

1-1474-89

IN THE FEDERAL COURT OF CANADA
TRIAL DIVISION

Court File:
DND-ASSOC / MND
Referred to
Trans: a MND

AUG 16 1989

BETWEEN:

DERRICK COLIN DWYER

File No.
Dossier No. 410-DT 8292
Charged to / Charge a. MND (1-)
Plaintiff

and

HER MAJESTY THE QUEEN and
THE MINISTER OF DEFENCE

Defendants



STATEMENT OF CLAIM

Facts

1. The Plaintiff is a member of the Canadian Armed Forces (hereinafter referred to as "C.A.F."). The Plaintiff enrolled in the C.A.F. on June 4, 1981. The Plaintiff was previously enrolled in C.A.F. from November 1977 to September 1980. The Plaintiff has held the rank of corporal since 25 September, 1982 and has been posted at Canadian Forces Base Montreal and has worked as an administrative clerk since June, 1984.
2. Her Majesty the Queen is joined for the purpose of the declaratory orders sought herein.
3. The Defendant Minister of Defence, (hereinafter referred to as "the Minister") is the Minister having the management and direction of the C.A.F. pursuant to the *National Defence Act*.
4. The Plaintiff was given a secret security clearance for C.A.F. in December, 1986.

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5. The Plaintiff is a homosexual and has stated he is a homosexual when questioned by superior officers.

6. In early June 1988 the Plaintiff's commanding officer showed the Plaintiff a message that stated that the Plaintiff's secret security clearance was suspended until an investigation was completed.

7. The Plaintiff was the subject of an investigation by the Special Investigation Unit of C.A.F. pursuant to Canadian Forces Administrative Order 19-20 (hereinafter referred to as "CFAO 19-20"). CFAO 19-20 was made pursuant to the authority granted under the Queen's Regulations and Orders for the Canadian Forces. The Queen's Regulations and Orders for the Canadian Forces are made pursuant to the authority granted in the *National Defence Act*.

8. On September 29, 1988 the Plaintiff's commanding officer informed the Plaintiff that the Plaintiff's secret security clearance was suspended. Despite the revocation of his secret security clearance the Plaintiff was directed to continue all his previous duties as administrative clerk even though this required his handling documentation that the suspension of his secret security clearance should have prohibited.

9. The Plaintiff was informed that his secret security clearance was reinstated in April 1989.

10. On or about May 4, 1989 the Plaintiff was asked to voluntarily resign from C.A.F. The Plaintiff refused. The Plaintiff's commanding officer informed the Plaintiff that the Plaintiff:

- a. was ineligible for any future promotion;
- b. was ineligible for any career or trade qualification courses;
- c. could not apply for any extension of his current term of service;
- d. would receive no postings except in the same geographical area.

11. The Plaintiff believes that the previous suspension of his secret security clearance

and the present orders restricting his future career in C.A.F. are all actions taken pursuant to CFAO 19-20. CFAO 19-20 deal with C.A.F. policy regarding homosexuality and sexual abnormality. The features that the Plaintiff believes were applied by C.A.F. to his case and that the Plaintiff objects to can be summarised as follows:

- a. Any member of C.A.F. who is aware or has suspicion that another member of C.A.F. is a homosexual or has a sexual abnormality must report the matter to the commanding officer who shall investigate;
- b. When an investigation indicates with reasonable certainty that a member of C.A.F. is a homosexual or has a sexual abnormality the commanding officer must forward report. The commanding officer shall consider disciplinary action against members who are homosexual or have a sexual abnormality;
- c. Service policy does not allow a homosexual member or a member with a sexual abnormality to be retained in the C.A.F.

12. The Plaintiff believes that but for the fact of his homosexuality he would not have endured the suspension of his secret security clearance, and the restrictions contained in the order communicated to him on or about May 4, 1989. The Plaintiff further believes that were he not known to be a homosexual that he would have been promoted before this time.

13. The Plaintiff has felt humiliated and has suffered stress and anxiety as a result of C.A.F.'s treatment of him.

14. The Plaintiff claims that CFAO 19-20 is unconstitutional as being in contravention of the Canadian Charter of Rights and Freedoms for failing to provide equal benefit and protection of the law in accordance with the principles of fundamental justice. The Plaintiff claims that he is being unfairly discriminated against on the basis of his sexual orientation. The Plaintiff is being denied the rights of advancement afforded to other members in C.A.F. who are not homosexual.

Relief Sought

The Plaintiff therefore claims as follows:

I A declaration pursuant to Section 24(1) and Section 52 of the *Canadian Charter of Rights and Freedoms* that the Plaintiff, pursuant to Section 15 (1) of the *Canadian Charter of Rights and Freedoms*, is entitled to the equal protection and equal benefit of the law without discrimination and further declarations that:

- (a) CFAO 19-20 contravenes Section 15 of the *Canadian Charter of Rights and Freedoms* insofar as it unlawfully discriminates against homosexual persons from other members of C.A.F.
- (b) the order suspending the Plaintiff's secret security clearance is null and void;
- (c) the order communicated to the Plaintiff on or about May 4, 1989, setting out restrictions on the advancement of the Plaintiff while he remains in C.A.F. be quashed and set aside.
- (d) any negative evaluations or references to the Plaintiff based on his sexual orientation be removed from the records of C.A.F. and that the Plaintiff's sexual orientation not be considered in future evaluations for advancement in C.A.F.
- (e) an interlocutory injunction enjoining C.A.F. from taking any disciplinary action or punitive action against the Plaintiff based on his sexual orientation or for having proceeded with this action;
- (f) general damages for humiliation and for the loss of income the Plaintiff could have expected to have obtained for a promotion in the normal course of events had the Defendants not unfairly discriminated against him.
- (g) Costs;

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(h) Such further and other relief as to this Honourable Court may seem meet.

Dated at Vancouver, British Columbia, this 12th day of July, 1988.

SMITH & HUGHES

R. J. Hughes

ROBERT J. HUGHES
Solicitor for the Plaintiff

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NOTICE TO THE DEFENDANTS

You are required to file in the registry of the Federal Court of Canada, at the City of Ottawa or at a local office, your defence to the within statement of claim within 30 days (or such other time as may be fixed by an order for service *ex juris* or other special order) from the service hereof in accordance with the Rules of Court.

If you fail to file your defence with the time above limited, you will be subject to have such judgment given against you as the court may think just upon the plaintiff's own showing.

NOTE:(1) Copies of the Rules of Court, information concerning the local offices of the Court, and other necessary information may be obtained upon application to the Registry of this Court at Ottawa--telephone 992-4238--or at any local office thereof.

(2) This statement of claim is filed by Robert J. Hughes, Esq., of the firm of Smith & Hughes, Barristers and Solicitors, Solicitors for the Plaintiff, whose place of business and address for service is 208 - 1242 Robson Street, Vancouver, British Columbia, V6E 1C1.

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