Date: 20060303
Docket: CI 05-01-43597
(Winnipeg Centre)
Indexed as: Sturby v. Eloy and Others
Cited as: 2006 MBQB 59

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

WAYNE BRADLEY STURBY plaintiff,	)	The plaintiff appeared in person
- and –	)	
LARRY ELOY and CHRIS GOLDEN and MICHAEL BILENKI and MANITOBA SOCCER REFEREES ASSOCIATION and MANITOBA SOCCER ASSOCIATION defendants.	)	Michael G. Finlayson and Erin Romeo for the defendants
	)	JUDGMENT DELIVERED: March 3, 2006

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CHARGE/FEE PAID: 11.00

MASTER SHARP

[1] The defendants move to strike out the statement of claim on the basis that it discloses no reasonable cause of action, is frivolous, scandalous and vexatious, and is an abuse of the process of the court.

[2] The plaintiff has represented himself throughout this proceeding. This motion was originally scheduled to proceed at an earlier date, however, no

material had been filed by the plaintiff in response to the defendants' motion, and accordingly an adjournment was granted to permit the plaintiff to file affidavit material, as well as a motions brief.

[3] The motion then proceeded, with the transcript of the cross-examination of the defendant Golden by the plaintiff being tendered at the hearing. This decision was therefore reserved.

Background

[4] The plaintiff, a member of the Manitoba Soccer Referees Association, ("the Association") officiated actively as a referee until July 6, 2004, when he was suspended by the Association's disciplinary committee for a fixed period of time, and then suspended indefinitely in or about November, 2004.

[5] The Association is an organization that establishes and enforces rules for soccer referees officiating in Manitoba. It is a member organization of the Manitoba Soccer Association ("MSA") that organizes and governs the game of soccer in this province.

[6] The defendants, Eloy, Golden and Bilenki are also members of the Association, and served on the Association's disciplinary committee ("the committee"). Bilenki was the chairman of the committee at the material times, and Golden became the president of the Association in 2005. It should be mentioned that officers serving with the Association do so on a voluntary basis, while referees receive a stipend for their services.

[7] As a result of the plaintiff's apparent failure to attend two games in his capacity of referee in or about May, 2004, the committee of the Association sought an explanation of the plaintiff, which was dealt with at a hearing of the committee in or about July 5, 2004. This resulted in the suspension referred to above.

[8] The Association's Appeals Committee abbreviated the suspension as a result of its hearing held on or about August 4, 2004. Thereafter, the plaintiff continued to challenge the suspension, and a re-instatement hearing was eventually held by the committee on or about November 3, 2004.

[9] The plaintiff communicated with the committee on or about January 26, 2005. In June, 2005, the plaintiff received a letter from Eloy, on behalf of the Association, advising the plaintiff to re-apply for membership of the Association in 2008. The plaintiff then initiated this action in August, 2005.

The Claim

[10] In his claim, the plaintiff says that he was subjected to unfair and harsh treatment by the Association and/or members of its disciplinary committee, has been denied natural justice, and continues to be deprived of his membership in the Association and suffers ridicule, embarrassment and humiliation. He also says that the Association has disregarded administrative procedures it is required to follow, has not acted with procedural fairness, and that as such the Association has lost jurisdiction.

Moving parties' position

[11] The defendants say that the statement of claim is, in effect, an abuse of process of the court as there is already an administrative remedy available to the plaintiff: that is, it is open to him to appeal his suspension to the executive committee of the MSA. To date, the plaintiff has not done so, and the court should, on this basis alone, strike out the statement of claim.

[12] In any case, the defendants say, the statement of claim does not disclose a reasonable cause of action as it does not set out the essential elements of any known cause of action, and it should therefore be struck out on this basis also.

[13] The defendants further say that the statement of claim contains allegations which, having no proper justification in law, are made with the clear intent to annoy or embarrass the defendants. This circumstance should also result in the striking out of the statement of claim.

Plaintiff's position

[14] The plaintiff alleges that although the Association and the committee purport to operate pursuant to a constitution, in fact they failed to abide by the constitution in a number of instances, and in instances where their own constitution provided no specific guidelines, they then failed to apply, and/or conduct themselves in accordance with, the constitution of the parent organization, the MSA. Throughout, the Association and the committee failed to provide minimum requirements of fairness and demonstrated a reasonable apprehension of bias against the plaintiff.

[15] The plaintiff argues that the defendants' motion should therefore be denied.

Decision

The Law

[16] The applicable provisions for striking out a pleading such as a statement of claim are set out in Queen's Bench Rule 25.11 which reads:

> 25.11 The court may on motion strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,
> . . .
> (b) is scandalous, frivolous or vexatious;
> (c) is an abuse of the process of the court; or
> (d) does not disclose a reasonable cause of action or defence.

(a) Abuse of process

[17] The defendants place reliance for their position on the decision of the Manitoba Court of Appeal in ***Turnbull v. Canadian Institute of Actuaries***, [1995] M.J. 424.

[18] At para 3, Scott, C.J.M. speaking for the court stated:

> The principal issue on this appeal is whether the application was premature in that the applicants should first have exhausted their remedies in the administrative process before asking the court to intervene.

[19] At para 17 of the decision, Scott C.J.M. quoted from a decision of the Supreme Court of Canada in ***Canadian Pacific Ltd. v. Matsqui Indian Band***, [1995] 1 S.C.R. 3 per Lamer C. J. at p 20 (who was quoting with approval from the decision at first instance):

> The basic characteristic, however, of judicial review providing an exceptional or extraordinary remedy must necessarily be maintained. It can only be maintained when no other effective recourse is open to a litigant. Absent any statutory bar to jurisdiction ... the relief which a court may grant by way of judicial review remains essentially discretionary. On such an application, a court must view all of the circumstances of the case and decide if any other recourse or remedy is available. Such a recourse is ... usually by way of an appeal. As stated by Culliton J.A., in Wilfong, Re Cathcart v. Lowery (1962), 32 D.L.R. (2d) 477 (Sask. C.A.), the practice is to decline jurisdiction where there is a right of appeal, except under special circumstances.
> (emphasis added).

[20] At para 29 of the ***Turnbull*** *(supra)* decision Scott C.J.M. also said:

> 29 Counsel for the Institute emphasized that the Supreme Court decision in Matsqui is consistent with a long line of administrative law decisions which mandate that, save for exceptional circumstances, the administrative process should be allowed to run its own course. This is to avoid bifurcated proceedings with the attendant further delay, proceedings that may turn out to be redundant or unnecessary, and to give the administrative tribunal an opportunity to correct its own errors. Typical of this approach is the fairly recent decision in Ontario College of Art v. Ontario (Human Rights Commission) (1993), 99 D.L.R. (4th) 738, where the Ontario Divisional Court held an application for judicial review involving allegations of bias and delay to be premature since the administrative proceedings had not been concluded.
> (emphasis added)

[21] The basic principal would therefore appear to be that judicial review is an extraordinary remedy which will normally not be undertaken if there is an adequate alternative remedy.

(b) Reasonable cause of action

[22] It is well settled law that in order to proceed, with a possibility of success, a statement of claim should disclose a reasonable cause of action, that is, ". . . a factual situation the existence of which entitles one person to obtain from the

court a remedy against another person." (per Lord Diplock in ***Letang v. Cooper***, [1964] 2 A11 E.R. 929 (C.A.) at 934).

[23] In determining this question, the outcome of the case must be "plain and obvious" or "beyond doubt" from a review of the pleadings themselves (i.e. in this case, the statement of claim) (see, for example, Wilson J. in ***Hunt v. Carey***, [1990] 2 S.C.R. 959 at 980).

[24] To determine this issue, affidavit evidence is not necessary as the test above implies: the issue can be decided on the basis of the actual pleadings themselves (see, for example, ***Lloyds Bank Canada v. Sherwood***, [1990] M.J. 163). This is to be contrasted with the determination of whether a pleading constitutes an abuse of the court's process, where affidavit evidence will likely be necessary in order to make that determination.

(c) Scandalous, frivolous and vexatious

[25] ***In 57655 Manitoba Ltd. et al v. Iliffe et al***, [1988] M.J. 527, Monnin J. adopted Referee Lee's conclusion at first instance, as follows:

> For pleadings to be struck as frivolous and vexatious I believe that it must be shown that the pleadings are made without any probably justification at law, *mala fides* with a clear intent only to annoy or embarrass the opposite party.

Conclusions

[26] The question to be determined is whether the statement of claim should be struck out for any of the reasons upon which the defendants rely. In other words, can the claim be allowed to go forward or should its progress be halted because the plaintiff has failed to follow other more appropriate avenues, or

because the plaintiff has not shown in the statement of claim that he does indeed have a valid claim, based on known legal principles.

(a) Does this action constitute an abuse of the process of the court?

[27] The question here is whether there was another remedy available to the plaintiff through the administrative process which he could – and should – have exhausted before he sought redress through the courts?

[28] Affidavits were sworn by the defendant Golden as well as by the plaintiff. There was also an extensive cross-examination of Golden undertaken by the plaintiff. Neither the plaintiff's affidavit nor his cross-examination of Golden have assisted the court in determining any of the issues raised by the defendants' motion. It is appreciated that the plaintiff, who is certainly very articulate, is unrepresented, however it would appear that the plaintiff fell into a common error of unrepresented parties in assuming that by throwing every conceivable piece of information into the mix a positive result will be obtained.

[29] The only assistance found in the plaintiff's affidavit was Exhibit W, being an extract from the By-laws, Rules, Regulations and Administrative Guide on the Canadian Soccer Association. Exhibit P to Golden's affidavit are the Rules and Regulations of the MSA. From these two documents it is apparent that these voluntary and related organizations have their own specific scheme or schemes of procedure. For example, paragraph 2 a) of the MSA Rules and Regulations reads:

> 2. a) Any club or person aggrieved by a decision of any association or league in membership or by the association Disciplinarian may as of right, appeal from said decision to the Executive Committee.

[30] Golden's affidavit states:

> 8. Mr. Sturby was advised of his right to contact the MSA on or about September 12, 2004, as noted by Eloy in Exhibit "H" hereto.
>
> 9. I am advised by Dave Kerr, Finance and Administrative Manager of the MSA, that Sturby has never commenced an appeal with the MSA.

[31] The evidence shows that subsequent to that the plaintiff did meet with the executive committee of the Association, but there is no evidence to indicate he ever followed up with an appeal to the executive of the MSA.

[32] The obvious conclusion therefore is that there is an alternative remedy available to the plaintiff in the administrative process.

[33] The question then is whether the available alternative remedy is an "effective" or "adequate" one. In my view, no evidence has been presented to establish that the available alternative remedy is not adequate.

(b) Does the claim establish a reasonable cause of action based on legal principles?

[34] From a reading of the statement of claim, it is fair to conclude that what the plaintiff is seeking is judicial review based on the various points of complaint as summarized above.

[35] At the hearing, the plaintiff denied he was attempting to relitigate the issues before the Association, and stated he was in fact seeking compensation for lost income and lost opportunity, issues which are not in fact raised at all in the statement of claim.

[36] I am in agreement with the defendants that there are no facts alleged in the statement of claim upon which to base the monetary claims as voiced by the plaintiff, nor indeed, is there anything alleged, upon which to base a claim either in tort or in contract or other cause of action known to the law.

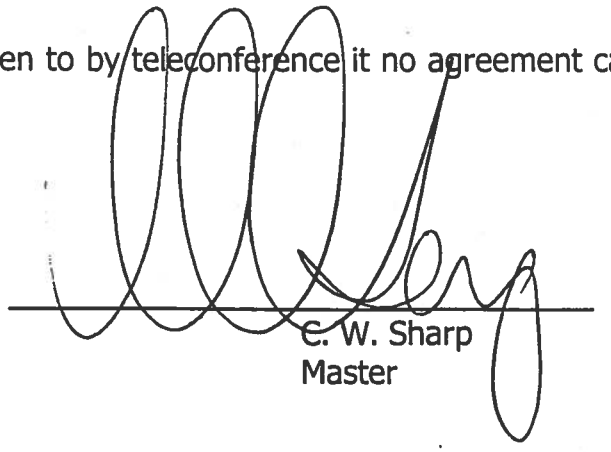
Decision

[37] For all the above reasons it is my view that the statement of claim, as presently framed, cannot stand. This is because there exists an adequate alternative remedy for the issues apparently raised in the claim as presently framed, and there is, in any event, no reasonable cause of action detected therein.

[38] The issue of whether the statement of claim is also scandalous, frivolous and vexatious has not been dealt with, as the claim has been held to fail on both other grounds.

[39] At the hearing, the plaintiff requested that in the event his pleadings were found to be deficient that he be permitted to amend them. Given the conclusion as to alternative remedy it is, not in my view, appropriate to so order.

[40] The defendants' motion is therefore granted. The defendants are entitled to their costs which may be spoken to by teleconference it no agreement can be reached.



C. W. Sharp
Master