

Date: 20080826

Docket: T-1248-07

Citation: 2008 FC 968

Toronto, Ontario, August 26, 2008

PRESENT: The Honourable Mr. Justice Harrington

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] Mr. Moodie, a former Canadian Armed Forces serviceman, has taken an action against Her Majesty, as represented by the Minister of National Defence, for damages arising from his treatment as a member of the Forces. He claims under a number of separate heads including: loss of reputation and defamation, infliction of mental anguish, negligence and breach of fiduciary duty. However, he also specifically claims \$500,000.00 in damages arising out of an alleged breach of his right to security of the person as guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms* and a further \$1,000,000.00 for alleged breach of equality rights pursuant to section 15 of the Charter.

[2] Prothonotary Milczynski granted the defendant's motion for an order striking the action in its entirety for want of jurisdiction. She reasoned that section 29 of the *National Defence Act* and the *Queens Regulations and Orders* for the Canadian Forces establish a complete and exclusive statutory scheme for the resolution of service-related disputes between members of the Canadian Armed Forces and Her Majesty. At the time of her decision, there were at least six grievances that were pending final disposition. She specifically relied upon the decision of Madam Justice Layden-Stevenson in *Sandiford v. Canada*, 2007 FC 225, 309 F.T.R. 233, which held that it was necessary to exhaust a statutory grievance scheme before commencing an action.

[3] Mr. Moodie instructed counsel to appeal Prothonotary Milczynski's order. Counsel attempted to file a notice of appeal with the Federal Court of Appeal within 30 days of her decision. That would have been the appropriate method of proceeding had the decision to dismiss been issued by a judge (*Federal Courts Act*, section 27). However, there is a special rule pertaining to appeals of prothonotaries' orders. Rule 51 of the *Federal Courts Rules* provides for an appeal within 10 days by way of a motion to a judge of the Federal Court. Thus, the notice of appeal was flawed both with respect to the Court to which it was addressed and as to time constraints.

[4] Mr. Moodie has now moved for an order to extend the delays to file his appeal in this Court. Her Majesty opposes.

[5] The reason the motion was not filed in time is clear. Counsel overlooked Rule 51.

[6] Rule 8 of the *Federal Courts Rules* provides that the Court may extend a delay either before or after the end of the period sought to be extended. To a large extent, the Court's discretion is fact specific. Cases such as *Canada (Attorney General) v. Hennelly* (1999), 244 N.R. 399 (Fed. CA) and *Canada (Minister of Human Resources and Development) v. Hogervorst*, 2007 FCA 41, (2007) 359 N.R. 156, ask whether there was: (a) a continuing intention to appeal; (b) an arguable case; (c) a reasonable explanation for the delay; and (d) if the other party would suffer a prejudice as a result of an extension.

[7] The ultimate test however is whether or not the extension would do justice between the parties (*Grewal v. Canada (Minister of Employment and Immigration)*, [1985] 2 F.C. 263 (Fed. CA)).

[8] I do not think that either side is prejudiced whether an extension is granted or not.

Prothonotary Milczynski held:

The statement of claim is struck and the action dismissed, without prejudice to the Plaintiff commencing a further action for damages after the full and final disposition of his grievances, including any other matter that is the proper subject matter of the grievance procedure.

[9] 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.

[10] On that basis, it may be that at least some of the paragraphs of the amended statement of claim could have survived the motion to strike.

[11] Given the short delay and the reasons therefor, I am granting the extension.

ORDER

UPON MOTION in writing pursuant to Rules 8(1) and 369(1) of the *Federal Courts Rules* for an order extending time to file a notice of motion to appeal from the order of Madam Prothonotary Milczynski dated May 27, 2008 striking the statement of claim and dismissing the action;

IT IS ORDERED that the motion is granted without costs.

“Sean Harrington”

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-1248-07

STYLE OF CAUSE: *ANTHONY MOODIE v. HER MAJESTY THE QUEEN IN
RIGHT OF CANADA as represented by the MINISTER OF
NATIONAL DEFENCE*

CONSIDERED AT TORONTO, ONTARIO PURSUANT TO RULE 369

**REASONS FOR ORDER
AND ORDER:** HARRINGTON J.

DATED: August 26, 2008

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