of Claim disclosed no reasonable cause of action.

[10] The Plaintiff filed a Notice of Motion on September 5, 2007, appealing from the Order of Prothonotary Aalto. He sought an extension of time within which to appeal and further, an order reversing the Order of July 11, 2007. He argues that the Rules had been breached because the Order of July 11, 2007 was not mailed to him until August 21, 2007, more than 40 days after it was issued, contrary to Rule 395.

[11] The Plaintiff also submits that the Prothonotary had erred by accepting the Written Representations and the Motion Record of the Defendant after the pleadings were closed, contrary to Rule 202(a).

[12] He argues that the Prothonotary should not have considered the affidavit of Ms. Heather Graham that was filed as part of the Defendant's Motion Record. He submits that this was contrary to Rule 82 which prohibits the use of a solicitor's affidavit.

[13] The standard of review upon this appeal from a decision of a Prothonotary was discussed by the Federal Court of Appeal in *Merck & Co. v. Apotex Inc.* (2004), 30 C.P.R. (4th) 40 (F.C.A.) where the Court said the following at para. 19:

> ...
>
> Discretionary orders of prothonotaries ought not be disturbed on appeal to a judge unless:
>
> a) the questions raised in the motion are vital to the final issue of the case, or
> b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts.

[14] In this case, as noted by the Plaintiff, the Prothonotary made two orders: he dismissed the motion for default judgment and he dismissed the action in its entirety.

[15] Rule 210 provides for the entry of default judgment. Rule 210(4) describes the power of the Court upon a motion for default judgment as follows:

(4) On a motion under subsection (1), the Court may: (a) grant judgment; (b) dismiss the action; or (c) order that the action proceed to trial and that the plaintiff prove its case in such a manner as the Court may direct.	(4) Sur réception de la requête visée au paragraphe (1), la Cour peut : a) accorder le jugement demandé; b) rejeter l'action; c) ordonner que l'action soit instruite et que le demandeur présente sa preuve comme elle l'indique.

[16] A motion for default judgment must be supported by evidence. I refer in this regard to the decision in *Ragdoll Productions (UK) Ltd. v. Jane Doe*, [2003] 2 F.C. 120. The evidence must support the plaintiff's claim. In the absence of such evidence, the Prothonotary is authorized to dispose of the motion in accordance with Rule 210(4) by either granting the motion, dismissing the action or ordering the matter to proceed to trial.

[17] A motion for default judgment involves the exercise of discretion and is limited to what is claimed in the Statement of Claim; see *Island Tug & Barge Ltd. v. Haedong Co.* (2002), 217 F.T.R. 318.

[18] I see no error in the manner in which the Prothonotary exercised his discretion here. He dismissed the motion for default judgment and proceeded to examine the basis of the Plaintiff's claim.

[19] Similarly, I see no error in the manner in which the Prothonotary accepted the evidence and the Motion Record submitted by the Defendant. Contrary to the submissions of the Plaintiff, a motion received is not a "pleading" as defined in the Rules and the Defendant was entitled to respond to the Plaintiff's Motion Record by filing his own. "Pleading" is defined in Rule 2 as follows:

"pleading" means a document in a proceeding in which a claim is initiated, defined, defended or answered.	"acte de procédure" Acte par lequel une instance est introduite, les prétentions des parties sont énoncées ou une réponse est donnée.

[20] The affidavit of Ms. Graham, which was submitted by the Defendant as part of her Motion Record, is indeed a solicitor's affidavit. However, Rule 82 is not an absolute bar to the use of such an affidavit. Rule 82 provides as follows:

82. Except with leave of the Court, a solicitor shall not both depose to an affidavit and present argument to the Court based on that affidavit.	82. Sauf avec l'autorisation de la Cour, un avocat ne peut à la fois être l'auteur d'un affidavit et présenter à la Cour des arguments fondés sur cet affidavit.

[21] The Prothonotary did not make a specific ruling with respect to the use of the affidavit from Ms. Graham but in any event, she was not the lawyer who argued before the Prothonotary. Furthermore, her affidavit set forth facts concerning prior proceedings undertaken by the Plaintiff relative to the termination of the Plaintiff's employment. There was nothing improper about its presentation to the Court.

[22] The most important aspect of this matter is the Prothonotary's Order dismissing the Plaintiff's action. Since this Order has effectively ended the action, the decision will be reviewed upon the *de novo* standard. In other words, this Court will consider whether the Plaintiff's action is well-founded.

[23] In *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, the Supreme Court of Canada said that the test in Canada to strike out pleadings is whether it is plain and obvious that the Claim discloses no reasonable cause of action.

[24] The present Statement of Claim relates to the termination of the Plaintiff's employment with CSC while he was a probationary employee. In the context of public service employment, the Defendant has the right to establish conditions of employment, including the category of probationary employees. The rights and remedies of complaints and adjudication of grievances at the time of the Plaintiff's employment were governed by the *PSSRA*. The Plaintiff sought access to the grievance and adjudication process and after a hearing, his grievance was rejected on jurisdictional grounds. As noted above, that decision was upheld following the Plaintiff's application for judicial review.

[25] The Plaintiff, as a former employee of the Defendant, has no absolute right to commence litigation relative to his employment. That position was clearly stated by the Supreme Court of Canada in *Vaughan*, where the Court said the following at para. 2:

> I agree with the appellant that the statutory language and context of the PSSRA do not amount to the sort of explicit ouster of the jurisdiction of the courts as was the case in Weber v. Ontario Hydro, [1995] 2 S.C.R. 929. Nevertheless, while the courts retain a residual jurisdiction to deal with workplace-related issues falling under s. 91 of the PSSRA, but not arbitrable under s. 92, the courts should generally in my view, as a matter of discretion, decline to get involved except on the limited basis of judicial review. The facts of this case, insofar as we can ascertain them, afford a good illustration

> of why judicial restraint in this area is desirable. I would dismiss the appeal.

[26] As in *Vaughan*, the Plaintiff here is trying to “dress-up” his claim as a claim in tort, to avoid the jurisdictional question that will arise if he simply based his claim on the termination of his employment while on probation. Again, I refer to the decision in *Vaughan* where Justice Binnie said the following at para. 11:

> On January 29, 1999, the appellant started an action in negligence against the respondent alleging that it "knew, or ought to have known, that a reasonable job offer had not been provided to the [appellant] and that the [appellant] was eligible for ERI" (statement of claim, at paras. 31-32). It is the negligence action that the respondent employer is attempting to have struck out. The appellant presumably felt obliged to frame his action, with a degree of artificiality, in the tort of negligence to circumnavigate the PSSRA. However, as our present Chief Justice wrote in Weber, at para. 49: One must look not to the legal characterization of the wrong, but to the facts giving rise to the dispute." Here the facts quite clearly arise out of the employer-employee relationship.

[27] Accordingly, I conclude that the Plaintiff’s action has no reasonable prospect of success, which is the test set out by the Supreme Court of Canada in *Hunt*. The Prothonotary did not err when he dismissed the Plaintiff’s action.

JUDGMENT

In the result, the appeal is dismissed with costs in the amount of $750.00 inclusive of fees, disbursements and GST.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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Liz Tinker	FOR THE DEFENDANT

SOLICITORS OF RECORD:

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