Federal Court  Cour fédérale

Date: 20220520

Docket: T-1378-21

Citation: 2022 FC 750

[ENGLISH TRANSLATION]

Ottawa, Ontario, May 20, 2022

PRESENT: The Associate Chief Justice Gagné

BETWEEN:

ÉRIC BERNARD FRÉMY

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

JUDGMENT AND REASONS

[1] This is a written motion to strike the plaintiff's statement of claim (including the amendments that were made to it) and to dismiss the plaintiff's action pursuant to Rules 221, 359, and 369 of the *Federal Courts Rules*, SOR/98-106. The defendant argues that the plaintiff's statement of claim discloses no reasonable cause of action.

I. Content of statements of claim and nature of action

[2] In reply to this motion, the plaintiff first asks the Court to examine both his initial statement of claim (which comprises 270 paragraphs and 35 pages) and his amended statement of claim (which comprises 109 paragraphs and 18 pages). The latter essentially responds to clarification questions asked by the defendant, though, in principle, it should have incorporated the initial statement of claim. However, as the plaintiff is self-represented, the Court will examine both pleadings in order to determine the true nature of his action against the defendant.

A. *Initial statement of claim*

[3] The plaintiff is a Francophone who alleges that he was subjected to language discrimination by his employer at the time, the Royal Canadian Mounted Police [RCMP]. His language-related complaints might even have led to his illegal dismissal.

[4] In his initial statement of claim, he stated that he had filed a discrimination complaint with the Commissioner of Official Languages; this complaint was the subject of a report issued in January 2021. The report confirmed that the plaintiff was subjected to discrimination by his employer while stationed in British Columbia. However, it concluded that since the plaintiff had been reinstated as a member of the RCMP (following intervention by this Court and, ultimately, the Federal Court of Appeal in *Canada (Attorney General) v Frémy*, 2019 FCA 26), no recommendation would be made. For both the Commissioner and the Court, the problem lay in the fact that the RCMP required a level of English of the plaintiff that was too high for his position.

[5] As he then had to demonstrate the causes of the harm suffered, he chose to bring this action. He alleges that following his reinstatement in 2019, the RCMP refused to recognize his twelve years of service and to grant him the promotions to which he would have been entitled during his first two years of service; he was only granted financial compensation not subject to the pension plan. The RCMP also refused to retroactively pay lost wages, to update his pension, and to give him an appropriate position, all in violation of the *Federal Public Sector Labour Relations Act*, SC 2003, c 22, s 2. He filed two grievances in 2019, as well as a complaint with the federal Public Service Staff Relations Board in November 2020 (the complaint was not pursued due to the lack of a collective agreement at the time, and the Court does not know the outcome of the two grievances). The RCMP wanted to reinstate him as a probationary member and have him go through the consequent training. The plaintiff agreed to the training but insisted that he be reinstated as a regular member. He ended up completing the training without any mention of his status. He was still denied the status of regular member, which, according to the plaintiff, constituted psychological harassment within the meaning of the federal government's policy, as well as constructive dismissal. He had no intention to resign, however, and preferred to continue defending his language rights.

[6] The plaintiff argues that the RCMP's refusal to grant him the promotions to which he was entitled constitutes language discrimination that has gone on for more than eight years and has caused him serious harm.

[7] In this regard, the plaintiff submits to the Court a list of questions and invokes section 37 of the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10; subsection 24(1) of the *Canadian Charter of Rights and Freedoms*, as enacted by the *Constitution Act, 1982* [Charter];

subsection 39(1) and section 62 of the *Official Languages Act*, RSC 1985, c 31 (4th Supp) [OLA]; and, lastly, section 7 of the *Canadian Human Rights Act*, RSC 1985, c H-6. He claims compensatory damages in the amount of $1,000,000, as well as punitive damages.

B. *Amended statement of claim*

[8] After the initial statement of claim was filed by the plaintiff, the defendant requested and obtained clarifications.

[9] First, the plaintiff was asked to specify which Charter right(s) he was alleging had been violated by the defendant so as to give rise to a remedy under section 24 of the Charter. In his amended statement of claim, the plaintiff specifies sections 15 (equality before and under the law) and 16 (recognition of the two official languages) of the Charter. The plaintiff then restates that as a Francophone member of the RCMP, he had not been entitled to the same protection of the law as his Anglophone colleagues.

[10] The plaintiff was then asked to explain the who, when, where, and how that gave rise to the defendant's liability in relation to these violations. The plaintiff replies that the defendant's liability was engaged by the RCMP's actions, from June to December of 2013 and following his reinstatement in March 2019 when he was stationed in British Columbia, and by the violation of his language rights, discrimination, and a constructive dismissal.

[11] The plaintiff breaks down the damages and specifies that he claims $210,000 in punitive damages. He refers the Court to section 49 of the [Quebec] *Charter of Human Rights and*

Freedoms, RSQ, c C-12, which provides for the possibility of granting punitive damages in the case of unlawful and intentional interference with any right or freedom guaranteed under that same Charter, and argues that this applies by analogy in the federal context.

[12] The plaintiff alleges that it was the defendant's responsibility to enforce sections 15 and 16 of the Charter, which it did not do when it allowed his language rights to be violated.

II. Analysis

[13] Like the defendant, I note that the plaintiff is representing himself and that he is doing so in good faith.

[14] Additionally, it is a given that a statement of claim should be read generously, especially when written by a self-represented party; mere drafting deficiencies or using the wrong label for a cause of action are not grounds to strike out a claim (*Gélinas v Canada*, 2021 FC 1157).

[15] This rule, which is intended to be generous to the plaintiff, does not, however, diminish the power to strike out claims that have no reasonable prospect of success (*R. v Imperial Tobacco Canada Ltd*., 2011 SCC 42 at paras 19-20). A claim may be struck under Rule 221(1)(a) of the *Federal Courts Rules* if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action (*Imperial Tobacco Canada Ltd*. at para 17; *Canada v Harris*, 2020 FCA 124 at para 23).

[16] That said, in his amended statement of claim, the plaintiff claims that he is entitled to a remedy under subsection 24(1) of the Charter as the defendant allegedly violated the rights guaranteed to him under subsections 15(1) and 16(1) of the Charter.

[17] With regard to subsection 15(1), the defendant alleges language discrimination, claiming that he was deprived of the equal protection and equal benefit that the OLA grants to Anglophones.

[18] Thus, though he invokes subsection 15(1) of the *Charter*, the plaintiff continues to base his action on the OLA by invoking case law related to this Act as well as several reports issued by the Commissioner of Official Languages.

[19] However, this approach is problematic for several reasons, which I will examine in order.

A. *Are the facts alleged by the plaintiff sufficient to establish a violation of the* Charter *and the right to the remedy sought?*

[20] The facts alleged in a pleading must be sufficiently detailed to define the issues and permit the defendant to prepare a defence (*Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227, at paras 16–17). In *Mancuso*, the Federal Court of Appeal clarifies how this rule applies to Charter cases:

> [21] There are no separate rules of pleadings for Charter cases. The requirement of material facts applies to pleadings of Charter infringement as it does to causes of action rooted in the common law. The Supreme Court of Canada has defined in the case law the substantive content of each Charter right, and a plaintiff must plead sufficient material facts to satisfy the criteria applicable to the

> provision in question. This is no mere technicality, "rather, it is essential to the proper presentation of Charter issues" ... .

[21] The Court adds that where an action is based on subsection 15(1) of the *Charter* and an analogous ground of discrimination is alleged, as in this case, the statement of claim must set out sufficient facts to support not only the constituent elements of the alleged discrimination, but also the claim that the ground in question is an analogous ground (*Mancuso* at para 24).

[22] However, it is recognized that to establish discrimination within the meaning of subsection 15(1), the plaintiff is required to demonstrate that a law or a measure comparable to a law:

- on its face or in its impact, creates a distinction (that is, a difference in treatment) based on enumerated or analogous grounds; and

- imposes burdens or denies a benefit that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.

(*R v C.P.*, 2021 SCC 19, at paras 56 and 141; *Fraser v Canada (Attorney General)*, 2020 SCC 28, at para 27)

[23] The first deficiency in the initial and amended statements of claim is that they do not identify any law or measure comparable to a law that would give rise to a different treatment of a Francophone compared to an Anglophone. If the pleaded facts are true, it would seem that the plaintiff's language rights were not respected. That is, in fact, the conclusion reached by the Commissioner of Official Languages. Nevertheless, this is a case of an individual violation caused by his employer's lack of compliance with a law that seeks precisely to protect him. This

is not a case of a law, directive, policy, or other broadly applicable measure that might discriminate against him because he belongs to a particular group.

[24] Not only do the facts alleged by the plaintiff not support the constituent elements of the alleged discrimination, but they also do not support the claim that the ground in question is an analogous ground. In this case, the plaintiff is essentially asking the Court to recognize the existence of a new analogous ground. Given the significance of such a decision for the legal system, the record needs to be clear and expansive enough to allow us to decide whether a particular ground of discrimination should be recognized as an analogous ground, especially since this issue is the subject of complex discussions (*Fraser* at paras 117, 120, and 123).

[25] Since the plaintiff's initial and amended statements of claim do not allege any material facts sufficient to establish an analogous ground, his claim based on subsection 15(1) of the *Charter* is bound to fail.

B. *Can subsection 15(1) of the* Charter *be used to recognize, expand, or reinforce the rights that arise from the OLA?*

[26] But there is more. In his action, the plaintiff confuses the linguistic discrimination that he allegedly experienced—as a result of non-compliance with the OLA—and the right to equality guaranteed by the *Charter.* For the plaintiff to have the right to the remedy he seeks, we would need to conclude that non-compliance with the OLA constitutes discrimination under the *Charter*.

[27] However, such a conclusion would go against a robust consensus around the opposite view in the case law from courts of appeal across the country.

[28] First, in *Gingras v Canada*, [1994] 2 FC 734 (para 60), the Federal Court of Appeal affirmed that "it seems unlikely … that a person could by means of so-called discrimination based on use of the official languages obtain more under subsection 15(1) of the Charter than what he would be entitled to under the language guarantee as defined in sections 16 to 22 [of the OLA]".

[29] In *Lalonde v Ontario (Commission de restructuration des services de santé)*, 2001 CanLII 21164 (paras 96 and 99–101), the Court of Appeal for Ontario wrote that "section 15 of the Charter may not be used as a back door to enhance language rights beyond what is specifically provided for elsewhere in the Charter" and that it "cannot be invoked to supplement language rights which the Charter has not expressly conferred".

[30] That same year, the Court of Appeal of Québec stated the following in *Westmount (Ville de) c Québec (Procureur Général)*, 2001 CanLII 13655:

> [TRANSLATION]
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> [144] In finding [in *R. v Beaulac*, [1999] 1 SCR 768, and *Arsenault-Cameron v Prince Edward Island*, 2000 SCC 1, [2000] 1 SCR 3] that language rights must be interpreted liberally and in a manner consistent with their purpose, the Supreme Court did not, as such, set aside the principle that it is not the place of the courts to add to the political compromise on language rights.
>
> [145] In short, the appellants seek the creation of a new language right, a right that the courts cannot grant them. ...

> [149] It is far from certain that section 15 of the Canadian Charter can be relied upon to support the protection of language rights under the Constitution. As we have already noted, language rights should not be confused with fundamental Charter guarantees. Moreover, the Supreme Court clearly stated that it was inappropriate to rely on sections 15 and 27 to define the scope of language rights.

[31] In *McDonnell v Fed. des Franco-Colombiens*, 1986 CanLII 927 (para 17), the Court of Appeal of British Columbia affirmed that though it was possible to envisage discrimination based on language, the concept of "official languages" was not in the scope of section 15 of the *Charter*.

[32] Finally, the courts of appeal of Alberta, Newfoundland, and Nova Scotia have reached similar conclusions (*Paquette v Canada*, 1987 ABCA 228 (para 35); *Ringuette v Canada*, 1987 CanLII 3953 (paras 30–33); *R v MacKenzie*, 2004 NSCA 10 (para 33).

[33] This consensus in the case law is easily explained: it would be "totally incongruous to invoke in aid of the interpretation of a provision [of the OLA in this case] which grants special rights to a select group of individuals, the principle of equality intended to be universally applicable to 'every individual'" (*Mahe v Alberta*, [1990] 1 SCR 342, page 369).

[34] It would be equally incongruous to invoke this same universal principle of equality to recognize, expand, or reinforce the language rights and privileges granted to the country's linguistic minorities, but only for the speakers of Canada's two official languages.

[35] As a result, even assuming that the facts alleged by the plaintiff are true, the argument based on subsection 15(1) of the *Charter* is not valid in law; it is therefore bound to fail.

C. *Does subsection 16(1) of the* Charter *confer individual rights, the violation of which would give rise to a remedy under subsection 24(1) of the* Charter*?*

[36] The plaintiff pleads that a violation of subsection 16(1) of the *Charter* gives him the right to a remedy under subsection 24(1) of the *Charter*.

[37] Though subsection 16(1) of the *Charter* recognizes and affirms the principle of substantive equality between the two official languages of Canada, the courts have never inferred from this provision any individual right that could give rise to a remedy for personal injury under subsection 24(1) of the *Charter*.

[38] Subsection 16(1) of the *Charter* reads as follows:

16 (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.	16 (1) Le français et l'anglais sont les langues officielles du Canada; ils ont un statut et des droits et privilèges égaux quant à leur usage dans les institutions du Parlement et du gouvernement du Canada.

[39] Even if interpreted broadly and liberally, this text concerns the status of Canada's two official languages and not an individual right that would be otherwise guaranteed by the *Charter*. Parliament has acted on this principle by enacting the OLA and by including in the *Criminal Code* the right of the accused to be tried in the official language of his or her choice.

[40] The *Charter* does indeed protect certain individual language rights: the right to use either English or French in any debates or other proceedings of Parliament (subsection 17(1)); the right to use either English or French in, or in any pleading in or process issuing from, any court established by Parliament (subsection 19(1)); and the right to use either English or French to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada (subsection 20(1)). However, none of these guaranteed rights are at stake in this case.

[41] However, subsection 24(1) of the Charter concerns persons whose rights "as guaranteed" have been infringed. As the Supreme Court of Canada stated in *Vancouver (City) v Ward*, 2010 SCC 27 (at para 61), a right must be guaranteed to the plaintiff in order for it to be infringed. The rights claimed by the plaintiff are guaranteed by the OLA, which itself meets the requirements of subsection 16(1) of the Charter.

[42] This cause of action invoked by the plaintiff is therefore equally invalid in law and bound to fail.

D. *Does the OLA allow for the plaintiff's claim for damages?*

[43] As indicated earlier, the plaintiff relies on excerpts from reports issued by the Commissioner of Official Languages, who concluded that there was non-compliance with paragraph 39(1)(a) and subsection 62(2) of the OLA (he had also concluded that the initial complaint filed in 2013 under Part VI of the OLA was founded).

[44] However, section 77 of the OLA does not provide for a remedy for the violation of sections 39 and 62 of the OLA. The Federal Court of Appeal discussed the scope of this provision of the OLA in *Devinat v Canada (Immigration and Refugee Board)*, [2000] 2 FC 212, and *Canada (Food Inspection Agency) v Forum des maires de la Péninsule acadienne*, 2004 FCA 263.

[45] In fact, in the latter decision, the Court closed the door on any legal remedy based on a provision not enumerated in subsection 77(1) of the OLA, with the exception of judicial reviews under section 18.1 of the *Federal Courts Act*, an exception provided for in subsection 77(5) of the OLA. Here is how the Court stated it:

> [23] I will deal first with the scope of subsection 77(1).
>
> [24] In *Devinat v. Canada (Immigration and Refugee Board)*, [2000] 2 F.C. 212 (C.A.), this Court held that a complaint filed pursuant to section 20 of the Act, which is found in Part III, was admissible not under subsection 77(1) of the Act, since it is not mentioned in Part III, but under subsection 77(5), which preserves "any right of action a person might have". The respondent and the interveners are basically asking us to reconsider the decision handed down in *Devinat*. But *Devinat*, in my opinion, was correctly decided.
>
> [25] The language of subsection 77(1) is clear and explicit. Parliament intended that only those complaints in respect of a right or duty under certain sections or parts of the Act could be the subject-matter of the remedy under Part X. The suggestion by counsel for the Commissioner that a complaint need only be filed under some sections or parts Of the Act listed in subsection 77(1) in order to set in motion a proceeding by the complainant in respect of any provision whatsoever of the Act cannot be adopted. Not only would Parliament have been using meaningless words when it went to the trouble to list certain sections and parts of the Act in subsection 77(1), but also, and perhaps above all, this list is completely compatible with Parliament's intention, clearly expressed elsewhere in the Act, to ensure that not every section or every part of the Act should enjoy the same status or the same protection in the courts.

> [26] Subsection 82(1) is particularly revealing in this regard, since it establishes the paramountcy of certain parts only of the Act over any other Act of Parliament, and Part VII is not one of those parts. Moreover, political accountability varies according t0 the parts of the Act that are at issue; the Treasury Board, for example, is responsible for the application of Parts IV, V and VI (see section 46) and the Minister of Canadian Heritage is responsible for the application of Part VII (see sections 42, 43 and 44 [as am. by S.C. 1995, c. 11, s. 29]). Under section 31, in the event of any inconsistency between Part IV and Part V, Part IV prevails to the extent of the inconsistency. Finally, section 91 of the Act provides that in particular staffing action, Parts IV and V of the Act do not apply in certain ways.
>
> [27] This asymmetry of the Act is easily explained when we note that it deals not only with policies and commitments but also with rights and duties. Subsection 77(1) is itself highly instructive in this regard, as it specifies that the complaints it covers are addressed not to the sections or parts of the Act in themselves, but to "a right or duty under" particular sections or parts. Parliament has thus spoken with great care, so as to ensure that only those disputes in respect of particular rights or duties may be taken before the Court. This prudence is especially warranted in that the remedial authority conferred by subsection 77(4) is exceptional in scope and it is readily understandable that Parliament did not intend to give the courts the power t0 interfere in the area of policies and commitments that is not usually within their jurisdiction.
>
> [28] I thereby conclude that the remedy under section 77 is limited to complaints based on the sections and parts listed in subsection 77(1).

[46] Moreover, it is a given that sections 39 and 62 of the OLA should be considered "statement[s] of commitment by the Government of Canada" and not sources of obligation for the government (*Ayangma v Canada*, 2003 FCA 149, at para 31; *Lavoie v Canada (Attorney General)*, 2007 FC 1251, at para 40).

[47] It follows that even if the plaintiff's action were based on the alleged non-compliance with the OLA, it would be bound to fail.

III. Conclusion

[48] For the reasons given here, the plaintiff's initial and amended statements of claim are struck out and his action is dismissed. As the plaintiff had the opportunity to clarify the basis of his action and to support the arguments with which he intended to establish his right to a remedy under subsection 24(1) of the Charter, he will not be permitted to amend his statement of claim again.

[49] Additionally, the Court exercises its discretion and awards the defendant costs in the amount of $500.

JUDGMENT in T-1378-21

THE COURT ORDERS AS FOLLOWS:

1. The defendant's motion is allowed.

2. The plaintiff's initial and amended statements of claim are struck out without leave to amend.

3. The plaintiff's action is dismissed pursuant to rule 221(1) of the *Federal Courts Rules*.

4. The plaintiff is ordered to pay costs to the defendant in the amount of $500.

"Jocelyne Gagné"
Associate Chief Justice

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1378-21
STYLE OF CAUSE:	ÉRIC BERNARD FRÉMY v HER MAJESTY THE QUEEN

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

JUDGMENT AND REASONS:	ASSOCIATE CHIEF JUSTICE GAGNÉ
DATED:	MAY 20, 2022

WRITTEN SUBMISSIONS:

Éric Bernard Frémy	FOR THE PLAINTIFF (ON HIS OWN BEHALF)
Michaël Fortier Benoît de Champlain	FOR THE DEFENDANT

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