Federal Court Cour fédérale

Date: 20250102

Docket: T-2142-23

Citation: 2025 FC 5

Ottawa, Ontario, January 2, 2025

PRESENT: The Honourable Mr. Justice Southcott

PROPOSED CLASS PROCEEDING

BETWEEN:

STACEY HELENA PAYNE, JOHN HARVEY and LUCAS DIAZ MOLARO

Plaintiffs

and

HIS MAJESTY THE KING

Defendant

ORDER AND REASONS

I. Overview

[1] This decision addresses a motion brought by the Defendant, His Majesty the King, pursuant to Rule 221(1)(a) of the *Federal Courts Rules*, SOR/98-106, to strike the Statement of

Claim [the Claim] in the underlying proposed class action [the Action] in its entirety, without leave to amend.

[2] The Claim asserts causes of action pursuant to section 2(d) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*], related to the right of freedom of association, as well as the tort of misfeasance in public office, all in connection with the *Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police* [the Policy] issued by the Treasury Board of Canada [Treasury Board] on October 6, 2021.

[3] The Defendant submits that the proposed representative Plaintiffs' claims fall outside the jurisdiction of this Court, as they are subject to grievance rights afforded by the *Federal Public Sector Labour Relations Act*, SC 2003, c 22 [*FPSLRA*], and that the pleadings disclose no reasonable cause of action in relation to the Plaintiffs' assertion of the tort of misfeasance in public office.

[4] For the reasons explained in greater detail below, this motion is granted in part. My Order will strike the portion of the Claim related to the Plaintiffs' assertion of the tort of misfeasance in public office, because the Plaintiffs are afforded grievance rights under the *FPSLRA* in relation to those claims, which therefore fall outside the jurisdiction of the Court. My Order will not strike the portion of the Claim related to the Plaintiffs' assertion of their *Charter* rights, as it is not plain and obvious that the Plaintiffs have grievance rights in relation to those claims. Also, in connection with the Claim's assertion of the tort of misfeasance in public office, my Order will

grant leave to the Plaintiffs to amend the Claim to identify additional proposed representative plaintiff(s), and to plead material facts in relation to claims by such plaintiffs, who are not afforded grievance rights by the *FPSLRA*.

II. Background

[5] The Action is a proposed class action brought by three individual Plaintiffs on behalf of a proposed class that, while described in varying ways in the Claim, in broad strokes appears intended to capture employees of the federal public service including the Royal Canadian Mounted Police [RCMP] who faced employment consequences as a result of the Treasury Board's issuance of the Policy.

[6] The Policy, issued under sections 7 and 11.1 of the *Financial Administration Act*, RSC 1985, c F-11 [*FAA*], required all employees of what is described as the core public administration (including the RCMP) to be vaccinated against COVID-19, with certain exceptions. The "core public administration" [CPA] is defined in subsection 11(1) of the *FAA* by reference to a list of departments named in Schedule I to the *FAA* and other portions of the federal public administration named in Schedule IV. Subject to exceptions set out in the Policy, employees of the CPA who were unwilling to be vaccinated or to disclose their vaccination status were placed on administrative leave without pay.

[7] The Plaintiffs filed the Claim in this Court on October 6, 2023. The Plaintiffs plead that they were former unionized employees of the CPA until either they were suspended or they resigned pursuant to the Policy. Stacey Helena Payne was an employee of the Department of

National Defence until she was suspended on December 15, 2021. John Harvey was an employee with the Correctional Service of Canada until he was suspended on March 11, 2022. Lucas Diaz Molaro was an employee of the Federal Economic Development Agency for Southern Ontario until he resigned on October 25, 2021.

[8] In the Claim, the Plaintiffs allege the Policy unjustifiably violated their rights to freedom of association under section 2(d) of the *Charter*, by imposing a new term and condition of their employment by the Treasury Board in the absence of collective bargaining or other agreement, consideration, or consent. The Plaintiffs further assert the tort of misfeasance in public office against the Treasury Board. They seek a declaration that the Policy violated their *Charter* rights and claim various categories of damages against the Defendant.

[9] On August 19, 2024, the Defendant filed the motion to strike the Claim that is the subject of this proceeding. The Defendant argues this Court does not have jurisdiction over the Claim due to the application of the *FPSLRA*. In particular, the Defendant submits that section 208 of the *FPSLRA* affords grievance rights to employees (as defined in the *FPSLRA*) that apply to the claims advanced by the Plaintiffs in the Claim. The Defendant argues that section 236 of the *FPSLRA*, which provides that the right to grieve under the *FPSLRA* replaces any right of action, therefore ousts the jurisdiction of the Court over the Claim.

[10] The Defendant further argues that the Plaintiffs' claims do not disclose a reasonable cause of action for the tort of misfeasance in public office. Specifically, the Defendant submits that the Plaintiffs have failed to plead material facts necessary to satisfy the elements of this cause of action.

III. Issues

[11] This motion raises the following issues for the Court's adjudication:

A. Are the Plaintiffs barred from bringing the Claim in this Court by section 236 of the *FPSLRA*?

B. Do the pleadings disclose a reasonable cause of action for misfeasance in public office?

C. In the event the Claim or portions of the Claim should be struck, should leave be granted to amend the Claim?

IV. Analysis

A. *Are the Plaintiffs barred from bringing the Claim in this Court by section 236 of the FPSLRA?*

[12] The Court may order that a pleading, or anything contained therein, be struck out on grounds enumerated under Rule 221(1), with or without leave to amend, including on the basis that the pleading discloses no reasonable cause of action (Rule 221(1)(a)). A statement of claim should not be struck unless it is plain and obvious that the action cannot succeed, assuming the facts pleaded in the claim to be true. In other words, the claim must have no reasonable prospect of success (*McMillan v Canada*, 2024 FCA 199 [*McMillan FCA*] at para 74). Expressed otherwise, a claim should not be struck unless it is doomed to fail (*Wenham v Canada (Attorney General)*, 2018 FCA 199 at para 33).

[13] The Defendant argues that the Claim is barred by section 236 of the *FPSLRA*, which provides as follows that grievance rights replace other rights of action:

Disputes relating to employment
236 (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.

Application
(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.

Exception
(3) Subsection (1) does not apply in respect of an employee of a separate agency that has not been designated under subsection 209(3) if the dispute relates to his or her termination of employment for any reason that does not relate to a breach of discipline or misconduct.

Différend lié à l'emploi
236 (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.

Application
(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.

Exception
(3) Le paragraphe (1) ne s'applique pas au fonctionnaire d'un organisme distinct qui n'a pas été désigné au titre du paragraphe 209(3) si le différend porte sur le licenciement du fonctionnaire pour toute raison autre qu'un manquement à la discipline ou une inconduite.

[14] As the Defendant emphasizes, the Federal Court of Appeal [FCA] had occasion to apply the grievance provisions of the *FPSLRA* in the context of the Policy in its recent decision in *Adelberg v Canada*, 2024 FCA 106 [*Adelberg FCA*], leave to appeal to SCC requested. The term "grievance" employed in section 236 is a defined term in the *FPSLRA*, which separately defines "group grievances", "individual grievances", and "policy grievances" (*Adelberg FCA* at para 26). As was the case in *Adelberg FCA*, the Defendant's arguments in the matter at hand surround the right to pursue individual grievances. An "individual grievance" is defined in subsection 206(1) of the *FPSLRA* as meaning a grievance presented in accordance with either section 208 or section 238.24 of the *FPSLRA*.

[15] Subsection 208(1) of the *FPSLRA* provides as follows for grievance rights conferred upon employees in the public service:

Right of employee **208 (1)** Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved	**Droit du fonctionnaire** **208 (1)** Sous réserve des paragraphes (2) à (7), le fonctionnaire a le droit de présenter un grief individuel lorsqu'il s'estime lésé :
(a) by the interpretation or application, in respect of the employee, of	**a)** par l'interprétation ou l'application à son égard :
(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	**(i)** soit de toute disposition d'une loi ou d'un règlement, ou de toute directive ou de tout autre document de l'employeur concernant les conditions d'emploi,
(ii) a provision of a collective agreement or an arbitral award; or	**(ii)** soit de toute disposition d'une convention collective ou d'une décision arbitrale;
(b) as a result of any occurrence or matter affecting his or her terms and conditions of employment.	**b)** par suite de tout fait portant atteinte à ses conditions d'emploi.

[16] The term "employee", as used in subsection 208(1), is in turn defined as follows in subsection 206(1), such that it excludes certain categories of persons employed in the public service:

employee means a person employed in the public service, other than	***fonctionnaire*** Personne employée dans la fonction publique, à l'exclusion de toute personne :
(a) a person appointed by the Governor in Council under an Act of Parliament to a statutory position described in that Act;	**a)** nommée par le gouverneur en conseil, en vertu d'une loi fédérale, à un poste prévu par cette loi;
(b) a person locally engaged outside Canada;	**b)** recrutée sur place à l'étranger;
(c) a person not ordinarily required to	**c)** qui n'est pas ordinairement astreinte

work more than one third of the normal period for persons doing similar work;

(d) a person who is an *officer* as defined in subsection 2(1) of the *Royal Canadian Mounted Police Act*;

(e) a person employed on a casual basis;

(f) a person employed on a term basis, unless the term of employment is for a period of three months or more or the person has been so employed for a period of three months or more;

(g) a *member* as defined in subsection 2(1) of the *Royal Canadian Mounted Police Act* who occupies a managerial or confidential position; or

(h) a person who is employed under a program designated by the employer as a student employment program. (*fonctionnaire*)

à travailler plus du tiers du temps normalement exigé des personnes exécutant des tâches semblables;

d) qui est un *officier*, au sens du paragraphe 2(1) de la *Loi sur la Gendarmerie royale du Canada*;

e) employée à titre occasionnel;

f) employée pour une durée déterminée de moins de trois mois ou ayant travaillé à ce titre pendant moinsde trois mois;

g) qui est un *membre*, au sens du paragraphe 2(1) de la *Loi sur la Gendarmerie royale du Canada*, et qui occupe un poste de direction ou de confiance;

h) employée dans le cadre d'un programme désigné par l'employeur comme un programme d'embauche des étudiants. (*employee*)

[17] As explained in *Adelberg FCA* at paragraph 29, section 208 of the *FPSLRA* does not apply to members of the RCMP (see *FPSLRA*, s 238.02). However, section 238.24 of the *FPSLRA* provides as follows for grievance rights conferred upon RCMP members:

Limited right to grieve
238.24 Subject to subsections 208(2) to (7), an employee who is an RCMP member is entitled to present an individual grievance only if they feel aggrieved by the interpretation or application, in respect of the employee, of a provision of a collective agreement or arbitral award.

Droit limité de présenter un grief
238.24 Sous réserve des paragraphes 208(2) à (7), le fonctionnaire membre de la GRC a le droit de présenter un grief individuel seulement lorsqu'il s'estime lésé par l'interprétation ou l'application à son égard de toute disposition d'une convention collective ou d'une décision arbitrale.

[18] The Defendant submits that, for persons to whom the *FPSLRA* extends grievance rights, the effect of the *FPSLRA* is to set out an exclusive and comprehensive scheme for resolving employment-related disputes. The Defendant argues that such grievance rights extend to the claims asserted by the Plaintiffs in this Action, that such claims are therefore beyond this Court's jurisdiction, and that the Claim should therefore be struck.

[19] The Plaintiffs disagree with the Defendant's assertion. The Plaintiffs emphasize the principles governing a motion to strike, as referenced earlier in these Reasons, pursuant to which the Defendant has an onerous burden in seeking to strike the Claim (*Doan v Canada*, 2023 FC 968 [*Doan*] at para 40), particularly without leave to amend (*Al Omani v Canada*, 2017 FC 786 [*Al Omani*] at para 34), and the commensurately low threshold for the Plaintiffs to establish a cause of action at this stage in the proceeding (*Doan* at para 43).

[20] The Plaintiffs also argue that the Defendant's position is based on a mischaracterization of both the nature of the Claim and the nature of the legislative scheme under the *FPSLRA*. The Plaintiffs submit that the *FPSLRA* does not represent a complete bar to claims in circumstances such as those that give rise to the present proceeding, and they refer to authorities in which this Court's jurisdiction was not ousted by section 236 (*Adelberg FCA* at paras 47, 53; *Ebadi v Canada*, 2024 FCA 39 [*Ebadi FCA*] at paras 32-33, leave to appeal to SCC refused, 41260 (17 October 2024). The Plaintiffs emphasize the parameters imposed by the language of the relevant sections of the *FPSLRA*, which limit the ouster of the Court's jurisdiction (*McMillan v Canada*, 2023 FC 1752 [*McMillan FC*] at para 25, rev'd in part on other grounds 2024 FCA 199; *Suss v Canada*, 2024 FC 137 at para 45).

[21] In relation to the nature of the Claim, the Plaintiffs submits that it does not involve matters that can be grieved. The Defendant emphasizes subparagraph 208(1)(a)(i) of the *FPSLRA* that, *inter alia*, affords grievance rights in relation to the interpretation or application of a provision of a direction or other instrument made or issued by the employer that deals with terms and conditions of employment. The Plaintiffs argue that the essential character of the Claim does not concern the terms and conditions of their employment but rather concerns the process by which the Treasury Board implemented the Policy, without the benefit of collective bargaining or other agreement and therefore in breach of the Plaintiffs' rights under section 2(d) of the *Charter*.

[22] The Plaintiffs also submit that the breadth of the proposed class militates against the ouster of the Court's jurisdiction. They argue that the proposed class includes individuals who are not "employees" as defined in section 206 of the *FPSLRA* for purposes of section 208 grievance rights. The Plaintiffs assert that the Policy affected individuals such as casual workers, students, and members of the RCMP, who are not afforded grievance rights by section 208 and whose claims are therefore not subject to section 236.

[23] The Plaintiffs therefore submit that it is at least arguable that the Court has jurisdiction over the Claim and that, applying the principles governing adjudication of a motion to strike, the Defendant's motion should be dismissed, because it is not clear that the Claim is doomed to fail.

[24] As both parties rely on portions of the analysis in *Adelberg FCA* that they consider to favour their position, it is useful to canvass that authority in some detail. That matter involved a

mass tort claim, against His Majesty the King and others, advanced by a large number of individual plaintiffs employed in various departments, agencies, and other portions of the federal public administration. The plaintiffs claimed that the Policy issued by the Treasury Board, and similar vaccination policies issued by other federally regulated employers, violated their *Charter* rights and caused them harm because they chose to decline to be vaccinated against COVID-19.

[25] The plaintiffs in *Adelberg FCA* also asserted claims in relation to the *Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No. 61,* issued by Transport Canada on April 24, 2022 [the Interim Order]. Because the plaintiffs chose not to be vaccinated, the Interim Order prevented them from travelling by plane. They challenged the Interim Order, and other comparable measures applicable to train and marine travel, as violating their *Charter* rights.

[26] As in the case at hand, the defendants in *Adelberg FCA* moved to strike the plaintiffs' claims on the basis that they were barred by section 236 of the *FPSLRA.* At first instance (*Adelberg v Canada*, 2023 FC 252 [*Adelberg FC*]), Justice Simon Fothergill of this Court struck without leave to amend the claims of the plaintiffs who were employed within the CPA, finding that they were barred by section 236. The Court rejected the plaintiffs' arguments that their claims were not barred by section 236 because the constitutional remedies they sought were beyond the powers of a labour arbitrator to grant (at paras 31-36). Justice Fothergill noted that in *Ebadi v Canada*, 2022 FC 834 [*Ebadi FC*], aff'd 2024 FCA 39, Justice Henry Brown had rejected a similar argument and held at paragraphs 43-44 that alleged *Charter* violations may be addressed through the grievance process under the *FPSLRA.*

[27] In *Adelberg FCA*, the FCA allowed in part the appeal from *Adelberg FC*, including finding that the Federal Court had erred in concluding that section 236 of the *FPSLRA* applied to bar the claims of the plaintiffs who were employed by the RCMP (at paras 42, 48). As noted earlier in these Reasons, *Adelberg FCA* explained that section 208 of the *FPSLRA* does not apply to members of the RCMP (at para 29). Rather, section 238.24 provides for grievance rights conferred upon RCMP members. However, section 238.24 applies only to grievances arising under a collective agreement applicable to RCMP members who meet the statutory definition of "employee" in the *FPSLRA*. Based on the materials in the motion, it was not possible to ascertain whether any collective agreement applied. Therefore, the FCA concluded that it was not plain and obvious that the plaintiffs who were members of the RCMP possessed rights to grieve the Policy such that section 236 of the *FPSLRA* foreclosed their access to the Court (at paras 45-48).

[28] *Adelberg FCA* also found that the Federal Court had erred in concluding that the plaintiffs' claims related to the Interim Order and other travel-related measures could have been grieved and were therefore subject to section 236 of the *FPSLRA*. The *FPSLRA* grants grievance rights only in respect of employment-related matters, and the section 236 bar applies only to disputes relating to an employee's terms and conditions of employment. However, the Interim Order and other travel-related measures were general measures that applied to all Canadians. Therefore, they could not be grieved, and section 236 did not apply (at paras 49-53).

[29] As previously noted, the Plaintiffs in the case at hand reference these conclusions in *Adelberg FCA* as illustrations supporting their position that section 236 does not operate as a complete bar to all claims that may arise in circumstances similar to those in this proceeding.

The Plaintiffs similarly reference *Ebadi FCA*, in which the FCA upheld Justice Brown's decision in *Ebadi FC* but, in the course of its analysis, identified at paragraphs 32 to 33 two cases in which portions of the asserted claims were found not to fall within a labour arbitrator's jurisdiction. Those portions involved allegations of harassment after a claimant's resignation (*Martell v AG of Canada & Ors*, 2016 PECA 8) and an employer's involvement of the police in connection with a security investigation at a claimant's workplace and her resulting termination (*Joseph v Canada School of Public Service*, 2022 ONSC 6734).

[30] Consistent with these illustrations, I accept that the language of the relevant sections of the *FPSLRA* impose parameters on the ouster of the Court's jurisdiction (*McMillan FC* at para 25). However, other than the analysis in *Adelberg FCA* in relation to members of the RCMP (to which I will return later in these Reasons), none of these examples is particularly relevant to the Plaintiffs' claim. As explained in *Adelberg FCA*, in determining whether an issue is one that can be grieved, what matters is the essence of the claim made and not the way in which the claim is characterized in the statement of claim. The FCA emphasised that it does not matter that claimants allege a *Charter* breach or a tort claim. One must instead look to the essential character of the dispute to determine if it raises a matter that could have been the subject of a grievance (at para 56).

[31] *Adelberg FCA* upheld Justice Fothergill's decision to strike the claims of the plaintiffs who were employed in the CPA (at paras 54-59) other than, for the reasons explained above, plaintiffs who were employed by the RCMP (at paras 60-64). The FCA found that compliance with the Policy was a term and condition of employment for the plaintiffs employed by the

organizations included in the CPA and that the requirement to be vaccinated or face leave without pay could have been grieved by those plaintiffs (other than the RCMP employees) under section 208 of the *FPSLRA* (at para 57).

[32] Against that jurisprudential backdrop, the question for the Court's determination is whether the essence of the Plaintiffs' claim (or, expressed otherwise, the essential character of the dispute) raises a matter that could have been the subject of a grievance under section 208 of the *FPSLRA*. As previously noted, the Defendant emphasizes subparagraph 208(1)(a)(i), involving the interpretation or application of a direction or other instrument issued by the employer that deals with the terms and conditions of employment.

[33] As also noted above, the Plaintiffs submit that it is at least arguable (and therefore sufficient to survive the motion to strike) that their claims based on section 2(d) of the *Charter* raise a dispute the essential character of which does not involve the interpretation or application of the terms and conditions of their employment but rather involves the process by which the those terms were altered by the Policy in the absence of collective bargaining. The Plaintiffs recognize that claims based on the *Charter* can be grieved under section 208 of the *FPSLRA* (*Adelberg FCA* at para 56). However, they argue that, if the particular claim based on the *Charter* does not involve the interpretation or application of the terms and conditions of their employment, then section 208 does not afford grievance rights and section 236 does not bar access to the Court.

[34] The Plaintiffs further submit (and, at the hearing of this motion, the Defendant's counsel concurred) that there appears to be a dearth of authority on whether an alleged violation of *Charter* section 2(d) in particular can be grieved under section 208. However, the Plaintiffs refer the Court to other authorities, addressing grievance rights in the context of collective bargaining, that they submit demonstrate the strength of their position that the reasoning in *Adelberg FCA* does not apply to the particular claim advanced in the case at hand (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v Quebec (Attorney General)*, 2004 SCC 39 [*Morin*]; *British Columbia Teachers' Federation v British Columbia*, 2015 BCCA 184, rev'd 2016 SCC 49; *AUPE v Alberta*, 2014 ABCA 43, leave to appeal to SCC refused, 36234 (26 March 2015)).

[35] In my view, the authority that carries the day for the Plaintiffs in the context of this motion is the decision of the Supreme Court of Canada [SCC] in *Morin*. That case considered whether a labour arbitrator's exclusive jurisdiction granted by provincial statute applied to an argument that a collective agreement was negotiated in a discriminatory manner, so as to include a discriminatory term, and thereby contravened the Québec *Charter of Human Rights and Freedoms*, RSQ, c C-12 [*Québec Charter*]. The majority decision, written by Chief Justice McLachlin, found that the grievance legislation did not confer exclusive jurisdiction on an arbitrator (and thereby did not oust the jurisdiction of a human rights tribunal to consider the claims under the *Québec Charter*), because the essential character of the dispute was not the interpretation or application of the collective agreement. The SCC found that the dispute did not concern how the relevant term in the collective agreement would be interpreted and applied but

rather whether the process leading to the adoption of the alleged discriminatory clause violated the *Québec Charter* such that the term was unenforceable (at paras 23-24).

[36] I note that *Morin* included a strong dissent, written by Justice Bastarache, which emphasized the public policy considerations underlying the assignment to labour arbitrators of the jurisdiction to rule on virtually all aspects of a case insofar as they are expressly or inferentially related to a collective agreement (at para 33). Justice Bastarache referenced at paragraph 43 the emphasis in paragraph 58 of *Weber v Ontario Hydro*, 1995 CanLII 108, [1995] 2 SCR 929 [*Weber*] of the benefits of affording exclusive jurisdiction to arbitrators and related restrictions on the rights of parties to proceed with parallel litigation in the courts. As the Defendant argues in the case at hand, *Weber* explained the need to avoid the ability of innovative pleaders to evade the legislative prohibition on parallel court actions by raising new and imaginative causes of action (at para 49).

[37] I am conscious of these considerations, which are echoed in the explanation in *Adelberg FCA* (at para 56) of the requirement (derived from *Weber*) to determine the essence of a claim, when assessing whether it can be grieved, such that it matters not whether the plaintiffs allege a *Charter* breach or various tort claims. To allow the artful pleading of workplace grievances as intentional torts or *Charter* breaches, in order to escape the operation of the *FPSLRA*, would undermine Parliament's intent (*Ebadi FCA* at para 36). However, the majority of the SCC in *Morin* took *Weber* into account and nevertheless concluded that the dispute, as to whether the process leading to the adoption of the alleged discriminatory clause in the collective agreement

violated the *Québec Charter*, did not relate to how the agreement should be interpreted and applied (at para 24).

[38] Obviously *Morin* is not on all fours with the matter at hand, as it involved different labour relations and human rights legislation and different allegations. However, both *Morin* and the case at hand involve assertions that the relevant term of employment is unenforceable or actionable because it was generated through an improper process (in the case at hand, a process that lacked the benefit of collective bargaining that the Plaintiffs argue was mandated by the *Charter*). The Defendant has not advanced a basis to distinguish *Morin*, and there is a sufficient parallel, between the reasoning in *Morin* and the Plaintiffs' arguments based on its allegations under section 2(d) of the *Charter*, that the Court cannot conclude that the Plaintiffs are doomed to fail in arguing that this aspect of the Claim does not fall within section 208 of the *FPSLRA* and is therefore not subject to the section 236 bar.

[39] As such, my Order will dismiss the Defendant's motion to strike the portion of the Claim based on section 2(d) of the *Charter*.

[40] However, this analysis does not apply to the Plaintiffs' assertion of the tort of misfeasance in public office. The jurisprudence is clear that disputes related to the terms and conditions of employment referred to in section 208 of the *FPSLRA* have been considered to encompass tort claims, including intentional torts (*Adelberg FCA* at para 56; *Ebadi FCA* at para 29). The Plaintiffs have advanced no arguable position that their claim in tort involves a dispute related to the process by which the relevant term of employment was generated, such as might

escape the application of sections 208 and 236 of the *FPSLRA* through the *Morin* reasoning. In my view, it is plain and obvious that the Plaintiffs' tort claim has no reasonable chance of success.

[41] As such, my Order will grant the Defendant's motion to strike the portion of the Claim based on the tort of misfeasance in public office. I will turn later in these Reasons to the question of whether the Plaintiffs should be granted leave to amend that portion of the Claim and, in that analysis, will address the Plaintiffs' argument that the proposed class includes individuals who would not have grievance rights under section 208 of the *FPSLRA*.

B. *Do the pleadings disclose a reasonable cause of action for misfeasance in public office?*

[42] Having found that the Plaintiffs' allegations of misfeasance in public office are barred by section 236 of the *FPSLRA*, the outcome of this motion can be determined without addressing whether the pleadings disclose a reasonable cause of action in relation to that tort. Nevertheless, for the sake of good order, I will turn briefly to this issue.

[43] As explained in *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227, leave to appeal to SCC refused, 36889 (23 June 2016), a plaintiff must plead material facts in sufficient detail to support the claim and relief sought (at para 16). The pleading must set out the constituent elements of the plaintiff's cause of action in sufficient detail, so that the defendant can understand the circumstances that are alleged to give rise to its liability (at para 19).

[44] In relation to the tort of misfeasance in public office, which forms part of the Claim in this matter, the parties largely agree on the constituent elements. As explained in *Anglehart v Canada*, 2018 FCA 115 [*Anglehart*] at paragraph 52, leave to appeal to SCC refused, 38294 (21 March 2019), misfeasance in public office is an intentional tort that is directed at the conduct of public officers in the exercise of their duties and includes the following elements: (a) deliberate, unlawful conduct in the exercise of public functions; (b) awareness that the conduct is unlawful and likely to injure the plaintiff; (c) harm; (d) a legal causal link between the tortious conduct and the harm suffered; and (e) an injury that is compensable in tort law.

[45] While it is not clear that the Defendant has conceded the following point, there is also jurisprudential support for the Plaintiffs' position that the required mental element can be satisfied in circumstances of reckless indifference to the illegality of the act and the probability of injury to the Plaintiffs (*Odhavji Estate v Woodhouse*, 2003 SCC 69 [*Odhavji*] at para 25).

[46] Relying on *Odhavji*, the FCA in *Anglehart* explained that there are two ways in which the tort of misfeasance in public office can arise (at para 53):

> … Category A involves conduct that is specifically intended to injure a person or class of persons. Category B involves a public officer who acts with knowledge both that she or he has no power to act in the way complained of and that the act is likely to injure the plaintiff.

[47] The Plaintiffs' counsel confirmed at the hearing of this motion that their allegations fall into Category B. While the portion of the Claim asserting the tort of misfeasance in public office is brief and somewhat lacking in precision, I interpret the pleading to be asserting that, in issuing and mandating implementation of the Policy, the Treasury Board acted with reckless indifference

or wilful blindness as to: (a) ineffectiveness of COVID-19 vaccines in achieving the objectives of the Policy; (b) potential risk of adverse events associated with vaccination; (c) absence of long-term safety data related to the vaccines; and (d) foreseeable harm to the Plaintiffs in the form of significant economic deprivation and emotional trauma.

[48] The Defendant argues that the Plaintiffs have failed to plead material facts sufficient to establish the constituent elements of the tort. In particular, the Defendant submits that the broad allegation against the Treasury Board lacks particularity as to the officials or offices that are alleged to have committed the tortious act, lacks specificity as to any particularized harm to any individual, and fails to plead a specific intention to deliberately cause harm to an individual by acting in a manner that an official knows to be inconsistent with their legal obligations.

[49] I disagree with the Defendant's position. In relation to the identity of the alleged tortfeasor, I appreciate that the Plaintiffs direct their allegation at the Treasury Board rather than at any particular individuals or offices therein. However, consistent with the reasoning in *Grand River Enterprises Six Nations Ltd v Attorney General (Canada)*, 2017 ONCA 526 at paragraphs 88-89, this is a matter in which there is no basis to expect that the Plaintiffs would be privy to information about the internal workings of the Treasury Board and the individual or individuals therein who were involved in the generation and issuance of the Policy. I do not find this aspect of the Plaintiffs' pleading to be insufficient.

[50] Nor am I convinced that the Claim is wanting for failure to identify the alleged harm to the Plaintiffs. The Claim pleads that the Plaintiffs were either suspended from their employment

or resigned as a consequence of the Treasury Board's issuance of the Policy, resulting in financial and emotional harm.

[51] In relation to the requirement to plead the tortfeasor's intention to deliberately cause harm by acting in a manner known to be inconsistent with the tortfeasor's legal obligations, the Claim pleads details of the product monographs applicable to COVID-19 vaccines that had been approved by Health Canada at the date the Policy was issued, as well as information related to safety and risk of adverse events associated with the vaccines. The Plaintiffs allege that the Treasury Board acted with reckless indifference or wilful blindness in issuing the Policy in that, based on the above information, it had no basis in fact to justify the Policy as a measure to prevent transmission of the virus, was aware of the risk of potential adverse events associated with vaccination, and did not have the benefit of any long-term safety data.

[52] I am satisfied that these allegations sufficiently plead facts intended to establish the elements of the tort of misfeasance in public office. In *Magnum Machine Ltd (Alberta Tactical Rifle Supply) v Canada*, 2021 FC 1112, Associate Chief Justice Jocelyne Gagné explained that, when considering a motion to strike, it is not important whether the arguments that a plaintiff wishes to advance are strong or accurate. Dismissing a motion to strike does not represent an endorsement of a plaintiff's claim. Notwithstanding that plaintiffs may face an uphill battle in proving their claim, they should not be deprived of the opportunity to do so, provided that their pleading satisfies the elements of the relevant cause of action (at paras 34-35).

[53] As such, were it not for the Court's conclusion that the portions of the Claim asserting the Plaintiffs' allegations in the tort of misfeasance in public office must be struck due to the effect of the *FPSLRA*, these portions of the Claim would survive the Defendant's motion to strike.

C. *In the event the Claim or portions of the Claim should be struck, should the Plaintiffs be granted leave to amend the Claim?*

[54] As noted earlier in these Reasons, Rule 221(1) affords the Court authority to strike a pleading, or anything therein, either with or without leave to amend. As explained in *Collins v Canada*, 2011 FCA 140 at paragraph 26, in order to strike a pleading without leave to amend, the defect that is identified in the pleading must be one that cannot be cured by amendment. As expressed in *Al Omani*, a pleading should not be struck without leave to amend unless there is no scintilla of a cause of action, such that it is clear that the claim cannot be amended to show a proper cause of action (at para 34).

[55] As explained above, I have decided to strike the portion of the Claim that advances the Plaintiffs' allegations related to the tort of misfeasance in public office, because that portion of the Claim is barred by section 236 of the *FPSLRA*. However, as also canvassed earlier in these Reasons, the Plaintiffs argue that the proposed class includes individuals who are not "employees" as defined in section 206 of the *FPSLRA* for purposes of section 208 grievance rights. The Plaintiffs assert that the Policy affected individuals such as casual workers, students, and members of the RCMP, who are not afforded grievance rights by section 208 and whose claims are therefore not subject to section 236.

[56] As the Plaintiffs' counsel noted in oral submissions, the Action is still some distance from a certification motion, and the parties have yet to litigate in any detail a proposed class definition. Indeed, the Claim describes the proposed class in more than one manner. However, that description includes the following at paragraph 8 of the Claim:

> The Class (to be defined by the Court) is intended to include all existing unionized employees and all persons hired within the core public administration of the Federal public service and the RCMP during the Class Period who were either subject to or subjected to discipline, including but not limited to suspension of employment and termination, pursuant to the Policy as a result of failing to disclose their vaccination status or failing to become vaccinated ("Class Members").

[57] This description is clearly broad enough to include members of the RCMP. It also appears broad enough to include other categories of individuals (such as casual workers and students) who do not meet the definition of "employees" for purposes of section 208 grievance rights. As such, I accept the Plaintiffs' position that the proposed class in this Action could include claimants whose entitlement to advance claims based on the tort of misfeasance in public office, akin to those asserted by the Plaintiffs in the Claim, would not be barred by section 236 of the *FPSLRA*.

[58] Of course, this analysis does not assist the Plaintiffs themselves in advancing their own allegations in the portion of the Claim based in tort, and the Defendant takes the position that, in the absence of material facts pleaded in relation to other members of the proposed class, there is no basis for the Court to exercise its discretion to grant leave to amend.

[59] However, in my view, this situation is similar to that in *McMillan FCA*, in which the FCA upheld the Federal Court's decision to strike the plaintiff's statement of claim, for failure to disclose a reasonable cause of action except in relation to certain members of the proposed class, but held that the Federal Court erred in denying leave to amend the statement of claim to advance allegations on behalf of other members of the proposed class (at paras 153-154).

[60] Some explanation of that authority is useful. Mr. McMillan, a former temporary employee of the RCMP, commenced a proposed class proceeding as a representative plaintiff, alleging systemic bullying, intimidation and harassment within RCMP workplaces. The proposed class included numerous categories of individuals who worked with the RCMP in a variety of capacities at different times and in different locations across Canada (*McMillan FCA* at paras 1-2).

[61] In *McMillan FC*, the Federal Court struck Mr. McMillan's statement of claim, without leave to amend, except to the extent that it related to Temporary Civilian Employees [TCEs] working in the RCMP's Kelowna Operational Communications Centre [Kelowna OCC] between January 1, 2003 and March 31, 2005. This time frame was a function of sections 208 and 236 of the *FPSLRA*, in that section 236 ousted the claims of any "employee" (as defined by section 206) arising after the statute came into force on April 1, 2005. The effect was that the claims of Mr. McMillan and other "employees" related to employment after April 1, 2005 were barred. Mr. McMillan's allegations of bullying and harassment that he had personally experienced did not date prior to April 1, 2005, but he did allege that other TCEs at the Kelowna OCC experienced

bullying and harassment prior to that date. The Federal Court therefore struck Mr. McMillan's claim but not that of the other TCEs at the Kelowna OCC (*McMillan FCA* at paras 3, 44-51).

[62] As noted above, the FCA upheld this aspect of the Federal Court's decision, except insofar as the Federal Court had denied leave to amend the statement of claim to assert claims on behalf of members of the broader proposed class. As the Federal Court had accepted that the statement of claim pleaded a reasonable cause of action with respect to certain individuals (other TCEs, specifically at the Kelowna OCC) in the period prior to April 1, 2005, the FCA concluded there was no reason to think that the statement of claim could not be amended to disclose a reasonable cause of action in relation to other categories of individuals, by providing material facts regarding their experiences with the RCMP (at paras 104-112).

[63] In the case at hand, the Claim advances tortious allegations, based on the vaccine product monographs, information concerning vaccine safety and risk of adverse events, and the Plaintiffs' personal experiences that they allege represent suspension or resignation pursuant to the Policy. As in *McMillan FCA*, there is no basis to think that the Claim could not be amended to advance similar allegations on behalf of other members of the proposed class that would not be barred by section 236 of the *FPSLRA* and, in connection therewith, to include additional representative plaintiff(s).

[64] As such, in connection with the Claim's assertion of the tort of misfeasance in public office, my Order will grant leave to the Plaintiffs to amend the Claim to identify additional

proposed representative plaintiff(s), and to plead material facts in relation to claims by such plaintiffs, who are not afforded grievance rights by the *FPSLRA*.

[65] As a final point, I note that if the Plaintiffs act upon such leave, the result may be a claim in which not all plaintiffs in this Action are asserting the same causes of action. The existing Plaintiffs' section 2(d) *Charter* claims, but not their tort claims, have survived this motion to strike, but the jurisprudence supports affording the Plaintiffs leave to amend the Claim to include additional plaintiffs who are in a position to advance such tort claims. The parties have made no submissions, and therefore the Court expresses no views, on the potential effect on this class proceeding or its eventual certification motion that would result from the inclusion in this Action of different sets of plaintiffs advancing different sets of causes of action.

V. Costs

[66] The Defendant seeks costs in the amount of $1500.00, payable forthwith. The Plaintiffs take the position that there should be no award of costs against them unless the Defendant is successful in dismissing the Claim in its entirety without leave to amend. The Plaintiffs submit that, if they are granted leave to amend on any claim, then success should be considered to be split between the parties, such that no costs award would be merited.

[67] I agree with the Plaintiffs' position and, as this motion is being granted only in part, the Court will award no costs.

ORDER IN T-2142-23

THIS COURT'S ORDER is that:

1. This motion is granted in part, and the portion of the Claim related to the Plaintiffs' assertion of the tort of misfeasance in public office is struck.

2. In connection with the Claim's assertion of the tort of misfeasance in public office, the Plaintiffs are granted leave to amend the Claim to identify additional proposed representative plaintiff(s), and to plead material facts in relation to claims by such plaintiffs, who are not afforded grievance rights by the *FPSLRA*.

3. This motion is otherwise dismissed.

4. No costs are awarded on this motion.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2142-23
STYLE OF CAUSE:	STACEY HELENA PAYNE, JOHN HARVEY AND LUCAS DIAZ MOLARO v HIS MAJESTY THE KING
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	DECEMBER 13, 2024
ORDER AND REASONS:	SOUTHCOTT J.
DATED:	JANUARY 2, 2025

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