

Federal Court



Cour fédérale

Date: 20180417

Docket: T-1311-17

Citation: 2018 FC 414

Ottawa, Ontario, April 17, 2018

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

DENEACE GREEN

Plaintiff

and

**CANADA BORDER SERVICES AGENCY
(CBSA)**

Defendant

ORDER AND REASONS

[1] Before the Court is a motion in writing by the Defendant under rules 221(a) and (f) of the *Federal Courts Rules*, SOR/98-106 (the Rules), for an order striking the Plaintiff's Statement of Claim on the basis that it discloses no reasonable cause of action and is otherwise an abuse of process.

[2] The Statement of Claim was filed on August 22, 2017. The Plaintiff seeks from the Defendant general, aggravated, punitive, exemplary and special damages in the amount of 6 million dollars, claiming that throughout the course of her employment with the Defendant, the Defendant has harassed her and otherwise treated her in a very condescending, demeaning, and prejudicial manner, especially by being guilty of racial discrimination. The Statement of Claim summarises the Defendant's alleged discriminatory conduct as follows:

6. Throughout the course of the Plaintiff's employment with the Defendant the Defendant has been guilty of the following types of discriminatory conduct inter alia:
 - (a) requiring the Plaintiff to work eight-hour shifts without being allowed to take a lunch break or dinner break;
 - (b) refusing to accept certified sick leave as such and requiring the Plaintiff to take vacation instead;
 - (c) not permitting the Plaintiff to take time to visit doctor and other medical service personnel when the Plaintiff required the same for the purpose of various health problems and health concerns that the Plaintiff had;
 - (d) wrongfully alleging that the Plaintiff had made inappropriate use of a government credit card;
 - (e) wrongfully alleging that the Plaintiff had left her workstation "unattended" knowing that allegation to be false and untrue;
 - (f) refusing to intervene on behalf of the Plaintiff when she was subjected to unwarranted and unnecessary searches of her person by the Canadian Air Transport Security Authority and denying that such unwarranted and unnecessary searched occurred as a result of racial profiling which was clearly the case;
 - (g) making allegations that the Plaintiff wanted to make an illegal arrest in spite of the fact that an arrest was clearly not warranted for the following reasons:
 - i there was no danger to the public;

- ii the dog was no longer in an inhumane carrying bag (kennel), i.e., there was no need to stop the repetition of an offence;
 - iii the Plaintiff knew the identity of the traveler;
 - iv Court appearance was not required because the penalty for the violation would have been an administrative penalty, not one of a criminal nature;
 - v there was no evidence to preserve that would have warranted an arrest.
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- (h) using crude and offensive language in a written report concerning the Plaintiff;
 - (i) accusing the Plaintiff of using offensive language in her report;
 - (j) alleging that the Plaintiff disobeyed direct orders from a supervisor;
 - (k) allegations of lack of integrity;
 - (l) tampering with the Plaintiff's electronic file in order to give credence to fabricated allegations against the Plaintiff;
 - (m) alleging that the Plaintiff had falsified doctor's reports concerning accommodated duties and disregarded specific note dated November 25, 2015, from Doctor Anozie thereby requiring the Plaintiff to resubmit this note a second and third time;
 - (n) making false allegations against the Plaintiff that the Plaintiff was able to carry out her normal duties and expectations of her employment when she had in fact been injured on the job and was suffering workplace injuries making it very difficult for her to carry out her normal duties as a border services officer;
 - (o) manager forced the Plaintiff out of her accommodated position (given as a result of her injuries) so that a family member (her daughter) could take over the job;
 - (p) failure to cooperate with the Worker's Compensation Board of Alberta with respect to injuries suffered by the Plaintiff during her employment with the Defendant;

- (q) failure to provide reports as required to the Worker's Compensation Board of Alberta as requested by the said board in relation to the Plaintiff's injuries suffered while on the job carrying out her duties with the Defendant as a border services officer;
- (r) making false allegations with respect to the Plaintiff being over paid and garnishing the Plaintiff's wages;
- (s) making false and malicious allegations that the Plaintiff was falsifying or exaggerating her injuries suffered on the job which injuries made it very difficult for the Plaintiff to carry out her normal duties as a border services officer;
- (t) refusing to allow the Plaintiff to carry out certain work duties of a less stressful nature when the Plaintiff was suffering from workplace related injuries;
- (u) requiring the Plaintiff to go to doctors of the Defendant's choosing rather than visiting her own doctor in relation to her workplace injuries;
- (v) many other allegations of a similar nature, the detail of which are capable of being proven at the trial of this action.

[3] The Defendant claims that the Plaintiff's action is barred by section 236 of the *Federal Public Sector Labour Relations Act*, SC 2003, c 22, s 2 [the Act] as, at all material times, the Plaintiff either filed a grievance or had the ability to file a grievance in relation to the matters raised in the Statement of Claim.

[4] Section 236 reads as follows:

No Right of Action

Disputes relating to employment

236 (1) The right of an employee to seek redress by way of grievance for any

Absence de droit d'action

Différend lié à l'emploi

236 (1) Le droit de recours du fonctionnaire par voie de grief relativement à tout différend

dispute relating to his or her terms or conditions of employment is in lieu of any right of action that the employee may have in relation to any act or omission giving rise to the dispute.

Application

(2) Subsection (1) applies whether or not the employee avails himself or herself of the right to present a grievance in any particular case and whether or not the grievance could be referred to adjudication.

Exception

(3) Subsection (1) does not apply in respect of an employee of a separate agency that has not been designated under subsection 209(3) if the dispute relates to his or her termination of employment for any reason that does not relate to a breach of discipline or misconduct.

lié à ses conditions d'emploi remplace ses droits d'action en justice relativement aux faits — actions ou omissions — à l'origine du différend.

Application

(2) Le paragraphe (1) s'applique que le fonctionnaire se prévale ou non de son droit de présenter un grief et qu'il soit possible ou non de soumettre le grief à l'arbitrage.

Exception

(3) Le paragraphe (1) ne s'applique pas au fonctionnaire d'un organisme distinct qui n'a pas été désigné au titre du paragraphe 209(3) si le différend porte sur le licenciement du fonctionnaire pour toute raison autre qu'un manquement à la discipline ou une inconduite.

[5] The test applicable on a motion to strike is well known: a claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading has no reasonable prospect of success (*R v Imperial Tobacco Canada Ltd*, 2011 SCC 42, [2011] 3 SCR 45 at para 17; *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at p. 980; *Sivak v Canada*, 2012 FC 272 at para 15).

[6] Here, I am satisfied that the Plaintiff's action, which raises matters that are all employment-related, is barred by section 236 of the Act and that the Defendant's motion must therefore succeed.

[7] As the Defendant correctly points out, while no evidence can be adduced on a motion brought under rule 221(a), evidence is permitted on motions brought under rule 221(f), which applies where it is contended that a cause of action is beyond the Court's jurisdiction (*Chase v Canada*, 2004 FC 273 at para 6; *Marshall v Canada*, 2006 FC 51 at para 31).

[8] The evidence I have before me on this motion shows that the Plaintiff has been employed by the Defendant for nearly eight years and continues to be employed as a Border Services Officer although she is currently on leave without pay. It also shows that the Plaintiff grieved a written reprimand that was given to her on March 17, 2014 for interacting disrespectfully with travellers at the Calgary International Airport and that the grievance process is ongoing. It further indicates that the Plaintiff filed a harassment complaint under Treasury Board's policy on Harassment Prevention and Resolution on November 12, 2014 and that said complaint was dismissed on January 13, 2016.

[9] The Plaintiff argues that this Court has jurisdiction to hear her claim because the *Constitution Act, 1982* supersedes all other Acts of Parliament (*Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Constitution Act, 1982*]). Therefore, she submits, she has the right to obtain remedy for the harassment and abuse of power she was subjected to through recourse to section 24(1) of the *Canadian Charter of Rights and Freedoms*

(Part 1 of the *Constitution Act, 1982* [*Charter*]). She further claims that under section 17(1) of the *Federal Courts Act*, RSC 1985, c F-7 [*Federal Courts Act*], this Court has concurrent jurisdiction in all cases in which relief is sought against the Crown. The Plaintiff asserts that rule 221 of the Rules and section 236 of the Act do not supersede section 17(1) of the *Federal Courts Act* or any rights she may have under section 24 of the *Charter*. However, this is incorrect.

[10] The Plaintiff's claim that section 24 of the *Charter* allows her to seek remedy from this Court cannot be accepted for two reasons. First, the Statement of Claim contains no *Charter* breach allegations. She cannot obtain a remedy under section 24 if her rights and freedoms guaranteed under the *Charter* have not been infringed. Second, even if she had alleged infringement to her *Charter* rights, the infringing actions, having occurred in the course of her employment, can be addressed through the grievance process (*Weber v Ontario Hydro*, [1995] 2 SCR 929 at paras 65-67; *Duval c Canada (Procureur général)*, 2005 CanLII 44516 (QC CS) at para 50).

[11] Section 236 of the Act grants federal employees a right "to seek redress by way of grievance for any dispute relating to his or her terms or conditions of employment". However, the right to seek redress by way of a grievance pre-empts any right of action the employee may have that could be subject to a grievance, regardless of whether the employee exercises their right of grievance (section 236(2) of the Act; *Bron v Canada (Attorney General)*, 2010 ONCA 71 at para 33 [*Bron*]; *Canada (Attorney General) v Robichaud*, 2013 NBCA 3 at para 16 [*Robichaud*]).

[12] Subsection 236(3) of the Act provides for an exception to this rule for employees of a separate agency. For the purpose of section 236(3) of the Act, a ‘separate agency’ has the meaning given in subsection 11(1) of the *Financial Administration Act*, RSC 1985, c F-11 [FAA], that is an agency listed in Schedule V of the FAA. As the Defendant is not one of the agencies listed at Schedule V of the FAA, the Plaintiff cannot benefit from the exception.

[13] The right of a federal employee to file a grievance can be found at section 208 of the Act. That provision grants federal employees a broad right to file grievances relating to their conditions of employment:

Right of employee	Droit du fonctionnaire
208 (1) Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved	208 (1) Sous réserve des paragraphes (2) à (7), le fonctionnaire a le droit de présenter un grief individuel lorsqu’il s’estime lésé :
(a) by the interpretation or application, in respect of the employee, of	a) par l’interprétation ou l’application à son égard :
(i) a provision of a statute or regulation, or of a direction or other instrument made or issued by the employer, that deals with terms and conditions of employment, or	(i) soit de toute disposition d’une loi ou d’un règlement, ou de toute directive ou de tout autre document de l’employeur concernant les conditions d’emploi,
(ii) a provision of a collective agreement or an arbitral award; or	(ii) soit de toute disposition d’une convention collective ou d’une décision arbitrale;
(b) as a result of any occurrence or matter affecting his or her terms and conditions of employment.	b) par suite de tout fait portant atteinte à ses conditions d’emploi.

[14] The grievance process is internal, relates to any occurrence or matter affecting the terms or conditions of employment, and proceeds according to established rules and procedures (*Bron* at para 14); this includes situations of discrimination in the workplace (see *Chamberlain v Canada (Attorney General)*, 2012 FC 1027 [*Chamberlain*] and *Stringer v Canada (Attorney General)*, 2013 FC 735). The role of this Court in claims subject to the grievance process is limited to judicial review (*Robichaud* at para 11; see also *Price v Canada (Attorney General)*, 2016 FC 649 at para 14 [*Price*]).

[15] The Plaintiff alleges in her Statement of Claim that the Defendant harassed her and discriminated against her during the course of her employment. As was the case in *Price*, the Plaintiff's claim is firmly rooted in her employment relationship with the Defendant, as evidenced by the nature of the allegations listed at paragraph 6 of the Statement of Claim, which is reproduced above (*Price* at para 31).

[16] And as was the case in *Price*, the grievance process found in the Act provides the only forum in which the Plaintiff may seek relief against her employer, even in respect of allegations of bad faith, malice, harassment and discrimination (*Price* at para 33; *Bron* at para 7; *Chamberlain* at para 72). Again, as subsection 236(2) clearly contemplates, the Court shall defer to the grievance process whether or not the employee avails himself or herself of the right to present a grievance in any particular case and whether or not the grievance could be referred to adjudication.

[17] It is therefore plain and obvious that the Plaintiff could have grieved the issues raised in her action, as she did to some degree, and that this Court, as a result, lacks jurisdiction to entertain her action. In such context, contrary to the Plaintiff's assertion, section 236 of the Act supersedes section 17 of the *Federal Courts Act*.

[18] Given the outcome of the present motion, the Defendant is entitled to its costs. The Defendant proposes that costs be set at a fixed amount of \$1,500.00. I find that this is a reasonable amount in the circumstances of this case.

ORDER IN T-1311-17

THIS COURT ORDERS that

1. The motion to strike is granted, with costs payable by the Plaintiff in the fixed amount of \$1,500.00.

“René LeBlanc”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1311-17

STYLE OF CAUSE: DENEACE GREEN v CANADA BORDER SERVICES
AGENCY (CBSA)

**MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO
RULE 369 OF THE *FEDERAL COURTS RULES***

ORDER AND REASONS: LEBLANC J.

DATED: APRIL 17, 2018

SOLICITORS OF RECORD:

Deneace Green
Calgary, Alberta

ON HER OWN BEHALF

Attorney General of Canada
Calgary, Alberta

FOR THE DEFENDANT