COURT OF APPEAL FOR ONTARIO

CITATION: Lobo v. Carleton University, 2012 ONCA 498
DATE: 20120711
DOCKET: C55068

Rouleau, Watt and Pepall JJ.A.

BETWEEN

Ruth Lobo and John McLeod

Plaintiff/Appellants

and

Carleton University, Dr. Roseann O'Reilly Runte, David Sterritt, Ryan Flannagan and Allan Burns

Defendants/Respondents

Albertos Polizogopoulos, for the plaintiffs/appellants

Richard Dearden, for the defendants/respondents

Heard & released orally: June 29, 2012

On appeal from the order of Justice Giovanna Toscano Roccamo of the Superior Court of Justice, dated January 10, 2012, with reasons reported at 2012 ONSC 254.

ENDORSEMENT

[1] This is an appeal from the order of Toscano Roccamo J. striking those portions of the appellants' claim pertaining to *Charter* breaches on the basis that

those portions of the claim disclose no reasonable cause of action. She held that the appellants failed to plead the material facts necessary to establish that the respondent University was implementing a specific government program or policy by failing to allocate the desired space for the appellants to advance their extra-curricular objectives. She also struck the claims made against the individual respondents as disclosing no reasonable cause of action.

[2] The appellants have appealed both the striking of the *Charter* claims and the claims against the individual respondents. On the *Charter* issue, the appellants argue that the motion judge should have concluded that the fresh as amended statement of claim pleaded facts capable of satisfying the test set out in *Eldridge v. British Columbia (A.G.)*, [1997] 3 S.C.R. 624 for applying the *Charter* to an entity such as the respondent University.

[3] In *Eldridge*, the Supreme Court of Canada explained that the *Charter* may be found to apply to a private entity on one of two bases. First, it may be determined that the entity is itself "government" for purposes of s. 32 of the *Charter*. Second, an entity may be found to attract the *Charter's* scrutiny with respect to a particular activity that can be ascribed to government. As to the first basis, the appellants concede that the respondent is not "government" for purposes of s. 32 of the *Charter*. Rather, as noted earlier, they argue that the

respondent is implementing a specific government program. That program is the delivery of post-secondary education. The actions of the respondent such as the limiting of the appellants' right to freedom of expression were, according to the appellants, actions taken by the University in the course of delivering a government program. In the appellants' submissions, therefore, the motion judge erred in concluding that the University was not acting as government in the circumstances of this case. At a minimum, the appellants argue that the *Eldridge* issue and whether the respondent was subject to *Charter* review ought to have been left to be decided at trial with the benefit of a full evidentiary record.

[4] We disagree. As explained by the motion judge, when the University books space for non-academic extra-curricular use, it is not implementing a specific government policy or program as contemplated in *Eldridge*. In carrying out this particular activity there is, therefore, no triable issue as to whether *Charter* scrutiny applies to the respondent's actions.

[5] With respect to the striking of the claim against the individual respondents, the appellants argue that the fresh as amended statement of claim pleaded that each of the individual respondents was acting outside of his or her capacity as employees of the university. The appellants explain that this is because the individual respondents did not agree with the appellants' political view. Putting

their own personal beliefs ahead of their professional obligations, they did not respect the university policies in the way they dealt with the appellants' requests. In making these allegations, the appellants submit that the facts necessary to demonstrate that the individual respondents had a separate identity from the University were pleaded and that it was not plain and obvious that the negligence claims against them could not succeed.

[6] We would not give effect to this submission. This court's decision in *Montreal Trust Co. of Canada v. Scotia McLeod Inc.* (1995), 26 O.R. (3d) 481 set out the criteria that need to be met to establish personal liability. These are:

> (1) the actions of the employees are themselves tortious; or
>
> (2) the actions of the employees exhibit a separate identity or interest from that of the corporation or employer so as to make the act or conduct complained of their own.

As to the first basis, it is conceded that there is no plea in the fresh as amended statement of claim for fraud, deceit, dishonesty or want of authority on the part of the individual respondents.

[7] With respect to the second branch of the *Scotia McLeod* case, we agree with the motion judge, at para. 35, that "the amended pleading […] does little more than "window dress" the suggestion of a separate identity or interest of the named Defendants from that of [Carleton University]" and, at para. 32, that "the

allegations made against each in pith and substance relate to decisions made within their ostensible authority as [Carleton University] employees". The fact that the individual respondents did not exhibit a separate identity or interest is confirmed by para. 145 of the fresh as amended statement of claim in which the appellants pleaded that, "As the employer of the individual Defendants, Carleton University, permitted or acquiesced the individual Defendants to act in the manner that they did and as such, is vicariously liable for their actions."

[8] In the result, the appeal is dismissed with costs to the respondents fixed at $15,000 inclusive of disbursements and applicable taxes.

"Paul Rouleau J.A."
"David Watt J.A."
"S.E. Pepall J.A."