Federal Court  Cour fédérale

Date: 20121219

Docket: T-1390-12

Citation: 2012 FC 1514

Ottawa, Ontario, December 19, 2012

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

JASON LEWIS

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR ORDER AND ORDER

[1] The plaintiff is an inmate in a federal penitentiary in Edmonton, Alberta. On July 16, 2012, he filed a Statement of Claim seeking damages in relation to the tort of misfeasance in public office that has allegedly been committed by some Correctional Service of Canada (CSC) representatives. The Statement of Claim initially identified the Attorney General of Canada as the defendant, but the style of cause was amended by this Court in an Order issued by Justice Mosley on November 7, 2012. The respondent moves for an Order under Rule 221(1)(a) of the *Federal Courts Rules* [the Rules], striking the Statement of Claim, without leave to amend, for failing to disclose a reasonable cause of action [the Motion to Strike].

I. Context

[2] The plaintiff commenced this action following the issuance of a judgment of this Court allowing an application for the judicial review of a decision regarding a grievance filed by the plaintiff (*Lewis v Canada (Correctional Service)*, 2011 FC 1233 (available on CanLII)).

[3] The plaintiff's grievance challenged an Assessment for Decision, dated October 3, 2008, that contained two recommendations: (1) that his request for an institutional transfer be refused; and (2) that his Institute Adjustment Score be increased. Both recommendations were eventually adopted in a decision dated March 5, 2008, made by the acting warden. The plaintiff's grievance wound its way through the internal grievance procedure and was eventually dealt with at the third, and final, level where the plaintiff raised several issues. Four of the issues raised by the plaintiff were rejected by the Assistant Commissioner for not having been raised at the lower levels of the grievance procedure.

[4] The plaintiff filed an application for judicial review challenging that decision. He claimed that the decision was made in breach of his right to procedural fairness because he had not been provided with the Executive Summary recommendations, prepared by Analyst Dwight Lalonde, prior to the making of the decision, and he had not been given an opportunity to explain why he was not able to raise the "new" issues at the lower levels of the grievance procedure. The plaintiff also claimed that the Assistant Commissioner violated subsection 27(1) of the *Corrections and Conditional Release Act*, SC 1992, c 20 [the Act], which states that when an offender is entitled to make representations in relation to a decision affecting him that is to be taken by CSC, he should be provided with the information that is to be considered in the decision-making process.

[5] The Court allowed the judicial review and set aside the third-level grievance decision. The judge found that CSC's representatives had not complied with subsection 27(1) of the Act and had breached the plaintiff's right to be treated fairly. The judge further found that CSC's representatives had failed to comply with paragraph 37 of Commissioner's Directive 81, which directed the decision maker to provide the grievor with a complete response to all the issues that he had submitted.

[6] The plaintiff subsequently commenced this action.

II. The plaintiff's pleading

[7] In his Statement of Claim, the plaintiff claims that the Analyst and the Assistant Commissioner committed the tort of misfeasance in public office. The Statement of Claim contains allegations that revolve around the following: (1) the Analyst and the Assistant Commissioner were aware of the provisions of the Act and of the Commissioner's Directives and it was their duty to carry out their responsibilities in accordance with them; (2) they failed to abide by the Act and by Directive 81, forcing the plaintiff to challenge the decision dismissing his grievance before this Court; (3) CSC's representatives would need to be wilfully blind or reckless not to be aware of the harm they caused to the plaintiff; and (4) they acted in bad faith.

[8] Rule 221(1) of the Rules provides that the Court may strike a pleading if it "discloses no reasonable cause of action". The stringent test for striking out a Statement of Claim on that basis is whether, taking the facts as pleaded, it is "plain and obvious" that the action discloses no reasonable cause of action. This test was reiterated by the Supreme Court in *R v Imperial Tobacco Canada*

Ltd., 2011 SCC 42 at para 17, [2011] 3 SCR 45, where Justice McLachlin stressed that "[w]here a reasonable prospect of success exists, the matter should be allowed to proceed to trial".

[9] The Court also insisted, at paragraph 22, that the claimant must clearly plead the facts supporting the claim:

> […]It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.

[10] It is also well established that the Court must read the pleading generously with a view to accommodating drafting deficiencies (*Brazeau v Canada (Attorney General)*, 2012 FC 648 at para 15 (available on QL) [*Brazeau*], *Jones v Kemball*, 2012 FC 27 at para 4 (available on CanLII)). This, however, does not exempt the claimant from pleading the material facts supporting the claim. Bare assertions and conclusions are not sufficient.

[11] In *Brazeau*, at para 15, Justice Snider, summarized as follows this requisite:

> The jurisprudence also establishes that a statement of claim does not disclose a cause of action where it contains bare assertions, but no facts on which to base those assertions (*Vojic v Canada (MNR)*, [1987] 2 CTC 203, [1987] F.C.J. No. 811 (CA)). Moreover, a conclusion of law pleaded without the requisite factual underpinning to support the legal conclusions asserted is defective, and may be struck out as an abuse of Court (*Sauve v Canada*, 2011 FC 1074 at para 21, [2011] F.C.J. No. 1321).

[12] In *Odhavji Estate v Woodhouse*, 2003 SCC 69 at para 15, [2003] 3 SCR 263 [*Odhavji*], as in this case, the issue related to the striking of a Statement of Claim for want of disclosing a reasonable cause of action. As in this case, the tort of misfeasance in public office was claimed. The Court indicated that the primary question in dealing with the Motion to Strike was "whether the statement of claim pleads each of the constituent elements of the tort" (para 33).

[13] The Supreme Court discussed the constituent elements of the tort of misfeasance of a public office and stated that there are two essential elements to the tort. Defining those elements, the Court wrote as follows at para 23:

> In my view, there are two such elements. First, the public officer must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer. Second, the public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff. […]

[14] The Court expanded and stated that the essential ingredient was "whether the alleged misconduct is deliberate and unlawful" (para 24). The Court then offered further clarification, indicating that "misfeasance in a public office requires an element of 'bad faith' or 'dishonesty'" and that knowledge of harm is insufficient to conclude that a public officer acted in bad faith or dishonestly (para 28).

[15] This Court must determine whether the applicant's Statement of Claim pleads each element of the alleged tort of misfeasance in public office. In addition to the principles set out in the jurisprudence with respect to the test for striking out pleadings, the Court must consider Rules 174 and 181 of the Rules. Rule 174 requires that every pleading "contain a concise statement of the material facts on which the party relies". The first paragraph of Rule 181 requires that allegations be particularized. It reads as follows:

> 181. Particulars – A pleading shall contain particulars of every allegation contained therein, including
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> (a) particulars of any alleged misrepresentation, fraud, breach of trust, wilful default or undue influence; and
> (b) particulars of any alleged state of mind of a person, including any alleged mental disorder or disability, malice or fraudulent intention.

[16] In *Merchant Law Group v Canada (Revenue Agency)*, 2010 FCA 184, 405 NR 160, the Federal Court of Appeal was seized with a situation somewhat similar to the situation in this case. The allegation of misfeasance in a public office was articulated as follows at para 32:

> Since 1992, the Government sought collection contrary to legislation, regulation, and its own policies, knowing that its conduct was unlawful and likely to injure the Class. In particular, for the purposes of harassing and injuring the Collector Subclass, and in bad faith, the Government ignored P-182R, P-209, and other interpretation and policy instruments.

[17] Justice Stratas, writing for the Court, discussed the sufficiency of the pleading and offered some guidance with respect to allegations of bad faith. His remarks read as follows:

> [34] I agree with the Federal Court's observation (at paragraph 26) that paragraph 12 of the amended statement of claim "contains a set of conclusions, but does not provide any material facts for the conclusions." When pleading bad faith or abuse of power, it is not enough to assert, baldly, conclusory phrases such as "deliberately or negligently," "callous disregard," or "by fraud and theft did steal": *Zundel v. Canada*, 2005 FC 1612, 144 A.C.W.S. (3d) 635; *Vojic v. Canada* (M.N.R.), [1987] 2 C.T.C. 203, 87 D.T.C. 5384 (F.C.A.). 'The bare assertion of a conclusion upon which the court is called upon to pronounce is not an allegation of material fact": *Canadian Olympic Association v. USA Hockey, Inc.* (1997), 74 C.P.R. (3d) 348, 72 A.C.W.S. (3d) 346 (F.C.T.D.). Making bald, conclusory allegations without any evidentiary foundation is an abuse of process: *AstraZeneca Canada Inc. v. Novopharm Limited*, 2010 FCA 112 at paragraph 5. If the requirement of pleading material facts did not exist in Rule 174 or if courts did not enforce it according to its terms, parties would be able to make the broadest, most sweeping allegations without evidence and embark upon a fishing expedition. As this Court has said, "an action at law is not a fishing expedition and a plaintiff who starts proceedings

> simply in the hope that something will turn up abuses the court's process": *Kastner v. Painblanc* (1994), 58 C.P.R. (3d) 502, 176 N.R. 68 at paragraph 4 (F.C.A.).
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> [35] To this, I would add that the tort of misfeasance in public office requires a particular state of mind of a public officer in carrying out the impunged action, i.e., deliberate conduct which the public officer knows to be inconsistent with the obligations of his or her office*: Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69 at paragraph 28. For this tort, particularization of the allegations is mandatory. Rule 181 specifically requires particularization of allegations of "breach of trust," "wilful default," "state of mind of a person," "malice" or "fraudulent intention."

[18] These principles apply to the case at bar. The Statement of Claim contains bald allegations that are purely speculative, not particularized, and not supported by facts. It does not disclose any facts that, if proven, could support a conclusion of misfeasance in a public office. To be more specific, the Statement of Claim does not disclose any facts that could support a conclusion that CSC's representatives deliberately failed to deal with the plaintiff's grievance in accordance with the Act and the Commissioner's Directives or that they were aware that their conduct was unlawful and likely to harm the plaintiff.

[19] In his Responding Motion Record, the plaintiff claims that his Statement of Claim is sufficiently particularized to disclose a reasonable cause of action. However, at the same time, he argues that he still has the opportunity to amend his Statement of Claim, without leave, until a defence is filed. He also adds that the defendants should have asked for particulars under Rule 181(2) of the Rules rather then seeking the dismissal of the action.

[20] First, for the reasons expressed above, the Court is of the view that the plaintiff's Statement of Claim is insufficient to disclose a reasonable cause of action, and that it does not comply with

Rules 174 and 181, as it is not particularized and does not set out the material facts in support of the bald allegations of deliberate unlawful conduct and awareness of the injury caused to the plaintiff.

[21] Second, the Court has to assess the sufficiency of the Statement of Claim that is on the record without speculating as to what the plaintiff may eventually add to it through an amendment. The filing of the respondent's Motion to Strike gave the applicant an indication of the concerns that his Statement of Claim may have raised. In addition, in the Order issued on November 7, 2012, the Court clearly informed the plaintiff that his Statement of Claim, as filed, failed to disclose a viable cause of action. Justice Mosley wrote the following:

> […] The plaintiff must understand, however, that on the basis of the record thus far his Statement of Claim does not contain a viable cause of action and should he fail to demonstrate that there is one and seek an amendment to the Statement of Claim, it will be struck and the action dismissed.

[22] Despite the Court's *mise en garde*, the plaintiff has not amended his Statement of Claim. The plaintiff's Responding Motion Record cannot supplement or replace a defective Statement of Claim. Moreover, even if the Court was to consider the factual allegations contained in the plaintiff's Responding Motion Record as if they were included in the Statement of Claim, or was to allow the plaintiff to amend is Statement of Claim accordingly, the Court would reach the same conclusion.

[23] The plaintiff essentially claims in his written representations that it was the duty of CSC's representatives to know the Act, the Regulations and the Commissioner's Directives and that, by not abiding by them, they acted intentionally. The plaintiff claims that CSC'S representatives cannot plead ignorance of the law. With respect, I am of the view that it is not sufficient to allege that

because it was the responsibility of CSC's representatives to deal with the applicant's grievance in accordance with the Act, Regulations and Directives, there is an inference that, in violating them, they acted deliberately and in bad faith and they knew that their conduct was unlawful and likely to harm the plaintiff. In order to proceed to trial, those kinds of allegations must be supported by facts that, if proven, would allow the Court to concluded that CSC's representatives acted in a deliberate manner and knew that their conduct was unlawful and likely to injure the plaintiff. The Statement of Claim, as filed, is insufficient to support such conclusions.

[24] Finally, while Rule 181(2) provides a party the opportunity, on motion, to request that another party be ordered to provide "further and better particulars of any allegation in its pleading", this possibility does not exempt the plaintiff from his initial obligation to file a Statement of Claim that contains "a concise statement of the material facts on which [he] relies" (Rule 174) and to provide "particulars of every allegation" (Rule 181(1)), especially when bad faith is alleged.

[25] I therefore conclude that the Statement of Claim does not disclose a reasonable cause of action as it does not have a reasonable chance of success. Furthermore, I am of the view that the plaintiff should not be authorized to amend his Statement of Claim. As stated above, the plaintiff was previously invited by the Court to amend his Statement of Claim and he chose not to do so. In addition, the factual allegations contained in the plaintiff's written representations submitted in reply to the defendant's Motion to Strike could not salvage his Statement of Claim. They remain insufficient to form the basis of a conclusion that the tort of misfeasance in public office has been committed.

ORDER

THIS COURT ORDERS that the motion be granted, without leave to amend, and that the action be dismissed with costs in favour of the defendant.

"Marie-Josée Bédard"

Judge