COURT OF APPEAL FOR ONTARIO

CITATION: Shaulov v. Law Society of Ontario, 2023 ONCA 95
DATE: 20230210
DOCKET: C70726

Feldman, Lauwers and Roberts JJ.A.

BETWEEN

Alexander Shaulov

Plaintiff
(Appellant)

and

Law Society of Ontario, Performance Assessment Group Inc.,
John Braham and Michael Williams

Defendants
(Respondents)

Alexander Shaulov, in person, for the plaintiff

Nader Hasan and Karen Bernofsky, for the respondents

Heard: January 20, 2023

On appeal from the order of Justice Marie-Andrée Vermette of the Ontario Superior Court of Justice, dated May 6, 2022, with reasons reported at 2022 ONSC 2732, and from the costs order, dated July 13, 2022, with reasons reported at 2022 ONSC 4131.

Roberts J.A.:

I. OVERVIEW

[1] The appellant appeals the dismissal of his claims against the respondents and seeks leave to appeal the $12,500 costs order made in favour of the respondents.

[2] The appellant states that he is a naturalized Canadian of West Asian origin with a Persian/Russian/Uzbek Jewish background. He came to Canada in 2001 as a permanent resident from Israel. He seeks a licence to practice law in Ontario and pursued the requirements of the respondent, Law Society of Ontario (“LSO”), for the issuance of a licence to practise law.

[3] The appellant successfully completed the articling requirement through the LSO’s Law Practice Program (“LPP”) and was hired as an articling student by a Toronto law firm. His articling principal and the LPP lawyers found him to be competent. The appellant also passed the Solicitor Licensing Examination on his third attempt.

[4] However, in accordance with the LSO’s Licensing Process Policies, the appellant was removed from the licensing process due to his unsuccessful fourth attempt at passing the Barrister Licensing Examination.

[5] The appellant commenced an action against the respondents seeking various remedies, including: declaratory relief that the LSO’s structure, process, and method of evaluation are discriminatory and violate the appellant’s rights

under the *Canadian Charter of Rights and Freedoms* ("the *Charter*") and the *Human Rights Code*, R.S.O. 1990, c. H.19 ("the *Code*"); that the appellant has fulfilled all licensing requirements; and an order requiring the LSO to issue to the appellant a licence to practise law.

II. MOTIONS TO STRIKE THE APPLICATION'S CLAIMS

[6] The respondents brought a motion under r. 21.01(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to strike the appellant's statement of claim as disclosing no reasonable cause of action.

[7] The motion judge dismissed the appellant's claims without leave to amend against the respondents, Performance Assessment Group Inc., John Braham, and Michael Williams, the consultants who had assisted in the design of the LSO's licensing examinations ("the non-LSO respondents"). She also dismissed his claims against the LSO under ss. 7 and 15 of the *Charter and the Code* with respect to alleged discrimination based on mental/cognitive disability or perceived mental/cognitive disability, without leave to amend. Finally, she dismissed the appellant's claims against the LSO under ss. 7 and 15 of the *Charter and the Code* with respect to alleged discrimination based on racial, ethnic and cultural

[1] The appellant initially filed an application for judicial review, but Corbett J. of the Divisional Court ordered that the application be converted into an action and transferred to the Superior Court of Justice: *Shaulov v. Law Society of Ontario*, 2021 ONSC 1656.

background, but granted leave to amend the s. 15 *Charter* and *Code* claims against the LSO under this ground.

[8] The motion judge determined that the Superior Court of Justice does not have jurisdiction over the appellant's claims that the licensing examinations' structure, process and method of evaluation are unreasonable and *ultra vires* the *Law Society Act*, R.S.O. 1990, c. L.8, nor the appellant's requests for (1) an order setting aside the LSO's decision dated October 1, 2020 deeming the appellant's application to have been abandoned, (2) an order compelling the LSO to conduct an assessment interview of the appellant to allow him to show his competence to practise law in Ontario, and (3) an order compelling the LSO to admit the appellant to the Bar and issue him a Class L1 licence ("the administrative law claims").

III. ISSUES

[9] The appellant submits that the motion judge erred in dismissing his claims and in declaring that the Superior Court of Justice has no jurisdiction over his administrative law claims.

[10] As I shall explain, I agree that the motion judge erred in dismissing the s. 15 *Charter and Code* claims against the LSO with respect to discrimination without granting leave to amend other than on the ground of race, ethnic and cultural background, and in her declaration that the Superior Court of Justice has no

jurisdiction over the appellant's administrative law claims. Otherwise, I see no basis to interfere with the motion judge's decision.

(1) General principles applied by the motions judge

[11] The motion judge referenced the guiding principles on a motion to strike under r. 21.01(1)(b). She acknowledged the requirements on a motion to strike to read the appellant's statement of claim generously and accept the pleaded facts as true for the purpose of the motion, excepting bald conclusory statements of fact, unsupported by material facts. She understood that the appellant's statement of claim should not be struck out unless it was plain and obvious that it disclosed no reasonable cause of action and had no reasonable prospect of success. She also recognized that leave to amend should only be denied in the clearest of cases where the appellant could not allege further material facts to support his allegations. See *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980; *Tran v. University of Western Ontario*, 2015 ONCA 295, at paras. 16, 26; and *Eliopoulos Estate v. Ontario* (Minister of Health and Long-Term Care) (2006), 82 O.R. (3d) 321 (C.A.), at para. 8, leave to appeal refused, [2006] S.C.C.A. No. 514.

(2) Dismissal of the appellant's s. 7 *Charter* claims against the LSO

[12] The motion judge correctly determined that the appellant's claims against the LSO under s. 7 of the Charter were doomed to failure because the appellant's pursuit of a profession through the completion of the LSO's licensing requirements

is not a protected interest under s. 7 of the Charter: *Mussani v. College of Physicians and Surgeons of Ontario* (2004), 74 O.R. (3d) 1 (C.A.), at paras. 39-43; *R. v. Schmidt*, 2014 ONCA 188, 119 O.R. (3d) 145, at para. 38, leave to appeal refused, [2014] S.C.C.A. No. 208; and *Tanase v. College of Dental Hygienists of Ontario*, 2021 ONCA 482, 156 O.R. (3d) 675, at paras. 35-45, leave to appeal refused, [2021] S.C.C.A. No. 350. Nor do these licensing requirements qualify as state interference with an individual interest of fundamental importance that results in a serious psychological incursion: *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at para. 82. The motion judge correctly concluded that the appellant had failed to allege any recognized deprivation of right to liberty and/or security of the person.

(3) Dismissal of the appellant's s. 15 *Charter* and Code claims against the LSO

[13] I see no error with respect to the motion judge's conclusion that the appellant's pleading of discrimination on the basis of racial, ethnic and cultural background is bald and does not contain sufficient material facts to support all the elements of a cause of action under s. 15 of the *Charter* or under the *Code*. She made no error in dismissing the claim with leave to amend.

[14] Nor are there any grounds to interfere with the motion judge's findings that on the basis of the pleading as it stood before her, the appellant has no private

interest standing to advance his claim for discrimination based on cognitive disability because of his admission that he does not live with a cognitive disability, and that, as a result, he has no personal legal interest in the outcome: *Carroll v. Toronto-Dominion Bank*, 2021 ONCA 38, 153 O.R. (3d) 385, at para. 33. I see no basis to intervene in her decision not to exercise her discretion to grant the appellant public interest standing to pursue the claim.

[15] However, I disagree with the motion judge's narrow characterization of the appellant's claims against the LSO as based merely on two categories of discrimination. Given the factual matrix pleaded, which the motion judge had to accept as true at the pleadings stage, and the requirement to read the pleadings generously, she should have considered the tenability of the appellant's discrimination claims from the larger perspective of claims based on discrimination in general, rather than on particular categories of discrimination.

[16] As the appellant ably clarified in his submissions on appeal, at the heart of his s. 15 *Charter* and *Code* claims against the LSO is that he was discriminated against by the LSO because of the structure and contents of its licensing examinations, which are alleged to penalize him culturally, ideologically and linguistically. Specifically, the appellant alleges that the ideological, cultural and linguistic orientation of the structure and contents of the LSO's licensing examinations prevent him, a person from a different ideological, cultural and linguistic background, from succeeding on the examinations. They are

discriminatory, according to the appellant, because they do not test his competency to practice law, which was attested to by his articling principal and the LPP lawyers, but discriminate against him because of their alleged inappropriate ideological, cultural and linguistic slant. The appellant maintains that this is not a case where accommodations would have assisted him; rather, there is something fundamentally discriminatory about the structure and contents of the LSO's licensing examinations.

[17] Moreover, the appellant says that without the discovery process, he is unable to plead further particulars of the alleged discriminatory structure of the licensing examinations. In his statement of claim, he requests an "interim, interlocutory, and permanent injunction" compelling production of documents and information relating to the licensing examinations, including all versions of his written examinations with answer sheets. Counsel for the LSO confirmed during the hearing of the appeal that the appellant would not have access to the examination questions and answers which he says he needs to make his claim, although he could have engaged the LSO procedure to meet and go over his examinations. The rightness or reasonableness of the LSO's decision not to make available the requested documentation and information, some of which could be confidential or subject to privilege, is not before us. However, it seems to me that if the requested information and documentation was unavailable to the appellant before he started his claim, it would be premature to find at this stage that the

appellant's pleading is fatally defective and cannot be cured by amendment because of a lack of particulars which may be in the LSO's power to provide through the discovery process.

[18] I return to the fact that these proceedings are at the pleadings stage. While the claims are baldly pleaded and require amendment, the appellant has articulated a basis for his claims against the LSO. It is too early to conclude that the appellant's claims are doomed to failure and that he will be unable to allege further, material particulars to support his allegations. So long as he pleads a legally tenable claim, he can plead whatever particulars he has at this point and then provide further particulars at his examination for discovery or seek to amend his pleadings once he obtains written and oral discovery from the LSO.

[19] In addition to whatever further particulars the appellant may plead or obtain, it is sufficient at this stage that he pleads discrimination because of the allegedly inappropriate ideological, cultural and linguistic structure and contents of the licensing examinations. It is not necessary at the pleadings stage that he rigidly categorize the bases for the discriminatory effects of the licensing examinations. The motion judge's decision to narrow the claim to only one category of discrimination was therefore premature, particularly in light of the fact that she granted leave to amend on part of the discrimination claim.

[20] Accordingly, the appellant is granted leave to amend his s. 15 *Charter* and *Code* claims against the LSO generally with respect to discrimination and is not limited to pleading discrimination based only on race, culture and ethnic background.

(4) Dismissal of the appellant's *Code* claims against the non-LSO respondents

[21] The motion judge correctly determined that s. 46.1(2) of the *Code* applies to the appellant's claims against the non-LSO respondents. Section 46.1(2) prohibits "an action based solely on an infringement of a right" under the *Code*. As the appellant's claims against the non-LSO respondents are solely based "on an infringement of a right" under the *Code*, they were properly dismissed without leave to amend.

(5) Jurisdiction over the appellant's administrative law claims

[22] As the respondents concede, the motion judge erred in concluding that the Superior Court of Justice has no jurisdiction to determine the appellant's administrative law claims that relate to the exercise of a statutory power because they were started by way of an action rather than an application. Pursuant to s. 8(1) of the *Judicial Review Procedures Act*, R.S.O. 1990, c. J.1, a judge of the Superior Court may retain jurisdiction over these claims: *Gratton-Masuy Environmental Technologies Inc. v. Ontario*, 2010 ONCA 501, 101 O.R. (3d) 321,

at para. 63, leave to appeal requested but application for leave discontinued, [2010] S.C.C.A. No. 397. The motion judge should therefore have determined whether the administrative law claims should be dismissed under r. 21.01(1)(b).

[23] As this is an issue that the motion judge should have determined, I would remit to her the question of whether the administrative law claims should be dismissed under r. 21.01(1)(b).

(6) Leave to appeal motion costs order

[24] Finally, notwithstanding the appellant's modest success on appeal, I see no basis to disturb the motion judge's costs order, which reflects an exercise of her discretion and the respondents' material success on their motion. The costs awarded were fair, proportionate and reasonably within the contemplation of the appellant. They represented a substantial discount of the respondents' partial indemnity costs and mirrored the amount requested by the appellant if he had been successful. It is well-established that leave to appeal costs is granted sparingly and only where the order is tainted by palpable and overriding error or error of law: *Carroll (Litigation Guardian of) v. McEwen*, 2018 ONCA 902, 143 O.R. (3d) 641, at para. 58. I see none here.

IV. DISPOSITION

[25] The appeal is allowed in part: the appellant is granted leave to amend his s. 15 *Charter* claims with respect to discrimination; the issue of whether the

appellant's administrative claims should be dismissed under r. 21.01(1)(b) is remitted to the motion judge for determination. The appeal is otherwise dismissed. Leave to appeal costs is granted but the appeal from costs is dismissed.

[26] In my view, the costs of the appeal should be fixed in the all-inclusive amount of $5,000 to the successful party in the cause. This disposition reflects the appellant's partial success on his appeal as well as the fact that this action is still at the pleadings stage and the pleadings are to be further amended by the parties.

Released: February 10, 2023. "K.F"

"L.B. Roberts J.A."
"K. Feldman J.A."
"P. Lauwers J.A."