

CANADA / JUDGMENT

Chisholm v. Canada (Attorney General)

2003 FCT 387

COURT

Federal Court

DECIDED

1 April 2003

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Chisholm v. Canada (Attorney General) Court (s) Database Federal Court Decisions Date
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Docket: T-667-01 Neutral citation: 2003 FCT 387 BETWEEN: SHAWN CHISHOLM Plaintiff and
ATTORNEY GENERAL OF CANADA Defendant REASONS FOR ORDER HARGRAVE P.

- [1] This action, by Corporal Chisholm, a member of the Canadian Military, is pleaded on the basis of the tort of economic interference with relations or interests, the Plaintiff allegedly being denied employment opportunities both within his own unit and elsewhere in the military.
- [2] The Defendant moved to strike out the Amended Statement of Claim. The thrust of the Defendant's arguments are three-fold. First, the Defendant submits that service in the armed forces, being at the pleasure of Crown and a unilateral commitment by the members of the military, there is no right to contractual compensation. Second, and this is often a successful ground, the Defendant alleges that Plaintiff has failed to exhaust the military grievance procedure. Third, the Defendant submits that the claim is, in fact, one for a pension and thus it ought to be stayed, to be dealt with under the Pension Act. This was not an argument pressed during oral argument. On a plain reading of the Statement of Claim the argument will not prevail. I now turn to consideration of the two principle submissions.

CONSIDERATION

- [3] I will not go into the law as to striking out an action beyond stating that it must be plain, obvious and beyond doubt that the action cannot succeed before it ought to be struck out, thus denying the Plaintiff a day in court. Nature of Cause of Action
- [4] The Defendant's first submission, reduced to its essentials, is that a member of the armed forces cannot sue the Crown for breach of contract, here referring to, among other cases, *Cooke v. Canada* (1929), Ex.C.R. 20 at 23, *Levesque v. Canada* (1990), 45 F.T.R. 22 at 23 and *Carroll v. Canada (Attorney General)*, [1995] 3 W.W.R. 264 in which, at page 268 Mr Justice Manson, of the Alberta Court of Queen's Bench, referred to *Mitchell v. The Queen* (1896) 1 Q.B. 121 (C.A.) for a clear statement that there may be no action by a member of a military against the Crown: Lord Ester M.R. I agree with Mathew J. that the law is as clear as it can be, and that it has been laid down over and over again as the rule on this subject that all

engagements between those in the military service of the Crown and the Crown are voluntary only on the part of the Crown, and give no occasion for an action in respect of any alleged contract. This passage was cited with approval by Mr Justice Cameron in *Fitzpatrick v. The Queen* (1959) Ex.C.R. 405 at 411.

- [5] Certainly the Statement of Claim in the present action is framed in tort. However here counsel for the Defendant refers to an Ontario Court of Justice (General Division) decision in *Haswell v. Canada (Attorney General)* (1998), 56 O.T.C. 143. In *Haswell* Mr Justice Chadwick observed that the case, which apparently involved the arbitrary release of the plaintiff from the military, and notwithstanding an attempt to frame the proceeding in tort, through the use of the word "negligence", clearly related to the plaintiff's engagement as a member of the military and particularly to his compulsory retirement.
- [6] In the present instance I am not convinced that the Amended Statement of Claim is merely framed in or disguised as a tort. The claim is for interfering with economic relations, negligently undermining the Plaintiff in performance of his work and negligently interfering with the Plaintiff's military career, and as such it is not a subterfuge for avoiding the absolute barrier of a claim in contract. Under Canadian law there is a recognised tort of interfering with economic relations or interests: see for example *Fridman on the Law of Torts in Canada*, 2nd edition, Carswell at 813 and 814.
- [7] The Defendant says that there are not enough particulars set out in the Statement of Claim to support the tort of interference with economic relations. However I note that the Plaintiff did provide particulars, 3 September 2002, which are quite wide in scope. There are enough particulars for pleading. Further, while the Statement of Claim may be a little thin I am not prepared to find the elements required for the tort of interference with economic relations, being an intention to injure, economic loss or related injury and an unlawful employment of the means to injure, as set out *Cheticamp Fisheries Co-operative Ltd. v. Canada* (1995), 123 D.L.R. (4th) 121 (N.S.C.A.), are not within the Amended Statement of Claim and particulars.
- [8] Taking all of the circumstances into consideration I am of the view that the Defendant has failed to establish that it is plain, obvious and beyond a reasonable doubt that this action, pleaded as it is in the tort of interfering with economic relations or interests, cannot succeed because the action may not proceed if it is in fact in contract. I therefore turn to a more substantial argument, that the Plaintiff ought to follow the National Defence Act grievance procedure. Military Grievance Procedure
- [9] Many cases have established that the grievance procedure under the National Defence Act is an adequate remedy as an alternative to a Federal Court proceeding. Thus, in the majority of instances, the grievance procedure ought to be followed through to a conclusion: see for example *Anderson v. Canada (Canadian Armed Forces)*, [1997] 1 F.C. 273 (F.C.A.) and *Brown v. Canada (Attorney General)* (1998), 148 F.T.R. 50 (F.C.T.D.), in which there is a consideration of *Anderson* and the earlier cases which provided a structure for *Anderson*.

- [10] There are also exceptions to the principle in *Anderson*, for example *Gayler v. Canada* (Director Personnel Careers Administration Other Ranks, National Defence Headquarters) (1994), 88 F.T.R. 241 (F.C.T.D.) in which Mr Justice MacKay decided that the military grievance procedure was, by reason of a decision already made, a meaningless exercise and therefore allowed judicial review to proceed. See also *Loiselle v. Canada* (Attorney General) (1998), 161 F.T.R. 232 (F.C.T.D.), where the grievance procedure would have been expensive, time-consuming and eventually meaningless as the grievance procedure would be circular, leading to an individual who had already made a decision.
- [11] There is an onus under the military grievance procedure requiring the person grieving a decision to push the procedure on up the chain of command. Thus, on receiving a decision, a griever who is dissatisfied with the decision must actively take it to the next level. If the griever is ignored at any level, for various durations of time as set out in section 19.26(11) of the Queen's Regulations and Orders, he or she may then submit the grievance to the next level without waiting further for a decision, as set out in section 19.26(12) of the Queen's Regulations and Orders.
- [12] The Plaintiff submits that he proceeded with his four grievances, but was unable to obtain responses. Counsel for the Plaintiff refers to a letter of 5 January 2001, addressed by Mr Chisholm to his commanding officer, requesting that all of the grievances be forwarded to the next level of command.
- [13] The Defendant has produced a 9 April 2001 response to two of the grievances, one of 23 May 2000 and the other of 5 January 2001. The commanding officer concludes his 9 April 2001 letter: "Should you not accept my finding you may request that your case be forwarded to a higher authority."
- [14] Counsel for the Defendant submits that three of the four grievances were stale dated by 5 January 2001 when Corporal Chisholm requested that they be forwarded to the next level. Here I note *Lazar v. Canada* (Attorney General) (1999), 168 F.T.R. 11 (F.C.T.D.), a decision of Mr Justice Evans, as he then was, at page 14 for the proposition that the fact that an applicant is out of time to take advantage of an administrative remedy, does not necessarily render the remedy inadequate, the rationale being that it would be anomalous if by sitting on a right and allowing it to expire an applicant could avoid having to utilize a statutory right of appeal: that would be wrong.
- [15] On this analysis I am left with the decision of commanding officer E. A. Brown, 9 April 2001, as dealing with the only effective grievance at that time. There is some question as to whether Corporal Chisholm received the 9 April 2001 letter, yet from the material exhibited to the affidavits I am persuaded that the last grievance was being taken seriously and was answered. However, if I am wrong in that belief, there is the onus on Corporal Chisholm, who was still writing to those above him on 12 April 2001, to again request that whatever grievances he thought he then had, which were current, be forwarded to the next level.

[16] From all of this it is clear that Corporal Chisholm did not take proper advantage of the grievance procedure. I cannot find that he comes within any exceptions to the grievance procedure, such as in *Loiselle (supra)* or *Gayler (supra)*. Thus his action plainly, obviously and beyond doubt is one which cannot succeed. The action is struck out. (Sgd.) "John A. Hargrave" Prothonotary Vancouver, British Columbia 1 April 2003 FEDERAL COURT OF CANADA TRIAL DIVISION NAMES OF COUNSEL AND SOLICITORS OF RECORD DOCKET: T-667-01 STYLE OF CAUSE: Shawn Chisholm v. Attorney General of Canada PLACE OF HEARING: Vancouver, British Columbia DATE OF HEARING: 20 February 2003 REASONS FOR ORDER: Hargrave P. DATED: 1 April 2003 APPEARANCES: Robert P Campbell FOR PLAINTIFF Ward Bansley FOR DEFENDANT SOLICITORS OF RECORD: Robert P Campbell FOR PLAINTIFF Barrister & Solicitor Surrey, British Columbia Deputy Attorney General of Canada FOR DEFENDANT Department of Justice Vancouver, British Columbia

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