Date: 20081106

Docket: T-1248-07

Citation: 2008 FC 1233

Ottawa, Ontario, November 6, 2008

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

ANTHONY MOODIE

Plaintiff

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF NATIONAL DEFENCE

Defendant

REASONS FOR ORDER AND ORDER

[1] This is an appeal under Rule 51 of the *Federal Courts Rules*, SOR/98-106 (the Rules) from the decision of Prothonotary Milczynski, dated May 27, 2008, which dismissed the applicant's action. The applicant's Amended Statement of Claim was struck on the grounds that the *National Defence Act*, R.S. 1985, c. N-5 (the Act) and the *Queen's Regulations and Orders for the Canadian Forces* (the QR&O) establish an exclusive statutory scheme for the resolution of service-related disputes between members of the Canadian Armed Forces (CAF) and Her Majesty the Queen.

[2] In his Amended Statement of Claim, the applicant seeks a declaration that he was wrongfully released from the CAF and an order restoring him to office. He also claims damages of $4.3 million for breach of his right to security of the person as guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, enacted as Schedule B to the *Canada Act*, 1982 (U.K.), 1982, c. 11 (the *Charter*), breach of equality rights under section 15 of the *Charter*, loss of reputation and defamation, intentional infliction of mental anguish, negligence and breach of fiduciary duty.

[3] These claims are based on allegations arising from the applicant's service with the CAF from 1995 to 2005. The applicant acknowledges that he filed grievances with respect to these allegations. He claims the respondent has either blocked his access to the grievance procedure under the Act, or has unreasonably refused to process and dispose of his grievances in an attempt to frustrate him from getting redress. The applicant claims that because of these alleged wrongful actions by the respondent, he has undergone medical treatment for stress and anxiety.

[4] The applicant filed no evidence on this motion and relies on the allegations of fact in his Amended Statement of Claim. He initially sought to appeal the Prothonotary's decision to the Federal Court of Appeal and then sought and obtained an extension of time to bring this motion under Rule 51. In granting the extension, Justice Harrington applied the test set out in *Canada (Attorney General) v. Hennelly*, (1999), 244 N.R. 399, that is whether there was (a) a continuing intention to appeal; (b) an arguable case; (c) a reasonable explanation for the delay; and (d) whether the other party would suffer prejudice because of an extension: *Moodie v. Canada (Minister of National Defence*), 2008 FC 968, [2008] F.C.J. No. 1202.

[5] Justice Harrington determined there had been a continuing intent to appeal, the respondent would not be prejudiced by the grant of an extension and that there was a reasonable explanation for the delay in that counsel had overlooked Rule 51.

[6] With respect to whether the applicant has an arguable case, at paragraph 9 of his reasons for order Justice Harrington commented as follows:

> In light of the recent decision of the Federal Court of Appeal in *Canada v. Bernath*, 2007 FCA 400, 290 D.L.R. (4th) 357, **a fairly arguable case can be made** that, despite the general rule that an application for judicial review cannot be commenced before the grievance procedure in the underlying statute is exhausted and that one must at least commence an application for judicial review against the final decision of a federal board or tribunal before suing in damages (*Canada (Minister of Citizenship and Immigration) v. Hinton*, 2008 FCA 215), there is no authority within the aforementioned grievance procedure to grant a monetary remedy to a member of the Canadian Forces who alleges that his Charter rights have been violated. It is thus arguable that one need not wait for what cannot be done. [Emphasis added]

[7] Justice Harrington concluded, at paragraph 10 of his reasons, that "it may be that at least some of the paragraphs of the amended statement of claim could have survived the motion to strike". Accordingly, he granted the extension of time to appeal.

[8] In his written argument on this motion the applicant submits that he seeks to further amend his Statement of Claim. He has not specified any proposed amendment. Alternatively, should the Court find that judicial review is a prerequisite to proceeding with an action in this context, he states

that he wishes to convert the action into an application for judicial review. But he has not identified any decision or decisions by the CAF or the grievance board that could be subject to judicial review.

Issues

[9] The respondent has framed the primary issue on this appeal in jurisdictional terms and submits that the jurisdiction of the Court has been ousted by the statutory grievance process. Alternatively, the respondent submits, assuming the Court holds residual jurisdiction, the issue is whether the Court should defer to the comprehensive statutory scheme.

[10] The applicant has identified the issues as whether the Federal Court has jurisdiction to hear this dispute and whether the applicant has to pursue judicial review before launching an action for damages.

[11] In my view, the questions which arise on this motion are as follows:

a) What standard of review governs an appeal from the decision of a prothonotary striking out a Statement of Claim?

b) Is the applicant required to exhaust the statutory grievance process applicable to workplace disputes in the Canadian Armed Forces before seeking the intervention of this Court?

Standard of Review

[12] As set out in *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425 (C.A.), 149 N.R. 273 and restated in *Merck & Co. v. Apotex Inc.*, 2003 FCA 488, [2004] 2 F.C.R. 459, discretionary orders of prothonotaries ought not to be disturbed on appeal to a judge unless:

> a) the questions 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 facts.

[13] A decision that can be interlocutory or final depending on the result should be considered vital to the final resolution of the case. The parties agree that this is a proper case to consider the matter *de novo* as the Prothonotary's decision disposed of the proceeding and as such was final.

Is the applicant required to exhaust the CAF statutory grievance process before seeking the intervention of this Court?

[14] The applicant submits that his averments of fact in his Amended Statement of Claim must be accepted by this Court as true or capable of being proven. He asserts that he has tried to use the statutory scheme for grievances and the respondent has obstructed and frustrated his attempts to access those procedures. The respondent's behaviour, the applicant alleges, constitutes a breach of his rights under the *Charter* for which a remedy in damages is not available under either the statutory grievance procedure or through a judicial review application in this Court. Accordingly, he submits, it cannot be said there is no chance of success in his bid to have the Court declare that the respondent's failure to accept or to dispose of his grievances is a stand-alone tort sounding in damages.

[15] The respondent denies the applicant's assertion of the facts and relies on the affidavit of Gordon Prieur filed on the motion to dismiss before Prothonotary Milczynski and resubmitted for this appeal. Mr. Prieur is Inquiries and Complaints Officer at the Canadian Forces Grievance Authority within the Department of National Defence. With supporting exhibits, Mr. Prieur's affidavit outlines the CAF grievance procedure and the status of six grievances filed by the applicant.

[16] Mr. Prieur deposes that four of the grievances are being held in abeyance pending the outcome of this action as required by section 7.16(1) of the QR&O. With respect to the remaining two grievances, the affidavit indicates that the applicant has not exhausted the avenues available to him to seek redress within the CAF. Mr. Prieur was not cross-examined on his affidavit and the applicant has not challenged the accuracy of its content.

[17] The respondent submits that the action struck out by the Prothonotary was an attempt by the applicant to circumvent the CAF grievance procedure by claiming *Charter* relief. That procedure, set out in sections 29 to 29.28 of the Act and sections 7.01 to 7.18 of the QR&O, constitutes a comprehensive and exhaustive code for determining grievances by CAF members.

[18] The applicant has two avenues of redress, the respondent submits: he can continue with his grievances seeking reinstatement to the CAF and other remedies, or he could apply for a pension under the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, S.C. 2005, c. 21 to compensate him for the injury he claims to have suffered. The action is, therefore, at best premature and at worst, an abuse of the process of the Court. If unsatisfied with the relief

obtained through either of these avenues, the argument goes, he can then bring an application for judicial review. That would not preclude the applicant from ultimately bringing an action for damages should he fail to obtain redress through these channels.

[19] Rule 221(1)(a) provides that 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 discloses no reasonable cause of action or defence, and may order the action be dismissed. Under paragraph 221(1)(f), the pleading may also be struck out on the ground that it is an abuse of process.

[20] A motion to strike a pleading on the ground that it discloses no reasonable cause of action will be allowed only if, assuming the facts alleged in the statement of claim to be true, the judge concludes that the outcome of the case is "plain and obvious" or "beyond reasonable doubt": *Hunt v. Carey Canada Inc*., [1990] 2 S.C.R. 959, 74 D.L.R. (4th) 321 at page 980.

[21] The assumption that material facts in a statement of claim must be taken as true does not mean that allegations based on assumptions and speculation must be accepted as fact. They should be assumed to be true if capable of proof through evidence that can be adduced at trial: *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, 74 D.L.R. (4th) 321 at paragraph 27. That applies equally to alleged breaches of *Charter* rights. The plaintiff must show that he has at least some chance of success.

[22] The case for a finding that the applicant has been deprived of security of the person is not readily apparent from the Amended Statement of Claim nor is it clear how his equality rights under

s. 15 of the *Charter* were breached by the military authorities. The applicant has offered nothing more than the bald allegations of his claims.

[23] The practice of the Court, as set out in Rule 221(2), is that no evidence shall be heard on a motion for an order under paragraph 221(1)(a). However, the jurisprudence is to the effect that an application to strike a pleading on the basis that the cause of action is beyond the jurisdiction of the Court may be supported by affidavit evidence: *Erasmus v. Canada (No.2)*, [1992] 2 F.C. 681, [1992] 2 C.T.C. 21 (C.A.). Nor will the court refuse affidavit evidence showing that an essential allegation of the claim is false: *Cameron v. Ciné St.-Henri Inc*., [1984] 1 F.C. 421 (T.D.), 2 C.P.R. (3d) 491. As I understand the applicant's Amended Statement of Claim, an essential allegation is that the respondent has refused to deal with his grievances.

[24] There is no restriction on the reception of affidavit evidence on a motion based on the other grounds set out in Rule 221(1) including that the pleading is an abuse of process.

[25] I conclude that Mr. Prieur's affidavit with respect to the CAF grievance procedure and the status of the grievances filed by the applicant is admissible on this appeal as an exception to the exclusion in Rule 221 (2) in support of the respondent's contention that an essential allegation of the applicant's claim is false or that the action is an abuse of process.

[26] The respondent's unchallenged evidence is that the applicant's grievances are being processed under the statutory scheme and that he is not being blocked from access to that scheme.

[27] This Court has described the grievance procedure created under the *National Defence Act* as the "broadest possible" and that it "accommodates any and every wording, phrasing, expression of injustice, unfairness, discrimination", and is "exhaustively comprehensive": *Jones v. Canada*, (1994) 87 F.T.R. 190, 51 A.C.W.S. (3d) 1271 at paragraph 9.

[28] It has been consistently held that the CAF grievance procedure constitutes an adequate alternative remedy that must be exhausted before an individual can turn to the Courts for redress: *Jones*, above; *Sandiford v. Canada*, 2007 FC 225, 309 F.T.R. 233; *Gallant v. Canada* (1978), 91 D.L.R. (3d) 695, [1978] F.C.J. No. 1122 (F.C.T.D.); *Pilon v. Canada* (1996), 119 F.T.R. 269 (T.D.), 23 C.C.E.L. (2d) 267; *Villeneuve v. Canada* (1997), 130 F.T.R. 134 (T.D.), 71 A.C.W.S. (3d) 669; *Haswell v. Canada (Attorney General)* (1998), 56 O.T.C. 143 (Gen. Div.), 77 A.C.W.S. (3d) 541 aff'd. (1998), 116 O.A.C. 395 (C.A.);.*Anderson v. Canada* (Armed Forces) (C.A.) (1996), [1997] 1 F.C. 273, 141 D.L.R. (4th) 54; and *Chisholm v. Canada (Attorney General)*, 2003 FCT 387, 231 F.T.R. 155.

[29] In *Sandiford*, above, Madam Justice Layden-Stevenson described the rationale for this holding at paragraph 29 of her reasons:

> This approach is consistent with the reasoning of the Supreme Court of Canada in Weber v. Ontario Hydro, [1995] 2 S.C.R. 929. There, the court determined that where the subject matter of a dispute is one that is covered by a statutory scheme or collective agreement, the court should, as a general rule, defer jurisdiction to the mechanisms set out in the applicable scheme (paras. 50-58 and 67). More recently, in Vaughn v. Canada, [2005] 1 S.C.R. 146, the Supreme Court emphasized that regard must be had to the facts giving rise to the dispute rather than the legal characterization of the wrong to determine whether there is an adequate alternative remedy (para. 11). In all but the most unusual circumstances, the court should decline jurisdiction and defer to statutory grievance schemes (para. 2).

[30] Justice Layden-Stevenson found that the nature of Mr. Sandiford's complaints in that case fell squarely within the reach of the grievance procedure. Similarly, I am of the view that the CAF grievance procedure is particularly well suited to address the issues which Mr. Moodie has raised. As was found by Prothonotary Milczynski, "…the alleged incidents arise directly out of the applicant's employment with the CAF. The harm to be remedied, the nature of the relief requested and the facts and circumstances resulting in the alleged harm relate to the regulation of his military life." That factual context is not altered by the applicant's characterization of the incidents as breaches of his *Charter* rights.

[31] The applicant submits that the recent decision of the Federal Court of Appeal in *Bernath*, above, as well as that of Justice Barnes in *Manuge v. Canada*, 2008 FC 624, [2008] F.C.J. No. 787, support the proposition that despite the general rule that an application for judicial review must be taken before a civil action in damages, an action for damages for breach of *Charter* rights could proceed without resorting to judicial review.

[32] In my view, *Manuge* does not support the applicant's position. In that case, Justice Robert Barnes ruled that in certain circumstances, an action by a member of the Canadian Armed Forces could proceed as a class action notwithstanding that judicial review had not been pursued. The claim dealt with a challenge to the lawfulness of a government policy. Justice Barnes concluded, at paragraph 17 of his reasons, that "any concerns regarding ensuring the finality around administrative decisions carried less weight where the challenge is limited to the lawfulness of a government policy and where the application of that policy has on-going implications for the party

affected". In this matter, the claim Mr. Moodie is pursuing is based on facts or incidents that have occurred in the past and are relevant only to him.

[33] In *Bernath*, the applicant had been partially successful with his grievance but the Chief of the Defence Staff declined to award monetary compensation as he considered that he lacked the authority to do so. Rather than bring an application for judicial review of that decision, the appellant began an action for damages under section 24 of the *Charter* for infringement of his right to security of the person.

[34] The Statement of Claim was struck and the action was dismissed by Prothonotary Mireille Tabib on the ground that the Chief of Defence Staff had the necessary jurisdiction to hear and decide the claim for damages; it could therefore have been raised during the grievance process and as a result the action constituted an abuse of process: *Bernath v. Canada*, 2005 FC 1232, 275 F.T.R. 232. The action was reinstated on appeal of the Prothonotary's decision by Justice Simon Noël in *Bernath v. Canada*, 2007 FC 104, 321 F.T.R. 1.

[35] Justice Noël concluded after an extensive review of the facts and the law that the CAF grievance process had not been designed to address issues of *Charter* rights and the relief to be granted with respect thereto. For those purposes, it was not a tribunal of competent jurisdiction within the meaning of section 24 of the *Charter*. Absent that jurisdiction, abuse of process did not arise. Furthermore, the applicant did not need to proceed first by way of judicial review before bringing his action.

[36] Upon appeal by the Crown, the Federal Court of Appeal held that Justice Noël had made no fundamental error in applying the functional and structural approach set out by the Supreme Court of Canada in *R. v. 974649 Ontario Inc.,* 2001 SCC 81, [2001] 3 S.C.R. 575 for determining whether the tribunal is an appropriate forum for ordering the remedy at issue. The Court noted, at paragraph 8 of its reasons, that in labour relations cases the courts have been adopting a non-interventionist approach for some years with regard to administrative tribunals specialized in this area: *Vaughan v. Canada*, [2005] 1 S.C.R. 146, par. 13.

[37] In my view, *Bernath* is distinguishable from the case at bar as the grievance procedure in that instance had been completed but was unable to provide the remedy which the plaintiff was seeking. Here, the applicant filed his action for damages prior to the final determination or completion of the grievance process. There has been no finding of error in any decision or action of the CAF respecting the applicant's career and no determination that a remedy is unavailable. This is not a case in which the grievance procedure has been found to be inadequate to the task but rather one in which the applicant seeks to circumvent that process.

[38] The primary remedy that the applicant seeks is a declaration that he has been wrongfully released from office and an order restoring him to office in the CAF. That is clearly a form of redress that he could obtain through the grievance process. Alternatively, he may be entitled to seek a disability pension for injuries incurred during his service. It is simply premature to assume that a remedy could not be provided through the administrative processes when the applicant has failed to take advantage of them. And these are the type of administrative decisions that are properly the subject of judicial review applications.

[39] The Court of Appeal in *Bernath* cited *Prentice v. Canada (Royal Canadian Mounted Police*), 2005 FCA 395, [2006] 3 F.C.R. 135 to illustrate the point that the plaintiff would find it difficult to make out a case for *Charter* infringement. In *Prentice*, the plaintiff had brought an action in the Federal Court claiming damages against the Crown for violation of his right to security of the person. The Crown sought to have the action struck on the grounds, among others, that the remedy sought could be claimed by filing grievances under Part III of the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10 or Part II of the *Canada Labour Code*, R.S.C. 1985, c. L-2.

[40] The Court of Appeal in holding that the action was a disguised grievance or discrimination complaint, struck out the Statement of Claim and dismissed the action. The Court had this to say at paragraph 76 of its reasons:

> …a plaintiff who wishes to bring action against the Crown in civil liability for damages must first exercise the remedies he or she is offered by administrative law. Section 24 of the *Charter* is not a life preserver for rescuing parties who fail to exercise the remedies that they have under 'ordinary' laws. It is not the role of the Federal Court to do things that the statutes assign to arbitrators and ministers. It is quite simply not this Court's function to decide, in an action brought under the Charter, whether a grievance or a claim for disability pension is justified, let alone to determine the amount of damages or of the pension that arbitrators or ministers could have granted if the matter had been put to them.

[41] Similarly, this action is a disguised grievance and discrimination complaint and the applicant has failed to exhaust the remedies that are available to him under the statutory grievance procedure. In my estimation, it is plain and obvious and beyond reasonable doubt that this action is premature pending the completion of those proceedings and has no chance of success.

[42] In oral argument, counsel for the applicant suggested that in the interests of judicial comity I should defer to Justice Harrington's assessment that "a fairly arguable case" can be made in favour of the applicant's claims.

[43] The principle of judicial comity is that a judge of a lower court should exercise restraint when faced with a legal point previously decided by another member of that same Court: *Abbott Laboratories v. Canada (Minister of Health)*, 2006 FC 120, [2006] 4 F.C.R. 41. It is not the application of the rule of *stare decisis*, but recognition that decisions of the Court should be consistent so as to provide litigants with some predictability: *Alfred v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1134, 279 F.T.R. 7.

[44] I note that my brother judge's assessment of the strength of the case was made in the context of a motion for an extension of time where the legal threshold is low and the exigencies require a fairly immediate decision. Justice Harrington considered that there was a "fairly arguable case" on the strength of *Bernath*. In my view, *Bernath* is distinguishable for the reasons I have given above. Moreover, I have had a more complete evidentiary record and have had an opportunity to review authorities which point in a different direction. The conclusion I have reached is, in my view, consistent with the weight of the jurisprudence.

[45] In light of these findings, it is not necessary for me to consider whether the "arguable case" standard required for the grant of an extension of time is equivalent to that required to defeat a motion to dismiss. But I would be loath in any event to accept that a ruling on an extension motion would be dispositive of the appeal for which additional time was granted.

[46] Having considered the applicant's alternative submissions, I see no point in attempting to further amend the Statement of Claim when the applicant has failed to set out how that might be done. Nor do I consider it appropriate to convert this action into an application for judicial review, assuming without deciding that I would have the jurisdiction to do so. There are, as yet, no decisions on the face of the record that could be made the subject of judicial review.

[47] It will remain open to the applicant to pursue his grievances and to seek judicial review of the resulting decisions and, if necessary, to then renew his action for damages.

[48] Accordingly, I dismiss the motion and exercising my discretion *de novo*, strike the Amended Statement of Claim and dismiss the action with costs to the respondent.

ORDER

IT IS THE ORDER OF THIS COURT that the motion appealing the decision of Prothonotary Milczynski, dated May 27, 2008, is dismissed, the Amended Statement of Claim herein is struck in its entirety and the action dismissed with costs to the respondent throughout.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1248-07
STYLE OF CAUSE:	ANTHONY MOODIE and HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF NATIONAL DEFENCE
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