

Federal Court



Cour fédérale

Date: 20140919

Docket: T-1383-14

Citation: 2014 FC 896

Ottawa, Ontario, September 19, 2014

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

ANTON OLEYNIK

Plaintiff

and

THE ATTORNEY GENERAL OF CANADA

Defendant

ORDER AND REASONS

[1] By Notice of Motion dated July 4, 2014, the Attorney General of Canada (the “Defendant”) seeks an Order pursuant to Rules 221(1)(a), 221(1)(c) and 221(1)(f) of the *Federal Courts Rules*, SOR/98-106 (the “Rules”) striking out the Statement of Claim of Anton Oleynik (the “Plaintiff”), with costs.

[2] The Plaintiff is a professor at Memorial University in Newfoundland and Labrador. In his Statement of Claim, he seeks damages based, in part, upon allegations that the Defendant

breached the *Privacy Act*, R.S.C. 1985, c. P-21 (the “Privacy Act”) and the *Access to Information Act*, R.S.C. 1985, c. A-1 (the “Access Act”), relative to an application he had made for funding to the Social Sciences and Humanities Research Council of Canada (“SSHRC”), that is a grant for research in the social sciences. He seeks damages in the amount of \$ 643,955 as compensation for damage to his reputation and for loss of opportunity to receive research grants.

[3] In a motion to strike on the grounds that the Statement of Claim discloses no reasonable cause of action, pursuant to Rule 221(1)(a) of the Rules, no evidence can be submitted; see Rule 221(2). The Court is to accept that the allegations that are capable of being proven, are true; see *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959. That principle does not apply to allegations based on speculation and assumptions; see *Operation Dismantle Inc. v. The Queen* (1985), 18 D.L.R. (4th) 481 (S.C.C.) at pages 486 - 487 and 490 – 491.

[4] Having regard to the contents of the Statement of Claim and the submissions of the parties, I am satisfied that the Statement of Claim should be struck as failing to disclose a reasonable cause of action.

[5] According to the decision in *Bérubé v. Canada* (2009), 348 F.T.R. 246 at paragraph 24, in order to disclose a reasonable cause of action, a claim must show the following three elements:

- i. allege facts that are capable of giving rise to a cause of action;
- ii. disclose the nature of the action which is to be founded on those facts; and
- iii. indicate the relief sought, which must be of a type that the action could produce and that the Court has jurisdiction to grant.

[6] The Plaintiff's Statement of Claim consists of 39 paragraphs, set out with headings as follows:

- i. Introduction: paragraphs 1 – 2;
- ii. Background information: paragraphs 3-11;
- iii. SSHRC's actions that caused damage to Dr. Oleynik: paragraphs 12 – 36;
- iv. Damages: paragraphs 37 – 39.

[7] At paragraph 1, the Plaintiff says the following:

This is a claim against the Attorney General of Canada. The basic nature of the claim is the failure of the Social Sciences and Humanities Research Council of Canada (SSHRC) to comply with its own rules and regulations regarding due procedure as well as with requirements of the Privacy Act (R.S.C., 1985, c. P-21) and the Access to Information Act (R.S.C., 1985, c. A-1), namely, by unduly collecting the Applicant's personal information and breaching his privacy. In consequence of these actions the Applicant (Dr. Anton Oleynik, an Associate professor of sociology at Memorial University of Newfoundland) suffered damages that amount to **\$643,955** [sic].

[8] The Plaintiff is essentially presenting a claim for non-compliance with processes related to his application for a SSHRC grant. He alleges that he was "blacklisted" as an assessor of proposals submitted to SSHRC and that SSHRC improperly used his personal information, thereby breaching both the Privacy Act and the Access Act. The alleged "blacklisting" occurred with respect to his research proposals from 2008 to 2014. The Plaintiff also alleges that SSHRC discriminated against him by sanctioning him, in violation of SSHRC's policy of non-discrimination.

[9] The Defendant claims that the Statement of Claims consists of bare assertions, speculation and conclusory statements, and fails to plead facts that disclose a cause of action. He argues that the Statement of Claim fails to disclose a reasonable cause of action as required by Rule 221(1)(a), is scandalous, frivolous and vexatious contrary to Rule 221(1)(c), and represents an abuse of process contrary to Rule 221(1)(f).

[10] The Plaintiff claims that SSHRC failed to follow its internal rules and regulations. Insofar as this is a claim about process, it may subject to an application for judicial review. There is no known cause of action for such a complaint.

[11] The Plaintiff alleges that SSHRC discriminated against him by “blacklisting” him after he criticized its handling of private information.

[12] There are no facts to support this allegation. In any event, there is no intentional tort of discrimination in Canada; see the decision in *Seneca College v. Bhaduria*, [1981] 2 S.C.R. 181 at paragraphs 26 – 27. Further, any complaints about discrimination should be pursued under relevant human rights legislation.

[13] The Plaintiff alleges that SSHRC breached section 5 of the Privacy Act by collecting personal information from his employer rather than from him directly. He also claims that SSHRC improperly used his personal information because it refused to correct personal information after he formally asked it to do so pursuant to subsection 12(2) of the Privacy Act. He has made several complaints to the Privacy Commissioner and the Statement of Claim refers

to a report dated February 2014, released by the Office of the Information Commissioner of Canada (the “Information Commissioner”), finding that his complaints were “well-founded”.

[14] The Plaintiff is complaining about alleged breaches of the Privacy Act. His remedy in that regard is to proceed by way of judicial review. If, at the end of that process, he can show a legitimate wrong, that is the time to commence an action. His action is premature.

[15] There is no free-standing right to bring an action for breach of legislation; see the decision in *Saskatchewan Wheat Pool v. Canada*, [1983] 1 S.C.R. 205 at page 225. Breach of a statute must be considered in the context of the general law of negligence; see *Collins v. Canada* (2010), 366 F.T.R. at paragraph 38, affirmed by *Collins v R.* (2011), 418 N.R. 23 (F.C.A.).

[16] In order to obtain a remedy for statutory breach, the Plaintiff must show a breach of a statutory duty of care; see the decision of the trial judge in *Collins, supra*, at paragraph 39. The Plaintiff has not established the elements of negligence to support a claim against SSHRC that it negligently breached the Privacy Act.

[17] If the Plaintiff takes issue with the findings of the Information Commissioner, his remedy lies in an application for judicial review.

[18] I agree with the arguments made by the Defendant that the Statement of Claim, as drafted, fails to disclose a reasonable cause of action. Insofar as the Plaintiff complains about misuse of discretion by SSHRC officials and improper access to his personal information, these

are issues that are more appropriately dealt with by way of an application for judicial review, properly constituted.

[19] In my opinion, the Plaintiff has failed to disclose a reasonable cause of action for the foregoing reasons and the Statement of Claim should be struck without leave to amend.

[20] I will briefly address the Defendant's submissions that the Plaintiff's Statement of Claim should be struck pursuant to Rule 221(1)(c), that is as being scandalous, frivolous and vexatious. In considering a motion to strike on these grounds, the Court is required to consider the merits of the claim; see the decision in *Blackshear v. Canada*, 2013 FC 590 at paragraph 12.

[21] In my opinion, the Statement of Claim should be struck on the basis of Rule 222(1)(c), as well. There are no facts pleaded to support a cause of action. The allegations are either unsupported or are speculative; for example, paragraphs 17, 20 – 21 and 30 of the Statement of Claim, read as follows:

17. In the **2010-2011 competition** [sic] the program officer exercised his discretion in an undue manner. The program officer, an individual without a PhD degree and experience in conducting research, has the discretion to make 'the final selection of external assessors' (Document **H** [sic], page 12). SSHRC was criticized by members of the panel of international experts, who evaluated the SSHRC operation, for giving the program officer waste discretionary powers (Document **G** [sic], page 3, see also Document **L** [sic]). To draw a relevant parallel, if a similar arrangement existed in the judicial system, the assignment of judges to particular cases would be registry officers' exclusive privilege.

20. In the final account members of the adjudication committee gave an eliminatory ('unsatisfactory') score for the 'appropriateness of the requested budget, and justification of proposed costs' (Documents **EE** [sic], page 3) without consulting

relevant supporting documents [sic]. The score for the project's feasibility turned to be the lowest (3.4 out of 6), and its resulting rank 'was not high enough for an award to be made from the available competition budget'. All the other scores were high warranting an award.

21. One more time, the program officer exercised her discretion in the recruitment of external assessors in an undue manner. 7 external assessors were contacted, including two after the program officer had secured the commitment of two other assessors. The SSHRC automated tracking system does not contain any information on responses of the two assessors invited on January 31, 2014 (Document **DD** [sic], page 3), which creates opportunities for 'massaging' the information available to the adjudication committee.

30. The OIC documented several breaches of the Access to Information Act committed by SSHRC's management (Documents **J, GG & MM**) [sic]. It must be noted that SSHRC's representatives supplied OIC's investigators with incomplete and/or erroneous information at times, which shall be taken into account when the Court considers the Statement of defence and documents produced by the Respondent in its support (Document **QQ**) [sic].

[22] Since the Statement of Claim fails to disclose a reasonable cause of action and is otherwise defective pursuant to Rule 222(1)(c), I am satisfied it represents an abuse of process per Rule 221(1)(f).

[23] It is an abuse of process to re-litigate essentially the same dispute when earlier attempts at relief have failed; see the decision in *Black v. NsC Diesel Power Inc. (Bankruptcy) et al.* (2000), 183 F.T.R. 301 at paragraph 11. The substance of this dispute has already been considered by this Court on two previous occasions. In both cases, the applications were dismissed; see the decisions in *Oleinik v. Canada (Privacy Commissioner)*, 2011 FC 1266, affirmed by *Oleinik v. Canada (Privacy Commissioner)* 2012 FCA 229, and *Oleinik v Privacy Commissioner (Can.)* (2013), 425 F.T.R. 228. The Plaintiff's present action is therefore an abuse of process.

[24] In the result, the Defendant's motion is granted and the Statement of Claim will be struck without leave to amend.

[25] Leave to amend pleadings will be granted where there is a curable defect in the pleadings; see the decision in *Simon v. Canada* (2011), 410 N.R. 374 (F.C.A.). In my opinion, there is no such curable defect here, given that Canadian law does not recognize an intentional tort of discrimination, nor a freestanding right to bring action for statutory breach.

[26] The Defendant seeks his costs. I see no reason to depart from the usual Rule that costs follow the event. Accordingly, in the exercise of my discretion pursuant to the Rules, I award costs in the amount of \$500.00 inclusive of HST and disbursements.

ORDER

THIS COURT ORDERS that the motion is granted, the Statement of Claim is struck out without leave to amend with costs to the Defendant in the amount of \$500.00 inclusive of HST and disbursements.

"E. Heneghan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1383-14

STYLE OF CAUSE: ANTON OLEYNIK v. THE ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: HALIFAX

DATE OF HEARING: AUGUST 13, 2014

ORDER AND REASONS: HENEGHAN J.

DATED: SEPTEMBER 19, 2014

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