Federal Court of Appeal | Cour d'appel fédérale

Date: 20240624

Docket: A-82-23

Citation: 2024 FCA 115

CORAM: **MACTAVISH J.A.**
MONAGHAN J.A.
HECKMAN J.A.

BETWEEN:

DREENA DAVIS

Appellant

and

ROYAL CANADIAN MOUNTED POLICE

Respondent

Heard at Saskatoon, Saskatchewan, on May 28, 2024.

Judgment delivered at Ottawa, Ontario, on June 24, 2024.

REASONS FOR JUDGMENT BY: MACTAVISH J.A.

CONCURRED IN BY: MONAGHAN J.A.
HECKMAN J.A.

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REASONS FOR JUDGMENT

MACTAVISH J.A.

[1] Dreena Davis is a former employee of the Royal Canadian Mounted Police, where she worked as an Internal Conflict Management Practitioner. She was an indeterminate public service employee, and was not a member of a union. Ms. Davis is also a person with disabilities.

[2] In 2018, Ms. Davis filed a complaint with the RCMP's Office for the Coordination of Harassment Complaints, alleging that her supervisor had subjected her to harassment and

bullying for several years. An Assistant Commissioner of the RCMP issued a 65-page "Record of Decision" with respect to Ms. Davis' complaint, finding that, on a balance of probabilities, the complaint had not been substantiated, and that her supervisor had not contravened the RCMP's Code of Conduct.

[3] Ms. Davis grieved the Assistant Commissioner's decision, alleging that he was not impartial and that he failed to consider all of the information in front of him before dismissing her complaint. By agreement of the parties, Ms. Davis' grievance was referred directly to the third level of the grievance process. The RCMP's Chief Human Resources Officer subsequently dismissed Ms. Davis' grievance, finding no evidence to support her claims.

[4] In accordance with subsection 209(1) of the *Federal Public Sector Labour Relations Act*, S.C. 2003, c. 22 (the *FPSLRA* or the Act), only certain matters that may be grieved by public servants can be referred to adjudication before the Federal Public Sector Labour Relations and Employment Board: *Adelberg v. Canada*, 2024 FCA 106 at para. 31 (*Adelberg* FCA). Dealing as it did with the terms and conditions of her employment, Ms. Davis' individual grievance was not one that could be referred to adjudication.

[5] Ms. Davis instead sought judicial review of the Chief Human Resources Officer's decision in the Federal Court, seeking to quash both the Record of Decision and the Grievance Decision on the basis of bias and procedural unfairness. Ms. Davis also sought to quash the investigation into her complaints, and claimed compensatory, aggravated and punitive damages. However, Ms. Davis discontinued her application for judicial review prior to it being heard.

I. Ms. Davis' Statement of Claim

[6] Shortly after discontinuing her application for judicial review, Ms. Davis filed a statement of claim in the Federal Court naming the RCMP as the defendant. Ms. Davis' statement of claim relates to many of the events that gave rise to her harassment complaint and grievance, as well as events surrounding the investigation and determination of her complaint.

[7] Ms. Davis' statement of claim asserts that the RCMP had engaged in a series of unfair labour practices that included harassment by her supervisor, unilateral changes to her employment contract, disguised and/or constructive dismissal, harm to her reputation and discrimination based on the failure of the RCMP to accommodate her disability. She further alleged that the RCMP had failed to investigate her allegations properly, and that the investigation and hearing processes were fraught with procedural unfairness.

[8] By way of relief, Ms. Davis sought, amongst other things, to have the Court quash the grievance decision "due to the lack of impartiality and procedural unfairness". She also sought compensatory, general and aggravated damages.

[9] The RCMP brought a motion to strike Ms. Davis' statement of claim, without leave to amend, on the basis that her claim was barred by operation of subsection 236(1) of the *FPSLRA*. Subsection 236(1) provides that "[t]he 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".

The full text of the statutory provisions at issue in this case is attached as an appendix to these reasons.

II. The Associate Judge's Decision

[10] An Associate Judge of the Federal Court granted the RCMP's motion, striking Ms. Davis' statement of claim without leave to amend. The Associate Judge found that subsection 236(1) of the *FPSLRA* was clear, and that it expressly stated that (save for limited exceptions that were not applicable in this case) an employee's right to grieve any matter relating to the terms and conditions of their employment was in lieu of any right of action that the employee may otherwise have had.

[11] Citing the Court of Appeal of Ontario's decision in *Bron v. Canada (Attorney General)*, 2010 ONCA 71, the Associate Judge held that the explicit privative clause created by subsection 236(1) of the *FPSLRA* deprives courts of their residual discretion to entertain disputes over the terms and conditions of the employment of employees governed by the Act.

[12] The Associate Judge further found that Ms. Davis' workplace concerns could have been the subject of a grievance, and that she had in fact used the grievance process but was dissatisfied with the result. Finally, the Associate Judge found that there was no "legislative gap" in the *FPSLRA*, nor was there any merit to Ms. Davis' allegation that there had been a "legislative error" in the enactment of subsection 236(1) of the Act.

III. The Federal Court Judge's Decision

[13] Ms. Davis appealed the Associate Judge's decision to a judge of the Federal Court, alleging numerous errors on the part of the Associate Judge. These included her allegedly failing to consider the impact of Ms. Davis' disability, and failing to provide Ms. Davis with access to appropriate accommodation measures in the hearing process.

[14] Ms. Davis also alleged that the Associate Judge failed to assist her with information and advice (including advice as to the points that ought to be included in her statement of claim), which Ms. Davis submitted the Associate Judge was obliged to do, given that Ms. Davis was a self-represented litigant. The Associate Judge had also distracted Ms. Davis by making interventions, and had ignored Ms. Davis' argument regarding "poor advice".

[15] In addition, Ms. Davis asserted that the Associate Judge refused to allow her to challenge the legislation, failed to analyze Ms. Davis' arguments, and failed to consider whether the grievance process could provide Ms. Davis with adequate redress. Finally, Ms. Davis submitted that the Associate Judge neglected to address her argument of bad faith and failed to provide adequate reasons for the decision.

[16] In a decision reported as 2023 FC 280, the Federal Court judge found that Ms. Davis had not demonstrated any error on the part of the Associate Judge that would warrant the Court's intervention. After carefully considering each of Ms. Davis' arguments, the Federal Court judge

was satisfied that the Associate Judge had not made any palpable and overriding errors in accommodating Ms. Davis' disabilities or her status as a self-represented litigant.

[17] The Federal Court judge further found that the Associate Judge had not erred in rejecting Ms. Davis' argument as to the alleged "legislative error" in the *FPSLRA* or her claim that there was a gap in the legislative scheme. The Associate Judge had correctly concluded that the Federal Court lacked jurisdiction to entertain Ms. Davis' claim, as subsection 236(1) operated to bar claims such as hers, and she had not established that her claim came within any of the possible exceptions to the bar.

IV. The Issues

[18] Ms. Davis has raised numerous arguments as to the errors that she says were committed by the Associate Judge and by the Federal Court judge. While I have carefully considered all of Ms. Davis' arguments, it is only necessary to address some of them.

[19] These arguments may be grouped under the following headings:

1. What is the appropriate standard of review?
2. Did the Associate Judge or the Federal Court judge fail to accommodate Ms. Davis' disability, and did they fail to have due regard to the fact that she is a self-represented litigant?

3. Was there a reasonable apprehension of bias on the part of the Associate Judge as a result of her past employment with the Department of Justice?
4. Did the Associate Judge and the Federal Court judge err in law in finding that Ms. Davis' claim was barred by operation of subsection 236(1) of the *FPSLRA*?

V. The Standard of Review

[20] The standard of review applicable to an appeal such as this is that established by the Supreme Court of Canada in *Housen v. Nikolaisen*, 2002 SCC 33. That is, where a Federal Court judge upholds a discretionary decision of an Associate Judge, this Court must examine the decision of the Associate Judge to determine whether the Federal Court erred in law or made a palpable and overriding error in refusing to intervene: *Calliou v. Canada*, 2019 FCA 23 at para. 9; *Sikes v. Encana Corp.*, 2017 FCA 37 at para. 12, leave to appeal to SCC refused, 37509 (2 November 2017).

VI. The Alleged Failure of the Federal Court to Accommodate Ms. Davis' Disabilities and her Status as a Self-Represented Litigant

[21] Ms. Davis states that she is cognitively impaired as a result of a brain injury she suffered in infancy, and that she also suffers from chronic fatigue syndrome and fibromyalgia. According to Ms. Davis, these conditions negatively affect her ability to represent herself in legal proceedings.

[22] Indeed, a primary focus of Ms. Davis' submissions on this appeal was on the challenges and barriers faced by self-represented litigants who suffer from disabilities (particularly those who are cognitively impaired) in accessing the justice system. Noting that many people with disabilities live at, or below, the poverty line, Ms. Davis observed that most of these individuals will be unable to afford legal representation, and will be left trying to navigate the justice system on their own.

[23] Ms. Davis also made submissions with respect to what she says were the shortcomings in the treatment that she received from the Federal Court, and its failure to accommodate her disabilities.

[24] On the advice of the Federal Court Registry, Ms. Davis wrote to the Associate Judge a couple of weeks prior to the hearing of the motion to strike. She stated in her letter that she had a disability that occasionally impeded her "ability to articulate specific verbal and written words", explaining that what she sees on paper "may be significantly different" from what others see. Ms. Davis went on to state that names were especially difficult for her to pronounce, and that the best that she could do when confronted with a name would be to spell the name for the Court.

[25] Ms. Davis also advised the Associate Judge that it would sometimes take her a few extra moments to find the word she wanted, or she might say the wrong word and need to correct it. Ms. Davis' letter concluded by asking the Associate Judge to advise "how you would like these issues to be dealt with during the hearing". Attached to Ms. Davis' letter was a note from her doctor that addressed Ms. Davis' need for certain accommodative measures in the workplace.

[26] The Associate Judge responded by granting Ms. Davis leave "to be accompanied [at the hearing] by a representative who may assist her as necessary". When Ms. Davis advised the Associate Judge shortly before the date set for the hearing that she had tested positive for COVID-19 and could not get certain documents sworn as a result, the Associate Judge allowed unsworn documents to be filed. The RCMP's motion to strike was then heard on the date originally set for the hearing, in accordance with Ms. Davis' wishes.

[27] In considering the appeal from the Associate Judge's decision, the Federal Court judge watched the video of the motion hearing. The judge noted that Ms. Davis had not availed herself of the opportunity to bring a representative with her to assist her at the hearing, but that she had nevertheless been able to fully articulate her arguments. The Federal Court judge described the representations made to the Associate Judge by Ms. Davis as being "coherent, responsive [and] articulate", stating that Ms. Davis had "advocated her position admirably for a self-represented individual".

[28] Ms. Davis gave no indication to the Associate Judge that she was experiencing any difficulties in presenting her case, save on one occasion where she indicated that she had been "thrown off" by a question from the Associate Judge. In response, the Associate Judge offered Ms. Davis a break to allow her to re-group, asking Ms. Davis how long she needed to collect her thoughts. Ms. Davis indicated that a 10-minute break would be sufficient, and the Associate Judge granted Ms. Davis' request.

[29] Ms. Davis asserted before the Federal Court judge and before this Court that the Associate Judge had erred by offering her a break, rather than adjourning the hearing to another day in order to permit her to adequately prepare her submissions. Ms. Davis says that the Associate Judge ought to have offered an adjournment without Ms. Davis having to ask for it.

[30] The Federal Court judge did not err in rejecting this argument.

[31] There is no doubt that the history of disabled persons in Canada is largely one of exclusion and marginalization. Amongst other disadvantages they face, individuals with disabilities have been "subjected to invidious stereotyping", and they have often been denied the equal concern, respect and consideration that the law requires: *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, [1997] S.C.J. No. 86 at para. 56.

[32] There is also no doubt that courts are required to accommodate the needs of self-represented litigants with disabilities: see the discussion of this issue in *Haynes v. Canada (Attorney General)*, 2023 FCA 158 at paras. 18-32, leave to appeal to SCC refused, 41047 (6 June 2024).

[33] The search for accommodation is, however, a two-way street. It is the responsibility of the disabled individual to bring the facts relating to the discrimination they are experiencing to the attention of the employer or service provider: *Desormeaux v. City of Ottawa*, 2005 FCA 311 at para. 19, leave to appeal to SCC refused, 31230 (23 March 2006). There is also an obligation on individuals seeking accommodation to assist in securing the appropriate accommodative

measures: *Haynes*, above at para. 30, citing *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, [1992] S.C.J. No. 75 at para. 43.

[34] In this case, the Associate Judge had no way of knowing, or even surmising, that Ms. Davis needed an adjournment of the hearing. When Ms. Davis stated that she had been "thrown off" by the Associate Judge's questions, the Associate Judge quite reasonably responded by giving her the 10-minute break that Ms. Davis stated would be sufficient to allow her to re-group. There was nothing unreasonable, unfair or discriminatory in the Associate Judge giving Ms. Davis precisely the accommodation that she sought.

[35] Ms. Davis did not ask the Associate Judge to hold her questions until Ms. Davis had concluded her submissions in order to avoid a disruption to her thought processes. She did ask the Federal Court judge to do so, and the Federal Court judge honoured that request. Ms. Davis' similar request to this Court was honoured by the panel.

[36] Judges are not clairvoyant, and they cannot be expected to know how a particular individual's disability may manifest itself in the course of a hearing. To require judges to speculate about a litigant's disability and the specific measures that the individual may require to accommodate that disability would invite reliance on stereotypes and potentially invidious assumptions as to the abilities of the individual—precisely the things that human rights legislation is designed to avoid: *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 2.

[37] Ms. Davis states that she made numerous attempts to obtain legal advice, but that she was unable to do so. As a result, she says that the Associate Judge should have provided her with advice, including advice as to what information should be included in her statement of claim, and how she could go about challenging the provisions of the *FPSLRA*.

[38] In support of this contention, Ms. Davis relies on the Canadian Judicial Council's *Statement of Principles on Self-represented Litigants and Accused Persons*, (September 2006) online (pdf): <https: //www.cjc-ccm.gc.ca/cmslib/general/news_pub_other_PrinciplesStatement_2006_en.pdf > [archived version: http: //www.scc-csc.ca/cso-dce/2017SCC-CSC23_1_eng.pdf]. As Ms. Davis noted, the Supreme Court of Canada endorsed these principles in *Pintea v. Johns*, 2017 SCC 23 at para. 4.

[39] While the *Statement of Principles* undoubtedly provides useful guidance for participants in the justice system as to the appropriate treatment of self-represented litigants, there are clear limits to a judge's duty to assist such individuals. In particular, the document recognizes that, in engaging in steps to protect the rights and interests of self-represented persons, judges cannot act in a manner that would compromise their neutrality and impartiality: *Girao v. Cunningham*, 2020 ONCA 260 at para. 151.

[40] Indeed, the Court of Appeal for Ontario relied on the *Statement of Principles* at paragraph 51 of *Thatcher-Craig v. Clearview (Township)*, 2023 ONCA 96, to draw a distinction between procedural and legal advice. The Court observed that while it is within a judge's discretion to

control the court process and to grant latitude to a self-represented litigant on procedural issues, that discretion does not extend to rectifying substantive legal deficiencies.

[41] The *Statement of Principles* also notes that there is a distinction between providing legal information (such as the information that we provided to Ms. Davis at the outset of her hearing in this Court as to the process that would be followed and as to the appropriate content of reply submissions), and providing legal advice.

[42] As noted at page 11 of the *Statement of Principles*, legal advice includes, "among other things … advising someone on how to best pursue a case". The information that Ms. Davis faults the Associate Judge for failing to provide clearly amounts to legal advice, and it would have been inappropriate for the Associate Judge to have provided Ms. Davis with the information in issue.

[43] Ms. Davis also asserts that the Associate Judge erred by failing to appoint a lawyer to represent her at the Court's expense, submitting that allowing her to bring a representative with her to the hearing was insufficient.

[44] It is not clear from the record that Ms. Davis ever raised this issue before the Associate Judge. She did, however, raise it before the Federal Court judge and before this Court, submitting that a legal representative should have been appointed for her in accordance with Rule 115 of the *Federal Courts Rules*, S.O.R./98-106, as she is a "person under a legal disability".

[45] Rule 115(1)(b) provides that "[t]he Court may appoint one or more persons to represent ... a person under a legal disability against or by whom a proceeding is brought". Rule 121 further provides that "[u]nless the Court in special circumstances orders otherwise, a party who is under a legal disability […] shall be represented by a solicitor".

[46] It should first be noted that there is nothing in the Rules that would require the Court to pay for a lawyer appointed under these Rules. Moreover, and in any event, as the Federal Court judge correctly advised Ms. Davis, a "person under a legal disability" within the meaning of the Rules is a person who lacks the legal capacity to represent themselves: *Haynes*, above at para. 48. Ms. Davis clearly does not come within this definition. While Ms. Davis (like most self-represented litigants) would no doubt have benefited from legal advice, she was nevertheless able to provide the Court with lengthy, detailed and carefully researched submissions.

[47] Ms. Davis has identified the very real challenges that are faced by self-represented litigants generally, and the even greater challenges that are faced by self-represented litigants who live with disabilities, as they attempt to navigate the judicial process in an effort to seek justice. These challenges have long been recognized by participants in the justice system and have been the subject of much study and commentary: *Statement of Principles*, above; Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice: A Roadmap for Change* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, 2013). Regrettably, however, many such litigants remain unable to obtain legal advice.

[48] While I have considerable sympathy for the position in which Ms. Davis finds herself, she has failed to establish that either the Associate Judge or the Federal Court judge erred in law or made a palpable and overriding error in failing to accommodate her disabilities or provide her with legal advice or legal representation.

VII. Was there a Reasonable Apprehension of Bias on the Part of the Associate Judge?

[49] Ms. Davis also asserts that there was a reasonable apprehension of bias on the part of the Associate Judge as a result of her past employment with the Department of Justice, where the Associate Judge had the RCMP as one of her client departments.

[50] Ms. Davis raised this concern in a letter that she sent to the Associate Judge a couple of months prior to the hearing of the RCMP's motion to strike Ms. Davis' statement of claim. The Associate Judge dealt with Ms. Davis' objection by way of an Order dated December 9, 2021, which found that there was no bias, whether actual or apprehended, on her part.

[51] Ms. Davis did not appeal this Order at the time that it was rendered, stating that she had decided instead to "give the Associate Judge the benefit of the doubt", and to proceed with the hearing of the RCMP's motion to strike a couple of months later. It appears that Ms. Davis did not pursue the bias issue before the Federal Court judge, and she did not raise it in her Notice of Appeal to this Court. However, Ms. Davis attempted to resurrect her bias claim in her written and oral submissions in this Court, arguing that the Associate Judge should have recused herself from Ms. Davis' case, given her relatively recent professional relationship with the RCMP.

[52] It appears that Ms. Davis made the strategic decision not to pursue the bias issue relating to the Associate Judge's prior employment within the time period for appealing the December 9, 2021 Order. As a result, that Order is now final. While it was entirely open to Ms. Davis to choose not to appeal the Associate Judge's decision, she must now live with the consequences.

[53] I understand that as a self-represented litigant, Ms. Davis may not have appreciated the consequences of her failure to appeal the Associate Judge's ruling on the issue of bias in a timely manner. Unfortunately, however, the fact that she is self-represented and is unfamiliar with the Court process does not provide her with special dispensation from the application of the law and the *Federal Courts Rules*: *Nowoselsky v. Canada (Treasury Board)*, 2004 FCA 418 at para. 8; *MacDonald v. Canada (Attorney General)*, 2017 FC 2 at para. 30.

[54] Ms. Davis now adds to her allegations of bias, asserting in this Court that the Associate Judge acted "with a closed or an unconscious bias" in finding that subsection 236(1) of the *FPSLRA* explicitly ousts the Court's jurisdiction, without considering all of the relevant factors. I will deal with the ouster issue later in these reasons. Suffice it to say at this juncture that the Associate Judge did in fact consider the relevant factors in striking Ms. Davis' statement of claim.

[55] The fact that the Associate Judge ruled in favour of the RCMP on the motion to strike is, moreover, insufficient to create a reasonable apprehension of bias in the mind of a reasonable, fully informed person, having thought the matter through: *Collins v. Canada (Attorney General)*,

2024 FCA 5 at para. 19; *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369, [1976] S.C.J. No.118 at 394.

VIII. Did the Associate Judge Err in Striking Ms. Davis' Statement of Claim?

[56] The next question for determination is whether the Associate Judge erred in striking Ms. Davis' statement of claim.

[57] The RCMP's motion to strike was brought under Rules 221(a) and (f) of the *Federal Courts Rules*, alleging that the Federal Court lacked the jurisdiction to entertain Ms. Davis' action by virtue of subsection 236(1) of the *FPSLRA*.

[58] The case law tells us that 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 statement of claim to be true: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93 at 980; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 63. In other words, the claim must have no reasonable prospect of success: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 21.

[59] The threshold that a plaintiff must meet to establish that a claim discloses a reasonable cause of action is a low one: *Brake v. Canada (Attorney General)*, 2019 FCA 274 at para. 70. A claim must, moreover, be read generously, in a manner that accommodates any inadequacies in

the allegations that are merely the result of deficiencies in the drafting of the document: see *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, [1985] S.C.J. No. 22 at 451.

[60] Judges should refrain from delving into the merits of a plaintiff's argument on a motion to strike, but should, rather, consider whether the plaintiff should be precluded from advancing the argument at all: *Salna v. Voltage Pictures, LLC*, 2021 FCA 176 at para. 77. Recognizing that the law is not static, judges must also err on the side of permitting novel, but arguable claims to proceed to trial: *R. v. Imperial Tobacco*, above at paras. 19-25; *Mohr v. National Hockey League*, 2022 FCA 145 at para. 48, leave to appeal to SCC refused, 40426 (20 April 2023).

[61] That said, it must also be recognized that there is a cost to access to justice in allowing cases that have no substance to proceed. The diversion of scarce judicial resources to such cases diverts time away from potentially meritorious cases that require attention: *Mohr*, above at para. 50; *Coote v. Lawyers' Professional Indemnity Company*, 2013 FCA 143 at para. 13.

[62] Ms. Davis submits that in striking her statement of claim, the Associate Judge erred in law by failing to treat her claims as true. In particular, Ms. Davis says that it was sufficient for her to allege that subsection 236(1) of the *FPSLRA* did not apply to her as an unrepresented employee. The Associate Judge should also have assumed that her claims were true that the RCMP grievance process was a sham, as it was corrupt, ineffective and ridden with bias.

[63] As noted earlier, the case law does indeed tell us that judges considering motions to strike must assume that the facts pleaded in the statement of claim are true. The difficulty with Ms.

Davis' argument is that none of the allegations referred to in the previous paragraph appear anywhere in her statement of claim. They are, rather, claims that she has made in her written and oral submissions.

[64] Ms. Davis also asserts that the Associate Judge and the Federal Court judge erred in law in failing to give adequate consideration to her contention that as an unrepresented employee, she was not bound by the grievance procedures outlined in the *FPSLRA*.

[65] This assertion is not borne out by a review of the Associate Judge's decision. Not only were Ms. Davis' arguments summarized at paragraphs 15 to 17 of the Associate Judge's order, her arguments were then analyzed at paragraphs 18 to 21 of the order. The fact that Ms. Davis' arguments were rejected by the Associate Judge does not mean that they were not considered.

[66] Ms. Davis has also failed to provide any support for her claim that, as an unrepresented employee, she was not bound by the grievance procedures outlined in the *FPSLRA*.

[67] Part 1 of the *FPSLRA* deals with labour relations, and it only applies to employees who are subject to collective agreements. In contrast, Part 2 of the Act (which addresses the grievance process) applies to both unionized and non-represented employees. This is made clear by the definition of "employee" in subsection 206(1). This provides that for the purposes of Part 2 of the Act (with some exceptions that do not apply to Ms. Davis), the term "employee" means "a person employed in the public service".

[68] Subsection 208(1)(b) of the Act permits these employees to present individual grievances if they feel aggrieved with respect to "any occurrence or matter affecting his or her terms and conditions of employment". Ms. Davis cannot escape the operation of subsection 236 by asserting that her claim is not an ordinary workplace dispute. As the Court of Appeal of Ontario observed at paragraphs 14-15 of *Bron*, above, the right to grieve is "very broad", and "[a]lmost all employment-related disputes can be grieved" under the terms of the governing legislation.

[69] Ms. Davis claims that the grievance process does not apply to non-unionized employees because it is not included in any directive, policy or employment contract. Whether or not that is the case, it is included in the *FPSLRA*, which is the law that governs the terms and conditions of employment of most federal public servants, including Ms. Davis.

[70] The fact that the grievance process is indeed available to unrepresented employees such as Ms. Davis is borne out by the fact that her complaints about her supervisor and the Assistant Commissioner's decision were dealt with through the RCMP's grievance system. It was only after her grievance was dismissed at the third level that Ms. Davis turned to the Federal Court for relief.

[71] The Associate Judge also did not err in law in rejecting Ms. Davis' claim that the inclusion of the ouster provision in subsection 236(1) of the *FPSLRA* was the result of a "legislative error". Not only has she failed to point to any facts to support this assertion, it also runs counter to the principle of statutory interpretation that Parliament does not speak in vain: *Ebadi v. Canada*, 2024 FCA 39 at para. 35; *R. v. D.A.I.*, 2012 SCC 5 at para. 31; *Attorney*

General of Quebec v. Carrières Ste-Thérèse Ltée, [1985] 1 S.C.R. 831, [1985] S.C.J. No. 37 at 838.

[72] Ms. Davis has also not identified any "legislative gap" in the *FPSLRA* that would somehow exempt her from the application of subsection 236(1). Indeed, in *Bron*, the Court of Appeal of Ontario specifically held that there is no "legislative gap" in the legislation, and that subsection 236(1) "speaks directly to workplace complaints that are grievable under the legislation". In such cases, the grievance procedure operates "in lieu of any right of action", even when there is no access to third-party adjudication: both quotes from *Bron* above at para. 32.

[73] According to Ms. Davis, the Associate Judge also erred in law in putting the onus on her to demonstrate that her statement of claim should not be struck, rather than requiring the RCMP, as the moving party, to demonstrate that her claim had no possibility of success.

[74] It is true that the initial onus is on the party seeking to establish that a pleading fails to disclose a reasonable cause of action: *Brink v. Canada*, 2024 FCA 43 at para. 44; *La Rose v. Canada*, 2023 FCA 241 at para. 19. The RCMP met its onus in this case by invoking subsection 236(1) of the *FPSLRA*, which bars actions such as that commenced by Ms. Davis. The onus then shifted to Ms. Davis to demonstrate that her claim came within an exception to the general rule: *Lebrasseur v. Canada*, 2007 FCA 330 at para. 19. This she failed to do.

[75] As noted at the outset of these reasons, subsection 236(1) of the *FPSLRA* states that "[t]he 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" [my emphasis]. Conflicts related to "terms or conditions of employment" have been found "to encompass allegations of defamation, discrimination, harassment, malice and bad faith, Charter breaches, and intentional torts, including intentional infliction of mental suffering": *Ebadi*, above at para. 29.

[76] Ms. Davis relies on this Court's decision in *Canada v. Greenwood,* 2021 FCA 186, leave to appeal to SCC refused, 39885 (17 March 2022), as authority for the proposition that claims of systemic negligence are properly the subject of actions against the RCMP by its employees, notwithstanding the provisions of subsection 236(1) of the Act. There are several difficulties with Ms. Davis' argument.

[77] The first is that nowhere in her statement of claim does Ms. Davis plead negligence on the part of the RCMP, whether systemic or otherwise, as a cause of action.

[78] More importantly, Ms. Davis' reliance on *Greenwood* is misplaced. *Greenwood* was an appeal from a certification order issued by the Federal Court in a class proceeding. The action related to the allegedly systemic bullying, intimidation and harassment of individuals who worked for the RCMP and/or with the RCMP. The statement of claim further alleged that the RCMP was negligent in failing to provide the representative plaintiffs and other class members with a workplace that was free from bullying and harassment.

[79] *Greenwood* does not, however, stand for the proposition that indeterminate public servants such as Ms. Davis can sue the RCMP, as long as they allege systemic negligence on the part of their employer. In fact, it suggests that precisely the opposite is the case.

[80] Indeed, this Court specifically addressed the situation of indeterminate civilian employees of the RCMP, noting at paragraph 39 of *Greenwood* that "public service employees who have the right to file grievances under section 208 of the *FPSLRA* are excluded from the class". This would include indeterminate public servants such as Ms. Davis.

[81] In other words, people in Ms. Davis' position were specifically excluded from the class on whose behalf the proceeding in *Greenwood* was brought.

[82] The other cases relied on by Ms. Davis also do not assist her.

[83] There was no suggestion by the respondent in *Davidson v. Canada (Attorney General)*, 2015 ONSC 8008, *Merlo v. Canada*, 2017 FC 533 or *Tiller v. Canada*, 2019 FC 895, that the bar in subsection 236(1) of the *FPSLRA* applied to the plaintiffs in these cases: *Adelberg* FCA, above at para. 47.

[84] Moreover, while civilian employees of the RCMP were originally part of the class on whose behalf the proceeding was brought in *Davidson*, it appears that the plaintiff in that case intended to amend the class definition in her statement of claim to remove public service

employees from the class, presumably because of the jurisdictional difficulties that would result from their inclusion: *Adelberg* FCA, above at para. 9.

[85] Most recently, in *Adelberg* FCA, above, this Court found that the Federal Court had erred in striking claims made by members of the RCMP who sought to challenge various COVID-19-related policies issued by Treasury Board. This Court found that it was not plain and obvious that members of the RCMP possessed grievance rights that would preclude them from bringing an action such as the one in issue in that case: at para. 45.

[86] This Court did not, however, interfere with the Federal Court's finding that the claims of plaintiffs who were subject to subsection 236(1) of the *FPSLRA* should be struck: *Adelberg v. Canada*, 2023 FC 252 at para. 8; *Adelberg* FCA, above at para. 59.

[87] As noted earlier, Ms. Davis also contends that the RCMP grievance process was inadequate, flawed, biased, corrupt and misleading, and that this brings her claim under one of the exceptions to the bar created by subsection 236(1) of the *FPSLRA*.

[88] This Court has recently addressed the common law exceptions to the bar created by subsection 236(1) in *Ebadi*, above at para. 47. There, this Court noted that courts retain a residual discretion to allow an action to proceed, notwithstanding the legislative bar contained in subsection 236(1) of the Act. However, this is so only where the internal grievance mechanism is incapable of providing effective redress: see also *Greenwood*, above at para. 130; *Bron*, above at paras. 27-30.

[89] This Court further noted in *Ebadi* that in *Canada v. Robichaud and MacKinnon*, 2013 NBCA 3, the New Brunswick Court of Appeal confined this discretion to situations where the grievance process is entirely "corrupt": *Ebadi*, above at para. 47; *Robichaud*, above at para. 10.

[90] However, as was the case in the *Lebrasseur* decision cited earlier, the record in this appeal contains no evidence that would demonstrate that the RCMP's internal grievance mechanism was incapable of providing effective redress. It was incumbent on Ms. Davis to have provided evidence about the efficacy of the grievance process if she wished the Court to exercise its discretion to hear her claim. In the absence of any such evidence, it was open to the Federal Court to have struck her statement of claim, without leave to amend: *Adelberg* FCA, above at para. 59.

[91] The lack of third-party adjudication also does not, in and of itself, allow a court to exercise its residual discretion to hear a claim: *Ebadi*, above at para. 26. This is because subsection 236(2) states that the exclusivity of the grievance process identified in subsection 236(1) operates whether or not the employee actually presents a grievance, and whether or not the grievance could be referred to adjudication. The result of the language used in these two provisions is that courts no longer have any residual discretion to entertain claims that are otherwise grievable under the *FPSLRA* on the basis of an employee's inability to access third-party adjudication: *Bron*, above at para. 29.

[92] The Federal Court judge thus did not err in law or make a palpable and overriding error in refusing to intervene in the Associate Judge's decision. In particular, the Federal Court judge

did not err in failing to find that the RCMP grievance process is corrupt, or in failing to find that exceptional circumstances exist that would allow Ms. Davis' civil claim to proceed in the Federal Court.

[93] Ms. Davis also argues that judicial review is not a reasonable alternative to a right of action as damages are not recoverable through the judicial review process. According to Ms. Davis, this warrants a favourable exercise of discretion allowing her action to proceed to trial. I note, however, that a similar argument was rejected by this Court in *Ebadi*, above at paras. 56-60.

[94] It is true that damages are not available as a remedy in judicial review applications: *Garshowitz v. Canada (Attorney General)*, 2017 FCA 251 at para. 10; *Maximova v. Canada (Attorney General)*, 2017 FCA 230 at para. 14. Damages are, however, available through the grievance process: *Wojdan v. Canada (Attorney General)*, 2021 FC 1341 at para. 27, aff'd 2022 FCA 120.

[95] As a result, it would be open to the Federal Court to find that an administrative decision-maker, such as a grievance officer, erred in failing to compensate a grievor for his or her losses. The Federal Court would then be able to refer the matter back for redetermination on that basis.

[96] Finally, Ms. Davis argued that the Associate Judge made a palpable and overriding error in denying her leave to amend her statement of claim to address any errors that she may have made in drafting the document as a result of her lack of legal training.

[97] For a claim to be struck without leave to amend, the defect in the statement of claim must be one that is not curable by amendment: *Simon v. Canada*, 2011 FCA 6 at para. 8; *Hunt v. Carey*, above at paras. 23-24, 28.

[98] As the Federal Court judge observed in this case, when considering whether a statement of claim should be struck, the motions judge "must look beyond the words used, the facts alleged, and the remedy sought": at para. 92. The judge must ensure that the proceedings are "not a disguised attempt to reach before the Federal Court a result otherwise unreachable in that Court": citing *Canada v. Roitman*, 2006 FCA 266 at para. 16.

[99] Ms. Davis seeks to question the authority and validity of subsection 236(1) of the *FPSLRA*, asserting that it is invalid as such a privative clause "is a labour law tool and the unrepresented employee is under the employment law". As noted earlier, she also seeks to argue that "collective agreement clauses (including the grievance process) [do not] apply to the unrepresented employee if they are not contained in any directive, policy or the employment contract". For the reasons given, I have concluded that neither argument has any merit. Consequently, I am not persuaded that the Associate Judge erred in law or committed a palpable or overriding error by denying Ms. Davis leave to amend her statement of claim.

IX. Conclusion

[100] Although only some employer-employee relationships in the federal public service are governed by collective agreements, all are governed by the applicable federal legislation. As the

Supreme Court held in *Vaughan v. Canada*, 2005 SCC 11, where Parliament has created a statutory scheme for dealing with labour disputes (as it has done with the enactment of the *FPSLRA*), "courts should not jeopardize the comprehensive dispute resolution process contained in the legislation by permitting routine access to the courts". Rather, "the general rule of deference in matters arising out of labour relations should prevail": both quotes from *Vaughan*, above at para. 39.

[101] Subsection 236(1) states clearly and unequivocally that the right granted to public service employees under Part 2 of the *FPSLRA* to grieve any dispute related to the terms and conditions of their employment is "in lieu of any right of action" that the employee may have in respect of the same matter: *Bron*, above at para. 29. Ms. Davis' claims unquestionably relate to the terms and conditions of her employment.

[102] If Ms. Davis was dissatisfied with the third level grievance decision, her avenue of recourse was to the Federal Court through the judicial review process. It would have been open to the Federal Court to consider Ms. Davis' arguments in that context, including her arguments as to the inadequacy of the RCMP's investigation into her allegations, the procedural unfairness of the grievance process and the bias and corruption that she says is inherent in the process.

[103] However, allowing Ms. Davis' civil action to proceed would undermine Parliament's intent in enacting subsection 236(1) of the Act, and would amount to "an impermissible incursion into the statutory scheme": *Greenwood*, above at para. 130.

[104] Having carefully examined the decision of the Associate Judge, I am satisfied that the Federal Court judge did not err in law or make a palpable and overriding error in refusing to intervene. For these reasons, I would dismiss Ms. Davis' appeal. The RCMP did not seek its costs and I would not award any.

"Anne L. Mactavish"
J.A.

"I agree.
K. A. Siobhan Monaghan J.A."

"I agree.
Gerald Heckman J.A."

APPENDIX

Federal Public Sector Labour Relations Act, S.C. 2003, c. 22, s. 2

206 (1) The following definitions apply in this Part.

employee means a person employed in the public service, other than

(a) a person appointed by the Governor in Council under an Act of Parliament to a statutory position described in that Act;

(b) a person locally engaged outside Canada;

(c) a person not ordinarily required to 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

206 (1) Les définitions qui suivent s'appliquent à la présente partie.

fonctionnaire Personne employée dans la fonction publique, à l'exclusion de toute personne :

a) nommée par le gouverneur en conseil, en vertu d'une loi fédérale, à un poste prévu par cette loi;

b) recrutée sur place à l'étranger;

c) qui n'est pas ordinairement astreinte 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 moins de 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) a person who is employed under a program designated by the employer as a student employment program. (*fonctionnaire*)

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

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

…

(b) as a result of any occurrence or matter affecting his or her terms and conditions of employment.

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 :

[…]

b) par suite de tout fait portant atteinte à ses conditions d'emploi.

Reference to adjudication

209 (1) An employee who is not a member as defined in subsection 2(1) of the Royal Canadian Mounted Police Act may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to

(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;

(b) a disciplinary action resulting in termination, demotion, suspension or financial penalty;

(c) in the case of an employee in the core public administration,

Renvoi d'un grief à l'arbitrage

209 (1) Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, le fonctionnaire qui n'est pas un membre, au sens du paragraphe 2(1) de la Loi sur la Gendarmerie royale du Canada, peut renvoyer à l'arbitrage tout grief individuel portant sur :

a) soit l'interprétation ou l'application, à son égard, de toute disposition d'une convention collective ou d'une décision arbitrale;

b) soit une mesure disciplinaire entraînant le licenciement, la rétrogradation, la suspension ou une sanction pécuniaire;

c) soit, s'il est un fonctionnaire de l'administration publique centrale :

(i) demotion or termination under paragraph 12(1)(d) of the Financial Administration Act for unsatisfactory performance or under paragraph 12(1)(e) of that Act for any other reason that does not relate to a breach of discipline or misconduct, or

(i) la rétrogradation ou le licenciement imposé sous le régime soit de l'alinéa 12(1)d) de la Loi sur la gestion des finances publiques pour rendement insuffisant, soit de l'alinéa 12(1)e) de cette loi pour toute raison autre que l'insuffisance du rendement, un manquement à la discipline ou une inconduite,

(ii) deployment under the Public Service Employment Act without the employee's consent where consent is required; or

(ii) la mutation sous le régime de la Loi sur l'emploi dans la fonction publique sans son consentement alors que celui-ci était nécessaire;

(d) in the case of an employee of a separate agency designated under subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct.

d) soit la rétrogradation ou le licenciement imposé pour toute raison autre qu'un manquement à la discipline ou une inconduite, s'il est un fonctionnaire d'un organisme distinct désigné au titre du paragraphe (3).

Application of paragraph (1)(a)

(2) Before referring an individual grievance related to matters referred to in paragraph (1)(a), the employee must obtain the approval of his or her bargaining agent to represent him or her in the adjudication proceedings.

Application de l'alinéa (1)a)

(2) Pour que le fonctionnaire puisse renvoyer à l'arbitrage un grief individuel du type visé à l'alinéa (1)a), il faut que son agent négociateur accepte de le représenter dans la procédure d'arbitrage.

Designation

(3) The Governor in Council may, by order, designate any separate agency for the purposes of paragraph (1)(d).

Désignation

(3) Le gouverneur en conseil peut par décret désigner, pour l'application de l'alinéa (1)d), tout organisme distinct.

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

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

employee may have in relation to any act or omission giving rise to the dispute.

aux faits — actions ou omissions — à l'origine du différend.

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.

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) 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.

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.

Federal Courts Rules, SOR/98-106

Appointment of representatives

115 (1) The Court may appoint one or more persons to represent

…

> **(b)** a person under a legal disability against or by whom a proceeding is brought.

Nomination de représentants

115 (1) La Cour peut désigner une ou plusieurs personnes pour représenter :

[…]

> **b)** une personne n'ayant pas la capacité d'ester en justice contre laquelle une instance est introduite ou qui en prend l'initiative.

Parties under legal disability or acting in representative capacity

121 Unless the Court in special circumstances orders otherwise, a party who is under a legal disability

Partie n'ayant pas la capacité d'ester en justice ou agissant en qualité de représentant

121 La partie qui n'a pas la capacité d'ester en justice ou qui agit ou demande à agir en qualité de

or who acts or seeks to act in a representative capacity, including in a representative proceeding or a class proceeding, shall be represented by a solicitor.

représentant, notamment dans une instance par représentation ou dans un recours collectif, se fait représenter par un avocat à moins que la Cour, en raison de circonstances particulières, n'en ordonne autrement.

Motion to Strike

221 (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it

(a) discloses no reasonable cause of action or defence, as the case may be,

(b) is immaterial or redundant,

(c) is scandalous, frivolous or vexatious,

(d) may prejudice or delay the fair trial of the action,

(e) constitutes a departure from a previous pleading, or

(f) is otherwise an abuse of the process of the Court,

and may order the action be dismissed or judgment entered accordingly.

Requête en radiation

221 (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :

a) qu'il ne révèle aucune cause d'action ou de défense valable;

b) qu'il n'est pas pertinent ou qu'il est redondant;

c) qu'il est scandaleux, frivole ou vexatoire;

d) qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;

e) qu'il diverge d'un acte de procédure antérieur;

f) qu'il constitue autrement un abus de procédure.

Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-82-23
STYLE OF CAUSE:	DREENA DAVIS v. ROYAL CANADIAN MOUNTED POLICE
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CONCURRED IN BY:	MONAGHAN J.A. HECKMAN J.A.
DATED:	JUNE 24, 2024

APPEARANCES:

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