Federal Court of Canada
Trial Division

T-769-89

BETWEEN:

SYLVAIN BORDELEAU,

plaintiff,

- and -

HER MAJESTY THE QUEEN,

defendant.

REASONS FOR ORDER

DUBÉ J.:

This is an application by the plaintiff to appeal from a decision of the Senior Prothonotary dated May 3, 1989 striking out his action. The order (rendered without other reasons) reads as follows:

> After hearing the argument of counsel, reading all the exhibits in the record and referring to the case law submitted, this application is allowed as worded on the basis of res judicata, with reference to case T-2537-86.
>
> (My emphasis)

As it happens, case T-2537-86 is the plaintiff's first action, which was also struck out by the Senior Prothonotary. The latter's first order, dated March 21, 1987 (also rendered without other reasons), read as follows:

> Application allowed as worded, as the six-level grievance procedure has not been entirely exhausted.
>
> (My emphasis)

The plaintiff is a member of the Canadian Regular Armed Forces who was dismissed in August 1986 because of his sexual orientation. On January 19, 1987 he brought an action for damages against Her Majesty the Queen. As noted above, his first statement of claim was struck out as "the six-level grievance procedure [had] not been entirely exhausted". The "levels"

in question are part of the procedure based on Regulations made pursuant to s. 29 of the National Defence Act, specifically s. 19.26, that an officer or soldier who has been a victim of oppression, injustice or other ill-treatment may ask to be heard by his commanding officer and proceed to other levels. Level six reads as follows:

> 6. If the complainant does not receive from the Chief of the Defence Staff the redress to which he considers himself entitled, he may submit his complaint in writing to the Minister and, if the complainant so requires, the Minister shall submit the complaint to the Governor in Council.

The plaintiff had not in fact exhausted these proceedings before he filed his first statement of claim. On the other hand, in his second statement of claim, filed on April 14, 1989, the plaintiff referred to the first dismissal of his action and alleged that he had now exhausted the other proceedings required by the Regulations in question.

It is true that he alleges he had applied to the "Governor General in Council" and that Her Excellency's Director, Policy and Planning, answered him on March 13, 1989, saying that though Her Excellency is the Commander in Chief of the Armed Forces she cannot intervene in the conduct of the Department of Defence's affairs or in the final decisions taken by its Minister.

Earlier, however, he had written to the Minister, and though his statement of claim could be more precise in this regard, it appears in his letter of December 8, 1987 to the Minister that he "insist[ed] on my grievance being submitted to the Governor in Council, unless you decide to intervene on your own authority". This allegation accordingly meets the requirements of level six.

Paragraph 1 of art. 1241 of the Civil Code of Lower Canada indicates the conditions in which res judicata will apply:

> 1241. The authority of a final judgment (res judicata) is a presumption juris et de jure; it applies only to that which has been the object of the judgment, and when the demand is founded on the same cause, is between the same parties acting in the same qualities, and is for the same thing as in the action adjudged upon.

It is accepted in Quebec law that these criteria come down to three identities, namely identity of the parties, identity of the case and identity of the object.[1] It is quite apparent that the three identities are not present in the two actions. The Senior Prothonotary accordingly erred in law in relying on the principle of res judicata.

It further appears that the arguments made before the Senior Prothonotary were much broader and were not limited to exhaustion of the procedure or res judicata. The fundamental point was whether the plaintiff had a reasonable cause of action against the Queen. Gallant v. The Queen,[2] The Queen v. Carole Sylvestre[3] and Operation Dismantle v. The Queen[4] were discussed. It appears from these judgments that before the Charter of Rights and Freedoms came into effect, an action such as that brought by the plaintiff had no chance of success because, as Marceau J. said in Gallant, "the Crown is in no way contractually bound to the members of the Armed Forces, that a person who joins the Forces enters into a unilateral commitment in return for which the Queen assumes no obligations, and that relations between the Queen and her military personnel, as such, in no way give rise to a remedy in the civil courts".[5]

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1 Léo Ducharme, Précis de la Preuve (en matières civiles et commerciales), Univ. of Ottawa, 2d ed., 1985, p. 99.

2 (1978) 91 D.L.R. (3d) 695 (F.C.T.D.).

3 [1986] 3 F.C. 51.

4 [1985] 1 S.C.R. 441.

5 French version of quotation taken from Sylvestre, supra, at 52-53.

Sylvestre, decided by the Federal Court of Appeal, concerned a case almost identical to that under consideration. It concerned a woman who was dismissed from the Armed Forces solely on the ground that she had admitted being a homosexual. She asked that the decision and administrative orders on which her dismissal was based be set aside and also claimed damages. The plaintiff Sylvestre based her argument solely on s. 7 of the Charter, since s. 15 of the Charter was not in effect on the date of her dismissal.

The Court of Appeal dismissed the argument made pursuant to s. 7 of the Charter. It stated unequivocally that there was no cause of action.

In the case at bar, the plaintiff Sylvain Bordeleau was dismissed on August 12, 1986. Section 15 of the Charter was then in effect and had been since April 17, 1985. In paragraph 26 of his statement of claim, the plaintiff relied on s. 15 of the Charter, which reads as follows:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

A point that must be resolved is thus whether discrimination based on sex also covers discrimination involving sexual orientation. It appears to me that the plaintiff Bordeleau may have a reasonable cause of action since discrimination under s. 15 of the Charter is not limited only to the categories listed, but also includes categories that are analogous (Smith, Kline & French

Laboratories Ltd. v. Canada).[6] The Crown has not referred the Court to any precedent that has decided this question since s. 15 of the Charter came into effect.

In Stiles v. Her Majesty the Queen[7] I myself held that an action for declaratory relief brought by a member of the Royal Canadian Mounted Police who was denied a transfer to the C.S.I.S. for homosexuality should not be struck out under Rule 419(1)(a) for the following reason:

> In his amended statement of claim the plaintiff now alleges that he was denied the opportunity to seek and obtain employment with C.S.I.S. because he is a homosexual. If he can establish that at the trial he may have a good cause of action under section 15 of the Charter. This application to strike out is therefore denied.

It would certainly be desirable for the case to be heard on the merits.

The plaintiff further submitted in his second action (at paragraph 36 of his statement of claim) that he "accordingly considers that he has finally exhausted all the available remedies, military and political, and is asking for the intervention of this Honourable Court in accordance with s. 32(1)(a) of the Charter of Rights and Freedoms". He relied on the judgment of the Supreme Court of Canada in Operation Dismantle, supra, and in particular on the judgment of Wilson J., at 462 et seq., that a government decision is subject to judicial review. In other words, he submitted that since the introduction of the Charter, in light of the Operation Dismantle judgment, it is not absolutely clear that the plaintiff does not have a reasonable cause of action against the defendant.

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[6] [1987] 2 F.C. 359 (F.C.A.), at 368-369.

[7] T-2284-85; reported in English in (1986) 13 F.T.R. 234.

Operation Dismantle held, inter alia, that Cabinet decisions are subject to judicial review under s. 32(1)(a) of the Charter and that the Executive Branch of the Canadian goverment has a general duty to act in accordance with the principles of the Charter. The Court held in that case that the decisions to authorize Cruise missile testing could not be regarded as contrary to the allegations of the Executive, since the possible effects of this governmental action were purely contractual.

On the other hand, before the Senior Prothonotary the defendant also raised another argument, namely that the action was prescribed as it must necessarily fall under the Crown Liability Act[8] and that in matters of prescription the latter refers to local legislation.[9] The Civil Code imposes a two-year prescription period:[10] it expired over three years after the plaintiff's dismissal.

To this argument the plaintiff responded that under the provisions of art. 2232 C.C., the prescription cannot run because he was prevented in law from beginning his action before exhausting all his grievance remedies, and that it was really the delays caused by Crown servants in responding to the plaintiff's proceedings which held up his action. It should be noted that the plaintiff's first action was within the two-year time limit. With respect to this second argument, therefore, it is not absolutely clear that the plaintiff's action is now prescribed.

It was stated in Derome v. The Queen[11] that the prescription applicable in a case involving dismissal was one year (art. 2262(3)(c)C.C.), two

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8 R.S.C. 1985, c. C-50.

9 Section 32.

10 Article 2261(2).

11 T-2515-72.

years (art. 2261(3)(c)) or five years (art. 2260(6)(c). In that case, the learned judge did not decide the point. Accordingly, it is not absolutely clear that the case is prescribed.

The plaintiff thus finds himself in the bizarre position where the Crown, after objecting to the first action (though it was brought within the deadline) on the ground that he had not exhausted the available remedies, is now, following the exercise of these remedies (which took over two years), objecting to the action on the ground that it is prescribed. The least I can say is that this two-pronged deletion does not in my opinion have the appearance of fairness and that it is not in the interests of justice to have this matter decided in such a summary manner.

As regards the suspension of prescription, it is worth recalling this statement taken from the monograph titled La Prescription,[12] at p. 354:

> As a general proposition, it can be said that prescription is suspended in all cases where the remedy the creditor is prevented from exercising results from fault by the debtor.

Martineau also mentions a fundamental principle of prescription:

> Extinctive prescription presupposes inaction by the person holding a right. The starting-point of prescription is thus the first day on which he could have acted, the day on which he could for the first time have taken action to assert his right.
>
> (at p. 251)

In the case at bar it could be found that the starting-point of prescription was from January 10, 1989, the date on which the plaintiff received the Minister's reply. Only then was the grievance procedure exhausted. When the legislator has provided means of redress, a litigant must exhaust them

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12 Pierre Martineau, Les Presses de l'Univ. de Montréal, 1977.

s.19(1)

before proceeding against Her Majesty (this indeed is what the Senior Prothonotary himself held in his first order to strike).

It is thus not absolutely clear that the plaintiff's second action is necessarily bound to fail. The application is accordingly allowed and the Senior Prothonotary's order set aside, the whole with costs.

O T T A W A
June 23, 1989

J.E. Dubé
J.F.C.C.

Certified true translation

[redacted]

T. V. Helwig