

CITATION: *Mittal v. Department of National Defence*, 2025 ONSC 7256
COURT FILE NO.: CV-22-353
DATE: 2025/12/30

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

Saket Mittal

Plaintiff

Michael D. Swindley, for the Plaintiff

– and –

Department of National Defence, Jeremy B.
Lemoine, Steven R. Ellis, and Ronald M.
O’Neill

Defendants

Dylan Smith, for the Defendants

HEARD: July 26, 2024 and June 16, 2025
(By videoconference)

RULING ON MOTION

CORTHORN J.

Introduction

[1] The plaintiff’s claims arise from his employment, as a civilian, with the Department of National Defence (“DND”). The plaintiff worked as a cook in the Cadet Dining Hall at the Royal Military College in Kingston, Ontario.

[2] The plaintiff commenced this action in November 2022 under the ordinary procedure. He claims general damages of \$200,000, plus interest and costs. Under the heading “LIABILITY”, the plaintiff alleges that he suffered “personal and special damages to his personal and business reputation” as a result of (a) workplace harassment by the defendants against him; and (b) the defendants’ negligence.

[3] The proper name for the institutional defendant is the “Attorney General of Canada”. The misnomer of the institutional defendant was resolved by the parties on consent. In this ruling, I refer to the institutional defendant as “the AGC”.

[4] The individual defendants are three of the plaintiff's former colleagues at the Cadet Dining Hall. In their notice of motion, the defendants assert that the claims against the individual defendants relate exclusively to conduct within the course of their employment – conduct for which the individual defendants say they cannot be held liable in the context of a civil action.

[5] The defendants did not deliver a statement of defence. They chose to bring the pleadings motion now before the court (“the defendants’ motion”).

[6] First, the defendants ask the court to dismiss the action in its entirety. The defendants’ position is that the action is barred by virtue of s. 236 of the *Federal Public Sector Labour Relations Act*, S.C. 2003, c. 22, s. 236 (“*FPSLRA*”). The defendants’ position is that the plaintiff’s claims fall entirely within the scope of employment-related disputes that must be resolved pursuant to the grievance procedure under the *FPSLRA*.

[7] The defendants’ additional or alternative position is that, even when read generously, it is plain and obvious that the statement of claim fails to disclose any cause of action that has a reasonable prospect of success. The defendants ask the court to strike the statement of claim in its entirety, without leave to amend.

[8] The responding record delivered by the plaintiff includes a notice of motion (“the plaintiff’s motion”). The relief requested therein includes an order (a) dismissing the defendants’ motion as it relates to the claims against the AGC; and (b) extending the deadline by which the AGC is required to deliver their statement of defence.

[9] Prior to the return of the motions, the plaintiff conceded that the defendants are entitled to an order striking the claims against the individual defendants. The parties consent to an order amending the title of proceeding so that the names of the individual defendants are removed and the “Attorney General of Canada” is substituted for all originally-named defendants. If the action survives the defendants’ motion, the AGC will be the only defendant.

[10] The plaintiff asks the court to order the AGC to produce each of the individual defendants for examination for discovery in any event of the claims against them being struck. The defendants’ position is that there is no basis for such an order to be made.

[11] I next summarize the substantive and procedural issues determined in this ruling.

The Issues

[12] The following issues are determined on the parties’ respective motions:

1. Are the plaintiff’s claims statute-barred by the *FPSLRA*?
2. Is the statement of claim to be struck because it discloses no reasonable cause of action?

3. Is the plaintiff entitled to leave to amend his pleading?
4. Is the plaintiff entitled to an order requiring the AGC to produce the individual defendants for examination for discovery in any event of the claims against them being struck?

Issue No. 1 - Are the plaintiff's claims statute-barred by the FPSLRA?

a) Overview

[13] The defendants rely on r. 21.01(3)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. It stipulates that “[a] defendant may move before a judge to have an action stayed or dismissed on the ground that [...] the court has no jurisdiction over the subject matter of the action”. The defendants’ position is that s. 236 of the *FPSLRA* creates a “strong jurisdictional bar” to the pursuit of a civil action related to terms or conditions of employment.

[14] Subsections 236(1) and (2) are relevant to Issue No. 1; s. 236(3) is not. The two relevant subsections appear in both official languages, below:

(1) The right of an employee to seek redress by way of grievance for any dispute relating to his or her terms or conditions of employment is in lieu of any right of action that the employee may have in relation to any act or omission giving rise to the dispute.

(1) Le droit de recours du fonctionnaire par voie de grief relativement à tout différend lié à ses conditions d'emploi remplace ses droits d'action en justice relativement aux faits — actions ou omissions — à l'origine du différend.

(2) Subsection (1) applies whether or not the employee avails himself or herself of the right to present a grievance in any particular case and whether or not the grievance could be referred to adjudication.

(2) Le paragraphe (1) s'applique que le fonctionnaire se prévale ou non de son droit de présenter un grief et qu'il soit possible ou non de soumettre le grief à l'arbitrage.

[15] Before setting out the court’s analysis for Issue No. 1, I will review the evidence upon which the parties rely and, thereafter, the plaintiff’s position regarding the causes of action he seeks to pursue against the AGC.

b) The Evidence

[16] The parties are entitled to file evidence in support of or response to a motion made pursuant to r. 21.01(3)(a). The defendants rely on an affidavit from a paralegal, William Hall, employed by DND (“the Hall affidavit”). In his affidavit, Mr. Hall reviews a harassment complaint and four grievances filed by the plaintiff during his period of employment at the Cadet Dining Hall. Copies of the complaint and each grievance are exhibits to the Hall affidavit. That affidavit does not address any other subject matters.

[17] The plaintiff's responding record includes three affidavits. The first affidavit is from the plaintiff ("the Mittal affidavit"). In his affidavit, the plaintiff describes changes in his work environment over time; an escalation, as of March 2021, in the harassment he experienced; a verbal and physical attack against him in April 2021; and a criminal proceeding, with charges laid against the plaintiff in 2021 and dropped in 2022.

[18] Also, in his affidavit, the plaintiff makes admissions relevant to his status as a civilian employee of DND. First, the plaintiff admits that he is a member of the Public Service Alliance of Canada. Second, the plaintiff admits that he is bound by the Operational Services (SV) Collective Bargaining Agreement between the Treasury Board and the Public Service Alliance of Canada ("the Agreement"). The plaintiff does not dispute that the exhibits to the Hall affidavit are accurate copies of documents related to his complaint and grievances.

[19] The second affidavit is from Yevheniia Kovalenko, a law clerk employed by the plaintiff's lawyers of record ("the Kovalenko affidavit"). In her affidavit, Ms. Kovalenko addresses a draft amended statement of claim ("the draft pleading"). A copy of the draft pleading is an exhibit to the Kovalenko affidavit.

[20] The third affidavit is from a lawyer, T.C.E.J. Ecclestone ("the Ecclestone affidavit"). Mr. Ecclestone's evidence is that much of the work in representing the plaintiff in a 2021-22 criminal proceeding (see para. 17, above) was done by a paralegal who is no longer employed at Mr. Ecclestone's office. Mr. Ecclestone provides evidence as to what transpired through to the conclusion of the criminal proceeding against the plaintiff.

[21] None of the affiants were cross-examined on their respective affidavits.

[22] I turn next to the plaintiff's characterization of the causes of action upon which the plaintiff relies in his pleading.

c) The Plaintiff's Characterization of the Causes of Action

[23] In the statement of claim, the plaintiff alleges that he is entitled to damages as a result of (a) workplace harassment against him by the defendants; and (b) the defendants' negligence. The statement of claim does not explicitly identify a claim based in malicious prosecution; the phrase "malicious prosecution" does not appear in that pleading.

[24] It is clear from the plaintiff's affidavit and factum, as well as from the oral submissions on his behalf, that the plaintiff now relies on the allegations in the statement of claim to support a claim based in malicious prosecution.

[25] Both in their factum and oral submissions, the defendants address, under Issue No. 2, the plaintiff's intention to pursue a claim in malicious prosecution. The defendants do so in the context of relief requested pursuant to r. 21.01(1)(b). I agree with that approach.

[26] The plaintiff concedes that damages arising from the workplace harassment, as alleged, fall within the grievance procedure under the *FPSLRA*. As a result, it is not necessary for the court to determine Issue No. 1 regarding the workplace harassment claim. The relief requested by the defendants for that cause of action is granted on the consent of the plaintiff.

[27] In paras. 49-50 of his factum, the plaintiff is clear in his intention to pursue a claim against the AGC based in negligence. The plaintiff submits that the statement of claim discloses a reasonable cause of action in negligence.

[28] For those reasons, I restrict my analysis under Issue No. 1 to a determination of whether the plaintiff's claim based in negligence is statute-barred by s. 236 of the *FPSLRA*. I next review the allegations in the statement of claim.

d) The Statement of Claim

[29] The allegations in the statement of claim are organized such that the workplace harassment claim is addressed first, followed by the claim in negligence.

[30] In para. 44 of the statement of claim the plaintiff sets out the particulars of the claim in negligence. He does so in four sub-paragraphs. The third and fourth sub-paragraphs are nothing more than a generic reference to the concepts of causation and foreseeability. Those sub-paragraphs are not relevant to Issue No. 1.

[31] Only the particulars of negligence set out in the first and second sub-paragraphs are relevant to Issue No. 1. Those particulars are replicated immediately below:

- a. As his employer and immediate supervisor, the Defendants owed Saket a duty of care. The Defendants were aware of Saket's [r]eligious values, and his reputation in the workplace and community at large. It was reasonably within the contemplation of the Defendants that carelessness on their part might cause harm to Saket;
- b. The Defendants fell below the standard of care owed to Saket. Their professional responsibilities included fair dealing with Saket. They were required to get their facts straight before taking the potentially career damaging actions against Saket, including having discussions with certain people in the DND about such allegations, including but not limited to making statements leading to Saket being charged by the Military Police[.]

[32] It would be unfair to the plaintiff to determine Issue No. 1, as it relates to the claim in negligence, based only on para. 44 of his pleading. That paragraph implicitly refers to allegations made in preceding paragraphs of the statement of claim. For that reason, I briefly review the allegations in the first portion of the statement of claim.

[33] Paragraphs 9 to 33 include allegations about “problems with discriminatory and harassing actions” against the plaintiff, which are alleged to have begun in 2017 or 2018. Those paragraphs include examples of the defendants’ conduct towards the plaintiff regarding the following matters:

- The plaintiff’s religious-based vegetarianism;
- Failure to provide the plaintiff with mandatory food safety training;
- Failure to adhere to Public Health measures during the COVID-19 pandemic;
- Failure to provide sanitary bathroom facilities;
- A verbal and physical attack against the plaintiff, by one of the individual defendants, in April 2021; and
- The plaintiff reporting that attack to the Military Police, with the end result that criminal charges were laid against the plaintiff.

[34] The plaintiff alleges that “[a]s a result of the caustic environment at DND, as well as the spurious charges brought against [him]”, he was forced to leave his position at the Cadet Dining Hall. As of November 2022, when the statement of claim was issued, the plaintiff continued to be a civilian employee of DND. At that time, the plaintiff was employed in a position for which the salary is approximately \$8,000 per year lower than the salary he earned when working at the Cadet Dining Hall.

[35] In para. 34 of the statement of claim, the plaintiff provides particulars of the claim based in workplace harassment. Paragraphs 35 to 42 of the statement of claim address consequences to the plaintiff arising from the alleged workplace harassment.

[36] The plaintiff concludes the workplace harassment portion of the statement of claim with the following statement in para. 43: “[The plaintiff] will rely on the entire conduct of the Defendants before and after the commencement of this action to the date of judgment in this action.”

e) Analysis

[37] The AGC’s position is that the essential character of the plaintiff’s claim in negligence, including all the specific allegations, is related entirely to events that occurred in the course of the plaintiff’s employment, as a civilian, with DND. The AGC submits that the events upon which the plaintiff relies in support of his claim in negligence were or each could have been the subject of a grievance made pursuant to the *FPSLRA*.

[38] For the following reasons, I agree with the AGC and conclude that the plaintiff’s claim in negligence is barred by s. 236 of the *FPSLRA*.

[39] I start with the statutory provision in which an employee’s right to grieve is prescribed. Section 208(1) of the *FPSLRA* stipulates that right, as follows:

- (1) Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved
 - (a) by the interpretation or application, in respect of the employee, of
 - (i) a provision of a statute or regulation, or of a direction or other instrument made or issued by the employer, that deals with terms and conditions of employment, or
 - (ii) a provision of a collective agreement or an arbitral award; or
 - (b) as a result of any occurrence or matter affecting his or her terms and conditions of employment.

[40] In *Bron v. Attorney General of Canada*, 2010 ONCA 71, 99 O.R. (3d) 749, Doherty J.A., writing for the Court of Appeal for Ontario, considered the breadth of an employee’s right to grieve under the predecessor statute to the *FPSLRA*. The conclusions reached in *Bron* apply to the *FPSLRA*.

[41] At para. 14, Doherty J.A. highlights that the relevant provisions of the statute “provide employees with a very broad right to grieve any occurrence or matter affecting the terms or conditions of their employment.” In para. 15, Doherty J.A. goes as far as to say that “[a]lmost all employment-related disputes can be grieved.”

[42] The range of subject matters falling within the scope of “terms and conditions of employment” has been found to be “vast” and include “[a]lmost any workplace issue”: see *Thompson v. Kolotinsky*, 2023 ONSC 1588, at para. 37 (citations omitted).

[43] The allegations in para. 44a of the statement of claim, quoted above, fall squarely within the meaning of “terms and conditions of employment” for the purpose of ss. 208(1) and 236 of the *FPSLRA*. Allegations of harassment and discrimination by the individual defendants, or of negligence on the part of the AGC, in its capacity as the employer, to prevent or address the conduct of the individual defendants, relate to conditions of the plaintiff’s employment.

[44] Paragraph 44b requires a more nuanced approach. First, and in broad terms, the plaintiff attempts to plead material facts to support a claim in negligence based on the alleged failure, on the part of the AGC, to fulfil a duty of care to deal with him fairly. The allegations related to fair treatment of the plaintiff, in the context of his employment, fall within the meaning of “terms and conditions of employment” for the purpose of ss. 208(1) and 236 of the *FPSLRA*.

[45] The allegations in the latter portion of para. 44b, however, relate to statements made that ultimately resulted in the plaintiff being charged criminally. In para. 29 of the statement of claim, the plaintiff alleges that it was the individual defendants who “falsely reported” events that gave rise to the charges against him. The allegations in para. 29 and in the latter portion of para. 44b are addressed under Issue No. 2 below.

f) Summary – Issue No. 1

[46] The plaintiff concedes that the allegations related to workplace harassment are barred by s. 236 of the *FPSLRA*. I conclude that the allegations against the AGC in negligence, including those set out in para. 44a and the first two sentences of para. 44b, are barred by s. 236 of the *FPSLRA*.

Issue No. 2 - Is the statement of claim to be struck because it discloses no reasonable cause of action?

a) Overview

[47] The AGC relies on r. 21.01(1)(b), which gives the court discretion “to strike out a pleading on the ground that it discloses no reasonable cause of action or defence”. Pursuant to r. 21.01(2)(b), no evidence is admissible for the purpose of a motion under r. 21.01(1)(b).

[48] Based on the concessions made by the plaintiff and the court’s ruling under Issue No. 1, this section of the ruling relates only to the claim in malicious prosecution.

b) The Law

[49] On a motion pursuant to r. 21.01(1)(b), the moving party has the burden of demonstrating that “it is plain and obvious that the claim could not succeed at trial”: *MacKinnon v. Ontario Municipal Employees Retirement Board*, 2007 ONCA 874, 88 O.R. (3d) 269, at para. 19, citing *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

[50] At para. 20 of *MacKinnon*, Gillese J.A., writing for the Court of Appeal, lists the following five principles to be applied on a Rule 21 motion to strike a pleading:

- (a) The material facts pleaded must be deemed to be proven or true, except to the extent that the alleged facts are patently ridiculous or incapable of proof;
- (b) The claim incorporates by reference any document pleaded and the court is entitled to read and rely on the terms of such documents as if they were fully quoted in the pleadings;
- (c) Novelty of the cause of action is of no concern at this stage of the proceeding;
- (d) The statement of claim must be read generously to allow for drafting deficiencies; and
- (e) If the claim has some chance of success, it must be permitted to proceed.

[51] Regarding the second principle, the statement of claim before this court does not refer to any document specific to a claim in malicious prosecution. Addressing the third principle, a claim in malicious prosecution is not novel.

[52] In determining Issue No. 2, I am mindful that “[i]t is well settled law that the threshold for sustaining a pleading on a Rule 21 motion is not high”: *MacKinnon*, at para. 21.

c) The Positions of the Parties

[53] The AGC’s position is that the plaintiff fails to plead facts capable of establishing the constituent elements of a claim in malicious prosecution. The AGC submits that it is plain and obvious the claim in malicious prosecution cannot succeed.

[54] In addition, the AGC’s position is that the statement of claim falls short of pleading requirements. The AGC relies on r. 25.06(8) and submits that the statement of claim does not include the requisite particulars for a claim in which malice is alleged.

[55] The plaintiff’s position is that, based on a generous reading of the statement of claim, the essential elements of a claim in malicious prosecution are pleaded. The plaintiff asks the court to conclude that it is not plain and obvious that the claim in malicious prosecution will not succeed.

d) Analysis

i) *The Elements of a Claim in Malicious Prosecution*

[56] The parties agree that there are four necessary elements to a claim in malicious prosecution: *Nelles v. Ontario*, [1989] 2 S.C.R. 170. The four elements are set out, as follows, in *Nelles*, at pp. 192-93:

- a) the proceedings must have been initiated by the defendant;
- b) the proceedings must have terminated in favour of the plaintiff;
- c) the absence of reasonable and probable cause; [and]
- d) malice, or a primary purpose other than that of carrying the law into effect.

[57] I next review each of the four elements.

▪ ***The proceedings must have been initiated by the defendant***

[58] The plaintiff consents to the claims against the individual defendants being struck. The only defendant against whom a claim in malicious prosecution may be pursued is the AGC. At para. 43(a) of his factum, the plaintiff acknowledges that he bears the burden of establishing that the proceeding was initiated by the sole remaining defendant – the AGC.

[59] For the first element, the plaintiff relies on paras. 28 and 29 of the statement of claim. Those paragraphs address, as follows, what happened after the plaintiff reported the April 2021 incident to the Military Police:

28. Rather than perform a fulsome investigation, Saket was charged by the Military Police wing of DND with public mischief. Saket was charged on or about May 28, 2021.
29. The charges against Saket were based on false reporting of events by Lemoine, as well as the remaining individual defendants, all of whom continued their pattern of harassment of Saket by providing false information to the Military Police leading to the charges.

[60] At the material time, the plaintiff was employed by DND. On a generous reading, the allegation in para. 28 is that a “wing” or division within DND (i.e., the Military Police) laid or initiated the charges against Saket. Based on that generous reading, the statement of claim includes allegations which support the first element of a claim of malicious prosecution.

- ***The proceedings must have terminated in favour of the plaintiff***

[61] In para. 30 of the statement of claim, the plaintiff alleges that the charges against him “were withdrawn completely for no reasonable prospect of conviction, on or about February 10, 2022.” Without resorting to a generous reading, the statement of claim includes allegations which support the second element of a claim in malicious prosecution.

- ***The absence of reasonable and probable cause***

[62] At p. 193 of *Nelles*, Lamer J., cites *Hicks v. Faulkner* (1878), 8 Q.B.D. 167, at p. 171, to explain what is meant by “reasonable and probable cause”:

Reasonable and probable cause has been defined as “an honest belief in the guilt of the accused based upon a full conviction, founded on reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.”

[63] On the same page, Lamer J. explains that the test quoted immediately above includes both a subjective and objective element. The subjective element is satisfied if there is an “actual belief on the part of the prosecutor”. The objective element is satisfied if the belief held by the prosecutor is “reasonable in the circumstances”.

[64] For the third element, the plaintiff relies on paras. 28-30 of the statement of claim. Even when read generously, the only one of those three paragraphs that addresses the third element is para. 28. The plaintiff therein alleges that the Military Police did not perform a “fulsome investigation” of the matter before laying charges against him.

[65] For the third element of the plaintiff’s claim in malicious prosecution to be supported requires that the reader interpret the laying of charges based on a less-than-fulsome investigation as meaning in the absence of reasonable and probable cause. The generosity required to interpret the statement of claim in that manner exceeds the level of generosity applied on a motion to strike.

[66] The allegation that the Military Police did not carry out a fulsome investigation before charging the plaintiff does not sufficiently address the subjective and objective elements of reasonable and probable cause: see *Nelles*, at p. 193. It is a significant leap from an investigation falling short of the requisite standard (i.e., for a claim in negligence) to (a) the laying of charges in the absence of “an actual belief on the part of the prosecutor” in the merits of the charges (the subjective element), and (b) the prosecutor’s belief being unreasonable in the circumstances (the objective element).

[67] Looking beyond para. 28, I consider the allegations in para. 44b. Those allegations were originally made to support a claim in negligence. The plaintiff alleges therein that the defendants fell below the standard of care they owed to him. The plaintiff alleges that the standard of care includes a requirement “to get their facts straight before taking the potentially career damaging actions as against Saket, including having discussions with other certain people in the DND about such allegations, including but not limited to making statements leading to Saket being charged by the Military Police”.

[68] The allegations in para. 44b address the conduct of the individual defendants in their reporting of matters to the Military Police. Even on a generous reading of the statement of claim, it is not possible to impart to the Military Police a lack of an actual belief in the merits of the charges because of whatever malice or improper purpose by which the plaintiff alleges the individual defendants were motivated.

[69] On a generous reading of the statement of claim, the statement of claim does not support the third element of a claim in malicious prosecution.

▪ ***Malice, or a primary purpose other than that of carrying the law into effect***

[70] For the fourth element, the plaintiff relies on the allegations in paras. 9 to 30 of the statement of claim. Paragraphs 9 to 26 address the harassment, verbal abuse, physical abuse, and discrimination the plaintiff alleges he experienced during his employment at the Cadet Dining Hall.

[71] The allegation in para. 28, that the Military Police failed to carry out a “fulsome investigation” before they laid criminal charges against the plaintiff, is not sufficient to support the fourth element of a claim in malicious prosecution. Even on a generous reading, that allegation falls far short of supporting the existence of malice or a primary purpose other than that of carrying the law into effect.

[72] In para. 29, the plaintiff alleges that the individual defendants “continued their pattern of harassment of Saket by providing false information to the Military Police leading to the charges.” The plaintiff’s reliance on para. 29 to support a claim in malicious prosecution is difficult to reconcile with the plaintiff’s acknowledgement that his claim based in workplace harassment is barred by s. 236 of the *FPSLRA*.

[73] The plaintiff now relies on the conduct of the individual defendants – in providing allegedly false information to the Military Police – to characterize the investigation by the Military Police as being malicious or carried out for an improper purpose. Even on a generous reading of the statement of claim, it is not possible to impart to the Military Police whatever malice or improper purpose by which the plaintiff alleges the individual defendants were motivated. The generosity required to interpret the statement of claim in that manner exceeds the level of generosity applied on a motion to strike.

[74] Before leaving the fourth element, I will address the AGC’s reliance on r. 25.06(8) of the *Rules*. Subrule 25.06(8) requires that, “[w]here fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading shall contain full particulars, but knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred.”

[75] The AGC submits that, where malice is alleged, it is not sufficient to rely on broad assertions of malicious conduct (i.e., such as those made on a generous reading of the statement of claim). I agree with the defendants that, when considered in the context of r. 25.06(8), the statement of claim is vague in addressing a claim in malicious prosecution. The statement of claim lacks specific allegations and particulars of malice or an improper purpose on the part of the Military Police.

▪ ***Summary – The Four Elements of Malicious Prosecution***

[76] The statement of claim includes allegations that support the first and second elements of a claim in malicious prosecution. Even on a generous reading, the statement of claim does not, however, include allegations to meet the requirements of the third and fourth elements of a claim in malicious prosecution.

ii) Assessing the Chance of Success

[77] Is it plain and obvious that the claim in malicious prosecution could not succeed at trial? For the following reasons, I answer that question in the affirmative.

[78] “It is beyond well-established that the bar for striking a pleading is very high”: *PMC York Properties Inc. v. Siudak*, 2022 ONCA 635, 473 D.L.R. (4th) 136, at para. 30. In paras. 31-34, Roberts J.A. reviews the principles applicable to a motion to strike a pleading. The principles reviewed include the following principles:

- Pleadings are to be read generously, accommodating for drafting deficiencies (at para. 31);
- “Cases should be determined on their merits based on the evidence presented before judges at trial” (at para. 31); and
- Where a reasonable prospect of success exists, the action should be permitted to proceed to trial (at para. 32, citation omitted).

[79] Roberts J.A. distinguishes between “parties quibbling over [...] technical pleadings disagreements” at one end of the spectrum and, at the other end, the weeding out of “clearly untenable causes of action that have no chance of success”: at para. 34.

[80] The plaintiff before this court submits that the parties' disagreement about his pleading falls into the category of a quibble over the technical aspects of a claim in malicious prosecution. I reject that submission. The deficiencies in the plaintiff's pleading for a claim in malicious prosecution amount to far more than "mere technicalities that can be cured by amendment": see *PMC York Properties*, at para. 34.

[81] First, the statement of claim does not even include mention, by name, of the cause of action upon which the plaintiff now attempts to rely. Second, the statement of claim does not support two of the four elements of a claim in malicious prosecution. Third, the two elements that are not supported are the two most challenging of the four elements to prove. There is nothing in the statement of claim to support any prospect of success in proving those two elements at trial. In summary, the claim in malicious prosecution, as currently pled, stands no chance of success.

e) Summary – Issue No. 2

[82] The claim in malicious prosecution is struck because it is plain and obvious that the claim could not succeed at trial. It remains to be determined whether that claim is struck with or without leave to amend.

Issue No. 3 - Is the plaintiff entitled to leave to amend his pleading?

a) Preliminary Matters

[83] Independent of Issue No. 3, and on the consent of the parties, the plaintiff is granted leave to amend the title of proceeding to substitute "Attorney General of Canada" for all defendants originally named in the title of proceeding.

[84] During oral submissions, the plaintiff acknowledged that his written materials – the responding record and factum – do not include a request for leave to amend the statement of claim. In oral submissions, in support of his request for leave to amend the statement of claim, the plaintiff relied on the relief requested in item 4 of his notice of motion: "[s]uch further and other relief as to this Honourable Court may deem just".

[85] The question posed as Issue No. 3 is really a continuation and forms the second part of the motion to strike pursuant to r. 21.01(1)(b). Issue No. 3 must be determined independent of the plaintiff's reliance on the catch-all "further and other relief" component of the relief requested in his notice of motion.

[86] In addition, the plaintiff asks the court to consider that he did not take advantage of the adjournment of the motions and attempt to deliver a further record – for a motion for leave to amend the statement of claim. I pause to note that the motions were adjourned twice. The first adjournment was required because the parties did not complete their respective submissions on the initial return date for the motions. The motion was adjourned a second time (a) at the plaintiff's request; and (b) on the consent of the parties.

[87] The plaintiff's decision not to attempt to deliver a motion record for a motion for leave is irrelevant to the outcome under Issue No. 3.

b) Analysis

[88] I conclude that the matter falls within the scope of the clearest of cases for which leave to amend must be denied: see *PMC York Properties*, at para. 31. First, I rely on the reasons above regarding the four elements of a claim in malicious prosecution. Second, I step back from the constituent elements of a claim in malicious prosecution and consider the pleading from a broader perspective.

[89] In its present iteration, the statement of claim includes detailed allegations about the conduct of the individual defendants. I contrast those detailed allegations with the singular allegation regarding the conduct of the Military Police – the alleged failure to perform a fulsome investigation before laying charges against the plaintiff.

[90] It would not be just, in the circumstances, to grant the plaintiff leave to attempt to recast his original claims – in workplace harassment and negligence, against all the defendants – as a claim in malicious prosecution against the AGC.

[91] The statement of claim does not meet the low threshold required to sustain a pleading on a Rule 21 motion.

c) Summary – Issue No. 3

[92] The claim in malicious prosecution is struck without leave to amend.

Issue No. 4 - Is the plaintiff entitled to an order requiring the AGC to produce the individual defendants for examination for discovery in any event of the claims against them being struck?

[93] The plaintiff's claims do not survive the defendants' motion. As a result, the question posed as Issue No. 4 is moot. Had the plaintiff's claim survived the defendants' motion, I would have dismissed the plaintiff's request for this form of relief without prejudice to the plaintiff bringing a motion, following the close of pleadings, for relief related to the oral discovery process.

Disposition

[94] On the consent of the parties, the plaintiff is granted leave to amend the title of proceeding to substitute "Attorney General of Canada" for all originally-named defendants.

[95] The plaintiff's claims in negligence and workplace harassment are struck, the latter on the consent of the plaintiff, because they are barred by s. 236 of the *FPSLRA*. The plaintiff's claim in malicious prosecution is struck, without leave to amend. The net effect of the claims based in negligence, workplace harassment, and malicious prosecution being struck is that the statement of claim is struck in its entirety.

[96] Other than as provided in para. 94, above, the plaintiff's motion is dismissed.

Costs of the Motions

[97] The defendants are entirely successful on the motions. As the successful parties, the defendants are presumptively entitled to their costs of the motions. That presumption is not rebutted on the motions before this court. The defendants request and are awarded their costs of the motion on the partial indemnity scale.

[98] I reviewed the costs outlines filed by the parties. The defendants request costs on the partial indemnity scale in the total amount of \$8,555 (fees of \$8,255 and disbursements of \$300). There is no claim for HST on either fees or disbursements. The fees of \$8,255 do not include a counsel fee of \$610 for the second day of the hearing. If that amount is included, then the costs claimed total \$9,165.

[99] I fix the defendants' costs on the partial indemnity scale in the all-inclusive amount of \$8,500. In fixing the quantum of costs to which the defendants are entitled, I have considered the substantive points raised in the parties' respective costs outlines and the following factors:

- The costs requested by the defendants are entirely in keeping with the costs incurred by the plaintiff; and
- There is some duplication of effort in the work of the defendants' senior counsel and associate counsel regarding the preparation of motion materials.

[100] In summary, the plaintiff shall pay to the defendants their costs of the motions, on the partial indemnity scale, fixed in the amount of \$8,500.

[101] Pursuant to r. 57.03(1)(a), costs awarded on a motion are payable within 30 days of the date of the order unless the court is satisfied that "a different order would be more just". As of November 2022, when the statement of claim was issued, the plaintiff was earning \$8,000 per year less than he earned when working at the Cadet Dining Hall. It may be challenging financially for the plaintiff to pay \$8,500 within 30 days of the date of this ruling.

[102] If the parties are unable to agree upon a plan for the payment of costs, then the costs shall be payable within 120 days of the date of this ruling. For clarity, if the parties consent, the payment plan may provide for payment of the costs awarded over a period in excess of 120 days.

Madam Justice Sylvia Corthorn

Released: December 30, 2025

CITATION: *Mittal v. Department of National Defence*, 2025 ONSC 7256
COURT FILE NO.: CV-22-353
DATE: 2025/12/30

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

Saket Mittal

Plaintiff

– and –

Department of National Defence, Jeremy B. Lemoine,
Steven R. Ellis, and Ronald M. O’Neill

Defendants

RULING ON MOTION

Madam Justice Sylvia Corthorn

Released: December 30, 2025