COURT OF APPEAL OF YUKON

Citation: *Sidhu v. Canada (Attorney General)*, 2016 YKCA 6

Date: 20160610
Whitehorse Docket: 15-YU770

Between:

Mandeep Singh Sidhu

Appellant
(Plaintiff)

And

The Attorney General (Canada), Constables Andrew West, Mike Seidemann, Matthew Leggett and Scott Carr, and Corporals Natasha Dunmall and Jason B. Waldner, members of the Royal Canadian Mounted Police

Respondents
(Defendants)

Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Sharkey
The Honourable Mr. Justice Harris

On appeal from: An order of the Supreme Court of Yukon, dated November 17, 2015 (*Sidhu v. Canada (Attorney General)*, 2015 YKSC 53, Whitehorse Registry 14-A0118).

Counsel for the Appellant:	Susan Roothman
Counsel for the Respondents:	Jonathan S. Gorton
Place and Date of Hearing:	Whitehorse, Yukon May 17, 2016
Place and Date of Judgment:	Vancouver, British Columbia June 10, 2016

Written Reasons by:
The Honourable Mr. Justice Harris

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Sharkey

Summary:

The appellant appeals from an order striking a number of paragraphs from his amended statement of claim. These paragraphs relate to various encounters between the appellant and the RCMP, which the appellant says support his claim under s. 15 of the Charter that he was a victim of racial profiling. HELD: appeal dismissed. The chambers judge did not make any reversible errors. As currently drafted, the paragraphs at issue do not allege facts from which one could infer that the appellant's equality rights have been violated.

Reasons for Judgment of the Honourable Mr. Justice Harris:

[1] This is an appeal from an order striking a number of paragraphs from an amended statement of claim. The defendants brought the application to strike under Rule 20(26) of the *Yukon Rules of Court* on the grounds that these paragraphs disclosed no reasonable claim (26)(a), were unnecessary, scandalous, frivolous or vexatious (26)(b), or that they may prejudice, embarrass or delay the fair trial or hearing of the proceeding (26)(c).

[2] In his statement of claim, the plaintiff, Mr. Sidhu, seeks relief arising from various interactions with members of the Royal Canadian Mounted Police ("RCMP"). Of particular importance for this appeal, he alleges that he has been subject to discriminatory racial profiling by the RCMP and that this violated his equality rights under s. 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 [*Charter*].

[3] The paragraphs the chambers judge ordered struck, which he described as the "historical pleadings" and which were found under the heading "Background" in the amended statement of claim, are the following:

> 8. During the summer of 2006 he became friends with Angela Spicer, a RCMP officer stationed at Watson Lake RCMP Detachment. The relationship ended when he was confronted by three male officers at his workplace who demanded of him not to contact Angela Spicer but through them.
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> 9. During the summer of 2006 Sidhu was detained several times by various officers for alleged motor vehicle infractions. This continued throughout the summer of 2007 and 2008.

10. During August 2010 Sidhu was arrested for alleged impaired operation of a motor vehicle, obstructing a peace officer, mischief and sexual assault. The charges were stayed.

11. On or about August 23, 2011 Sidhu was pulled over for allegedly using a cellphone while operating a motor vehicle. He was arrested, detained in police cells and later detained under the *Mental Health Act*, charged with assaulting a peace officer, uttering a threat, obstructing a peace officer, mischief and using an iPhone while operating a motor vehicle. The charges were stayed, but for using of an iPhone while operating a motor vehicle for which he was convicted ex parte. The conviction was quashed on appeal on January 8, 2013, after the crown [sic] conceded the appeal on the basis that an iPhone was not used by Sidhu.

12. Sidhu did not return to Watson Lake after his arrest during August 2011 and his subsequent detention pursuant to the *Mental Health Act* partly due to the conditions of his release from custody. His family further feared for his safety being on his own in a remote area and being the target of unwarranted police attention. The family business was closed down in Watson Lake and Sidhu lost his job.

13. From August to December 2011 Sidhu was pulled over by RCMP officers in Whitehorse for a further three times to check for proper documents. No tickets were issued pursuant to the *Motor Vehicle Act* on any of the three occasions.

14. Sidhu was arrested by Corporal T.L. Monkman while walking through the RCMP parking lot on October 26, 2011, charged with mischief, which charge was stayed.

15. Sidhu started to work at the family owned Laundromat in Whitehorse during 2012.

16. He was pulled over for an alleged seatbelt infraction on May 16, 2012 by Constable Andrew West and ticketed pursuant to the *Motor Vehicle Act*, which ticket was disputed by Sidhu and stayed.

17. Sidhu was pulled over a further twelve times by various RCMP officers on traffic duty pursuant to the *Motor Vehicle Act* since his forced return to Whitehorse during 2011, all of which did not result in any charges.

18. Sidhu laid various complaints with the Commission for Public Complaints against the RCMP about the above mentioned Watson Lake and Whitehorse incidents, which complaints were all informally resolved after investigation by Sergeant Grant D. Lohrenz.

19. Sidhu continues to be a target of unwarranted police attention in Whitehorse by being pulled over pursuant to the *Motor Vehicle Act,* being under sporadic police surveillance at his place of work and being visited by police at his place of work.

…

> 22. The detention was without reasonable or probable grounds; unlawful; singled Sidhu out as a person of East Indian descent and defamed his recent campaign to run as mayor of Whitehorse.
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> …
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> 48. The Defendants acted with malice and improper motives based amongst others on the history created by the Watson Lake and Whitehorse Detachments of the RCMP about Sidhu.
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> …
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> 58. Sidhu states that past and continuing police conduct against him as set out in paragraphs 4 to 19, 22, 26 and 48 above is based on racial profiling and discriminates against him as a person of East Indian decent [sic].
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> …
>
> 61. Sidhu claims that his rights pursuant to section 15 of the *Charter* were breached by the Defendants and continue to be in jeopardy of being breached by the Defendants.
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> [In paras. 22, 48, and 61, only the underlined portions were struck.]

[4] The order did not strike paragraphs of the amended statement of claim alleging various causes of action arising from Mr. Sidhu's alleged improper detention at a RIDE Program traffic stop in Whitehorse on December 2, 2012 and his arrest on December 5, 2012. Alleged in relation to those incidents are torts of unlawful detention, unlawful arrest, malicious prosecution, assault and battery, and breaches of his rights under the *Charter*, in particular, ss. 7, 9, 10 and 15. The chambers judge viewed the claims arising from the December 2 and 5, 2012 incidents as the principal claims in the action.

[5] The judge summarized the defendants' submissions and his conclusion:

> [15] In summary, the defendant's counsel submitted that the historical pleadings should be struck for a combination of reasons. First, the pleadings are unnecessary and vexatious because they cannot go to establishing the plaintiff's racial discrimination claim, nor do they advance any other claim known in law. Second, the pleadings are embarrassing and scandalous because they are irrelevant and they will involve the parties in useless expense and will prejudice the trial of the action by involving them in a dispute apart from the central issues arising from the events of December 2 and 5, 2012. Third, they disclose no reasonable claim/cause of action in and of themselves. Thus, it is plain and obvious that the pleadings do not constitute allegations of fact relevant to, or necessary for, the purpose of furthering the claim of racial discrimination associated with the events of December 2012.

> …
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> [17] I am largely in agreement with all of these submissions, except to say that repeated groundless detentions by police officers could give rise to a potential tort of misfeasance in public office or abuse of process. However, neither of those torts are pled here. In any event, I do agree that the plaintiff's counsel has failed to plead any material facts from which an inference can logically be drawn that the police acted in a racially discriminatory manner towards the plaintiff on December 2 or 5, 2012.

[6] These passages might be read to suggest that the plaintiff's claim is restricted to relief arising only from the December 2 or 5, 2012 incidents. If that were so, the judge's conclusions would be unassailable. The historical pleadings are found under the heading "Background" immediately before the heading "Facts", which set out the alleged facts relating to the December 2 and 5, 2012 incidents. I think these headings are unfortunate because they may induce a reader to think that the facts laid out as background are not alleged material facts giving rise to the relief claimed. Indeed, in his factum Mr. Sidhu described the historical pleadings as history that "put into context the incidents of December 2, 2012" when the appellant was detained at a RIDE Program stop. It appears that the defendants have interpreted the pleadings in this way, at least at times. Indeed, para. 17 suggests that the judge may have viewed the historical pleadings as potentially relevant only to the racial discrimination claim arising from the events of December 2, 2012 and that Mr. Sidhu only sought relief in relation to the December 2 and 5, 2012 incidents. Mr. Sidhu's description of the historical pleadings as context, thereby suggesting that they are not material facts stating a claim for relief, has not led to clarity about the true nature of his claim.

[7] That being said, I do not read the amended statement of claim as obviously limited to the December incidents. On a generous reading, Mr. Sidhu alleges that for a number of years he has been subject to discriminatory conduct rooted in racial profiling in breach of his equality rights. On that reading, the various historical incidents might give rise to multiple breaches of his equality rights, with each grounding an individual cause of action. But the pleading is not clear. It may be that the real claim is that Mr. Sidhu has been the victim of a systemic practice of discriminatory conduct specifically targeting him because of his race (or alternatively, generally targeting persons of his race) and the December incidents are merely the

latest manifestation of that practice. If this were so, the nature of the action would be much closer to the description found in para. 17 of the reasons. Whatever the true case is, it is not clearly pleaded. Hence, the real question on appeal is whether Mr. Sidhu has adequately pleaded a claim.

[8] On balance I do not think the judge restricted his analysis to a claim arising only from the December 2012 events, although he regarded the action as principally focused on them. I will proceed then to consider this appeal on the basis that the historical pleadings are intended to support relief in relation to the events they describe and that the judge appreciated that.

[9] It appears that the judge's conclusion is based on each of the component elements of Rule 20(26). What is important to emphasize is that the ruling is not premised on a conclusion that Mr. Sidhu could not properly plead a cause of action based on s. 15 arising from the history of his interactions with the police. The judge's order is based on his conclusion that Mr. Sidhu had not done so properly.

[10] As I read the reasons of the judge, the principal defect in the historical pleadings is Mr. Sidhu's failure to plead material facts capable of making out a claim that his equality rights were breached as a result of racial profiling during the course of his multiple interactions with the police. In the judge's opinion, a bare allegation of racial profiling is insufficient to make out a s. 15 claim without any pleading of material facts supporting the allegation that the RCMP's conduct towards Mr. Sidhu arose from racial profiling. The judge relied on *Hamalengwa v. Bentley*, 2011 ONSC 4145, in which Lederman J. said:

> 10. The statement of claim does not plead material facts that would establish any *Charter* breach for racial profiling. Instead, the statement of claim is largely a combination of evidence and argument that racial profiling is a systemic problem. An allegation of racial animus is analogous to an allegation of fraud, misconduct or dishonesty. Thus, a bald allegation of racial profiling without particularity must be struck (*Hamalengwa v. Duncan*, [2005] O.J. No. 851 (S.C.J.) at para. 24; aff'd [2005] O.J. No. 3993 (C.A.) at para. 17; leave to appeal denied, [2005] S.C.C.A. No. 508).
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> 11. It is clear that no fact or particulars are pleaded regarding the allegations of racial profiling related to the various traffic violations. … Even at

> its highest, the statement of claim does not provide sufficient particulars to ground the plaintiff's allegations of intentional and malicious conduct.

[11] On appeal, Mr. Sidhu argues that the chambers judge erred in his interpretation of s. 15 of the *Charter.* As a result, even though the judge correctly stated the tests to apply in determining whether to strike pleadings, he erred in his application of the tests to the pleadings in this case. Mr. Sidhu contends that his pleading is sufficient to state the cause of action. In particular, he observes that para. 58, set out above, and paras. 59 and 60 of his amended statement of claim connect the historical incidents to racial profiling. Paragraph 59 alleges that the defendants' racial profiling and discriminatory conduct violated his dignity and para. 60 alleges that the defendants' conduct breached his equality rights.

[12] At the outset, I do not think the chambers judge misapprehended the nature of a claim alleging a breach of equality rights arising from discriminatory conduct rooted in racial profiling. I do not think the judge misunderstood that discrimination based on race might occur systemically, result from practices or policies whether intended or not, and can arise in individual interactions with police officers.

[13] The real question is whether the judge erred in concluding that a bald allegation of racial profiling accompanied by a list of occasions on which Mr. Sidhu interacted with the RCMP in various ways is an inadequate pleading. If he did not err in this conclusion then, in my view, his reasoning that the historical pleadings should be struck as scandalous and prejudicial to a fair trial cannot be criticized.

[14] I do not think the judge fell into error.

[15] Pleadings serve a number of important purposes. They give notice of the claim being advanced. They define the issues joined between the parties to a dispute. They require a statement of the material facts underlying a cause of action so that a defendant knows what the case is that he or she must meet. They define what is relevant to the adjudication of the action. They facilitate an appropriate use of judicial resources to adjudicate the dispute between the parties: *Canadian Bar Assn. v. British Columbia*, 2008 BCCA 92 at paras. 59-60, leave to appeal ref'd

[2008] S.C.C.A. No. 185. It is evident that the judge concluded that the amended statement of claim failed to further these objectives.

[16] In her submissions, counsel for Mr. Sidhu clarified that most of the historical incidents related to road side stops. However, not all of them did. The pleadings describe a variety of different events, some of which led to charges, others which did not. The pleadings do not, for the most part, identify the dates or places of the incidents or the officers involved. Further, the pleadings do not provide any particulars of the circumstances of the incidents, including any statements by or conduct of RCMP members that might ground an inference that Mr. Sidhu was stopped, in part, as a result of a practice of racial profiling or because he was a specific target of the RCMP or the individual officers in part because of his race. Nor, as the judge noted, is there an explicit pleading that the total number of interactions are a basis for establishing racial profiling. The allegations are, in my view, vague, unspecific and ambiguous. I cannot see that they define the issues in such a way that the defendants can know the case that they have to meet.

[17] The historical pleadings do not allege facts from which one could infer that Mr. Sidhu's s. 15 equality rights have been violated. Since discriminatory conduct rooted in racial profiling can arise in many different ways, it is incumbent on a plaintiff to plead the material facts establishing such conduct. I share the view, expressed by Lederman J. in *Hamalengwa* and endorsed by the judge, that a bare allegation of racial profiling is insufficient. No doubt there will be circumstances where knowledge of certain material facts will be within the knowledge of the defendants, but that issue is readily addressed where appropriate, for example, by deferring the provision of particulars until after discovery.

[18] In the result, I am not persuaded that the judge made any reversible error. In my view, he correctly identified the tests he had to apply under Rule 20(26) and did not commit any error in principle in the application of the tests. I do not think his analysis was influenced by a view on the merits of the claims advanced, any misapprehension about the existence or prevalence of racial discrimination or

profiling, or an erroneous assumption that the litigation was governed by a two- rather than a six-year limitation period. The judge's analysis was based on the pleadings and, to a limited extent, on affidavit material in respect of Rule 20(26)(b) and (c). Moreover, the judge did not err in striking the portions of the pleadings that alleged defamation without providing any supporting material facts. Finally, the judge did not err in striking the portion of para. 60 of the claim that suggested Mr. Sidhu's s. 15 rights continue to be in jeopardy. This concern is more properly dealt with by further amendments to the statement of claim in the event that alleged breaches occur.

[19] It is important to remember that the order struck certain paragraphs from the amended statement of claim. It did not dismiss the claim. The order does not prevent Mr. Sidhu from advancing a properly pleaded claim. It may be that an application to further amend the pleading is required. That application would have to be considered on its merits. What this appeal concerns is simply whether the judge erred in striking the pleadings as they stand. I cannot conclude that he did err. Accordingly, I would dismiss the appeal with costs to the respondents.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Madam Justice Saunders"

I agree:

"The Honourable Mr. Justice Sharkey"