

Federal Court



Cour fédérale

Date: 20230207

Docket: T-1704-21

Citation: 2023 FC 182

Ottawa, Ontario, February 07, 2023

PRESENT: Associate Judge Mireille Tabib

BETWEEN:

**ADAM WOJDAN, ALANA MATHESON, ALEXANDER N HOBBS,
ALEXANDRA BODE, ALEXANDRA JANE HARRISON,
ALICIA DIAZ DE LA SERNA, ANA POTAKIS, ANASTASIA DALY,
ANDREA B MILLER, ANDRÉE FRANCE PAGÉ, ANDREEA LIVIA MODREA,
ANIK MARIE-LOU ARAND, ANNA BROWN, ANNA DOROTA YAARY,
ANNE-MARIE KANAAN, ASHLEY BRUNET,
AUDREY GENEVIEVE LACASSE, AUTUM CARDY, BIANCA BOUCHER,
BRANDON BRUCE LEO SMITH, BRANDON JAY MERRILL,
CALVIN BEDROS, CARL THIESSEN, CARLY LARSEN, CAROL-ANN DODD,
CATALINA CAZAN-MACISANU, CATALINE SOLOMAN,
CHAD MICHAEL GAGNON, CHAR-LEIGH POTVIN,
CHARLES PHILIPPE SAJOUS, CHRISTIAN FESTEJO, CHRISTIAN GAGNE,
CHRISTINE DANIS, CHRISTINE SERBAN,
CHRISTINE SUSAN GRAY HUTCHINS, CHRISTOPH PHILIPPE DAUDIN,
CHYLOW HALL, CINDY MILDRED DERAICHE, COREY CRABTREE,
COREY GAUTHIER, CRAIG MCGUIGAN, DAISY IVY-BODE, DANA TOMA,
DANIEL EMANUEL ANINOIU, DANIEL LIONEL GASTON GIROUX,
DANIEL NATHAN BUDD, DANIEL WILLIAM ADSHADE,
DANNY ALLEN EDWARD HONE, DAVID JOHN DEMPSTER,
DAVID MCNICOLL, DEAN A L DAVIS, DEANNA GETZ,
DEANNA THOMPSON, DENIS LECOMPTE,
DENISE GABRIELLA NICOLE RAMSANKAR, DERRICK ANTHONY BELL,
DESIREE LYNN ROCHON, DIANNE FLYNN, DONNA STAINFIELD,
DR. JULIE DONNA MOUNCE COMBER, EDMUND MCLAUGHLIN,
ELENA PALMIERI, ELIZABETH DROCHOLL, EMILIE GABRIELLE CYR,
FARRAH ESPERA, FILIPPAS LAVIDAS, FRANCE RENÉE PARADIS,
FRANCIS EMOND, FRANCK ARMEL DIEDRO,
FRANK MOURA RODRIGUES, GAEL BRASSARD,
GENEVIEVE BERGERON, GIUSEPPE SALERA, GIUSEPPINA TRAPANI,
GORDON WILLIAM HILL, GREGORY DALE,**

HAMID NAGHDIAN-VISHTEH, HANNA GEBARA, HEIDI SCHENKEWITZ,
HOLLY ANN JEFFERD, JACOB ALLEN ELLIOTT, JADE BERGERON,
JAMES EDISON JOHN SNIVELY, JASBIR SINGH KAILA,
JAY CHRISTOPHER SINHA, JEFFERY LADOUCEUR,
JENNIFER ANN THIESSEN, JENNIFER LYNNE STANNARD,
JENNIFER MARIE JUST, JENNIFER MCKEOWN,
JESSICA LEIGH WADDELL, JILI LI, JOANNE ELISABETH COUSINEAU,
JOHANNE LAROCHE, JOHN DONALD MARSHALL JR.,
JONATHAN CHARLES SERGIUS MANKOW, JONATHAN DAVID GIROUX,
JONATHAN RAYMOND CHOW, JONATHAN TASKER, JOSÉE SIVRE,
JOSEPH BREFNI W MACDONALD, JULIE BLOUIN, JULIE DIANE S H MA,
KALIN KOSTADINOW STOYANOV, KARINE GELINAS,
KATHY MULHOLLAND, KELLY ANNE GRENIER, KELSEY WARNOCK,
KERSTIN SYKES, KEVIN LYSIUS COTE, KHRISTEN,
KIMBERLEY ANN GIROUX, KIMBERLY LISSEL,
KRISTEN ALEXANDRA SOO, KYLE ROYCE STUPPLE,
LANCE AARON STUART DIXON, LAURA PALMA HECIMOVIC,
LAURA SUZANNE YKEMA, LILLIAM SCHULZ BECHAR,
LINDA BENKAIUCHE, LINDSAY VIRGINIA DAGENAIS, LISA HOUDE,
LLOYD WILLIAM SWANSON, LUC LAFLEUR, LUCAS BRETT REID,
LUKE BEDROS ZAVODNI, LYANE GIROUX, MANON TREMBLAY,
MARC DOMINIQUE, MARIE BETHIE THIMOT,
MARIE CLAIRE SONIA CARIGNAN, MARIE-CLAUDE PAGÉ,
MARIE-FRANCE LADOUCEUR, MARIE-FRANCE LADOUCEUR,
MARILYN DUFRESNE, MARK LAVAL JAEKL, MARTINE JOSEPH,
MARVIN CASTILLO, MARY-ANNE HUE, MATHIEU LEMAY,
MELISSA COOPER, MELISSA MARTIN, MELISSA RICCIARDELLI,
MERIEM MOKAIRITA-LAMSSAHHAL, MICHAEL ALBERT FALCONE,
MICHAEL DOUGLAS ANDERSON, MICHAEL LLOYD,
MICHAEL SHOSTAK, MICHAEL STEVEN GENDRON,
MICHAL WALCZAK, MICHELLE LALANDE, MIKE NOLAN,
MR WE SEONG LIM, NADINE KASPICK, NANCY DUNPHY,
NATASHA MARIE BUDY, NATHALIE DREW, OLIVIA JENKINSON,
PABLO ROMAN DICONCA, PANAGIOTA STAPPAS, PASCAL MUSACCHIO,
PATRICK HILBORN, PAWEL SZOPA, PEREZ HONG,
PIERRE-MARC COTE, RAELEEN KERELIUK, REID HOWARD MILLER,
RENEE FLEURY, RENÉE JOELLE THÉORÊT, RIANN BROOKE BABINEAU,
RICK KENNETH GABBNEY., ROBERT BRUCE COSMAN,
ROBERT JOHANNES DUECK, ROBERT MANDIC,
ROBERT WEIR ROBSON., ROBYN ELAINE MCKELVIE, DUNN,
ROLAND MICHAEL CHARBONNEAU, ROSEDORE GOTTFRIEDE KANITZ,
ROSEMARY RAIMONDI, ROXANNE LANTHIER, ROXANNE ROBERTSON,
ROXANNE ROBERTSON, SABRINA NICOLE FONTANA,
SABRINE BARAKTA, SALINNA BRANDY LACHANCE,
SANDRA ANNE HALEY, SASA DANICIC, SCOTT FAST,
SEAN RUSENSTROM, SEBASTIEN PROST, SESHA RABIDEAU,

**SÉVERINE HUGUETTE PARNAUDEAU, SHELLEY HARVEY,
SHELLY ANN ENMAN THERIAULT, SHERIE DAWN CRAIK,
SONIA PARISIEN, SONIA PARISIEN, STEPHANE LEBLANC, STEPHANE
ROBY JOSEPH DUBE, STEPHEN HOWARD KELLY, STEVEN BOLDUC,
STEVEN RACINE, SUZAN CHERIE MOTTI, SYLVIA VERISSIMO,
SZABOLCS PALL, TAMMY LYNN MYER, TANIA MICHAUD,
TANJA DANICIC, THERESA GELDART, TIMOTHY JOHN HIEBERT,
TRISTAN GRAVEL, TYLER MARK ALEXANDER BORG,
VÉRONIQUE SANTOS, and ZACHARY WILLIAM ANTHONY LINNICK**

Plaintiffs

and

HIS MAJESTY THE KING

Defendant

ORDER AND REASONS

[1] The Defendants, previously named as Her Majesty The Queen, Attorney General of Canada, The Treasury Board of Canada, Canada Border Services Agency, Correctional Service of Canada, Royal Canadian Mounted Police and Department of Employment and Social Development (hereafter collectively referred to as “Canada”), bring this motion to strike the present action on the basis that it is barred by section 236 of the *Federal Public Sector Labour Relations Act* SC 2003 c 22 (“FPSLRA”). The motion also seeks to vary the style of cause to designate His Majesty the King as sole defendant.

[2] The Plaintiffs do not oppose that part of the relief seeking to vary the style of cause, but they do oppose the principal relief sought by the motion.

I. Procedural Context

[3] As stated in the Statement of Claim, the Plaintiffs are all federal public servants who are affected by the Treasury Board's Policy issued October 6, 2021, pursuant to the *Financial Administration Act* RSC 1985 c F-11, requiring all federal public servants to be vaccinated against Covid-19. The Statement of Claim seeks the following substantive relief:

- (a) a declaration that the "Policy on Covid-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police ("Policy") [...] be declared inoperative and unconstitutional;
- (b) [...]
- (c) the issuance of a permanent injunction against the implementation of the Policy;
- (d) in the alternative to the declaration described in paragraph [(a)], a declaration that the sanctions provided for at paragraph 7.1 et seq., 7.2 et seq., and 7.3 et seq. of the Policy be declared inoperative and unconstitutional;
- (e) damages for violation of the plaintiffs' rights pursuant to sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* [...] (the "Charter") in the amount of \$60,000 per plaintiff;
- (f) punitive and exemplary damages in the amount of \$10,000 per plaintiff;.

[4] Sections 7.1, 7.2 and 7.3 of the Policy, referred to in (d) above, are the provisions whereby employees who remain unvaccinated or refuse to disclose their vaccination status are placed on administrative leave without pay.

[5] The Plaintiffs moved, in November 2021, for an interlocutory injunction to suspend the application of the Policy. That motion was dismissed (*Wojdan et al v Her Majesty the Queen et al* 2021 FC 1244). In the course of its reasons, the Court commented that “[w]hile the Federal Court has exclusive original jurisdiction to issue an injunction or grant declaratory relief against any federal board, commission or other tribunal (s 18(1)) this relief may be obtained only by application for judicial review, not action (18(3))”. Recognizing that the declaratory and injunctive relief were indeed only available by way of an application for judicial review, the Plaintiffs sought and were granted an extension of time to commence such an application. That application was filed as Court file No. T-1765-22. The only forms of relief that remain at issue in this action are the claims for Charter, punitive and exemplary damages.

[6] I should note that Canada has also brought a motion to strike the companion application for judicial review T-1765-22. That motion was heard concurrently with the present motion and is the subject of a separate order. The principal argument raised in that motion was mootness, given that the Policy was suspended in June 2022. As a subsidiary argument, Canada had argued that the application was premature and should be struck because the Applicants had failed to exhaust the grievance process available to them under s 208 of the FPSLRA. By Order of the same date as this Order, reported as (*Adam Wojdan et al v Attorney General of Canada* 2023 FC 181), I dismissed the application for judicial review in T-1765-22. I held that the application was moot, and that, in any event, it was brought prematurely given the availability of an adequate alternative recourse.

II. Canada’s Motion

[7] Canada does not suggest that the mootness of the application for judicial review affects the validity of the Plaintiffs' claim for Charter and other damages. What it does argue is that the alternative recourse that was available to the Plaintiffs and that was considered in T-1765-22 also precludes any action arising from the Policy, as explicitly provided by s 236 of the FPSLRA.

That section reads as follows:

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.

(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.

(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.

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.

(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.

(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.

[8] As stated by Canada, the Courts have recognized s 236 of the FPSLRA as an “explicit ouster” of the jurisdiction of the Courts, which applies whether or not the employee avails himself or herself of the right to present a grievance in a particular case and whether or not the grievance can be referred to adjudication (*Bron v Canada (Attorney General)* 2010 ONCA 71). In *Bouchard c Procureur general du Canada* 2019 QCCA 2067 (leave to appeal dismissed SCC 39027, 23 April 2020), the Court of Appeal of Québec stated that once it is established that a matter may be subject of a grievance, the grievance process cannot be circumvented, even for reasons of efficiency, as s 236 of the FPSLRA precludes relying on the residual jurisdiction of the Court. Even though the Plaintiffs allege that their rights under the Charter have been violated, the Supreme Court of Canada has confirmed that the decision-makers under the grievance process can interpret the Charter and award damages (*Weber v Ontario Hydro* [1995] 2 SCR 929). Finally, financial compensation, including punitive damages, can be obtained in the context of the grievance process, as the Québec Court of Appeal mentioned at paragraph 38 of its decision in *Barber c JT* 2016 QCCA 1194 (leave to appeal dismissed, SCC 37193, 26 January 2017).

III. Analysis

[9] The onus on Canada on this motion to strike is a heavy one. It must establish that the case is so forlorn that it stands no possibility of success.

[10] The Plaintiffs have not mounted a serious challenge to the general principles set out above as to the preclusion of recourse to the courts, even for the purpose of claiming Charter or punitive damages, when s 236 of the FPSLRA finds application. Rather, the Plaintiffs have

argued that the application of s 236 to the issues raised in the Statement of Claim is not so plain and obvious that the matter should be dismissed on a preliminary motion.

[11] In my view, Canada will have met its burden by establishing two elements: first, that the Plaintiffs are indeed employees to whom the individual grievance process contemplated by s 208 of the FPSLRA is available, and second, that the issues raised in this action are indeed amenable to that grievance process.

[12] In support of its motion, Canada has submitted affidavit evidence to establish the first proposition and that many of Plaintiffs have indeed submitted grievances in respect of the application of the Policy.

[13] The Plaintiffs have argued that, pursuant to Rule 221(2), evidence is not permitted on a motion to strike. That position is correct insofar as most motions brought pursuant to Rule 221(1)(a) are concerned. However, Canada's contention that the recourse is barred by reason of a statutory prohibition is akin to a motion contesting the jurisdiction of the Court. A jurisprudential exception to Rule 221(2) is recognized with respect to jurisdictional facts (*Marshall v Canada* 2006 FC 51; *Aquavita International S. A. v M/V Pantelis* (The) 2015 FC 180). Canada's motion also falls within the purview of Rule 221(1)(f), relating to actions that are otherwise an abuse of the process of the Court, for which evidence is admissible. I am therefore satisfied that the evidence led by Canada on this motion is admissible.

[14] In any event, the allegations of the Statement of Claim contain, in and of themselves, admissions from which the Court can conclude that the grievance process of s 208 of the FPSLRA is available to the Plaintiffs. The Statement of Claim alleges that all of the Plaintiffs are employees of Canada, and members of the Core Public Administration, as defined in the *Financial Administration Act*. That definition overlaps with the definition of “employees” who have the right to grieve, as set out in s 206 of the FPSLRA. That definition excludes only officers and certain managers of the RCMP, casual employees or students. There are no allegations in the Statement of Claim to the effect that any of the Plaintiffs fall within these exceptions. Thus, the evidence led by Canada on the motion merely goes to providing confirmation that the verifications that Canada was able to make do not provide a basis to believe that any of the Plaintiffs fall within these exceptions. The Plaintiffs have not raised a cogent argument as to why, on the facts as set out in their Statement of Claim or known to them, a Court could fail to reach the conclusion that all of the Plaintiffs do have access to the individual grievance process provided by s 208 of the FPSLRA.

[15] As to the evidence that some of the Plaintiffs in fact filed grievances, it is also merely confirmatory that this process is available to them. Whether any of the Plaintiffs in fact filed or did not file a grievance is immaterial to the outcome. The entitlement to grieve, as a matter of law, is all that is needed to determine this motion.

[16] The Plaintiffs also argue that the Court must take as true the allegations of paragraphs 28 and 29 of the Statement of Claim to the effect that “no grievance, arbitration nor adjudication procedure provided for in [...] any applicable law applies to the present issue” and that

“[c]onsequently, no arbitrator or adjudicator or board has exclusive jurisdiction over the issues raised in the present Statement of Claim.” Contrary to the Plaintiffs’ argument, these paragraphs are not allegations of fact but conclusions of law. The Court is not bound to accept them as true (*Lawrence v R* [1978] 2 FC 782). It is the Plaintiffs’ status as employees meeting the definition of s 206 of the FPSLRA, and the nature of the dispute as framed in the Statement of Claim, that determine whether a grievance procedure provided in the FPSLRA applies to the issues raised in the Statement of Claim. That is a question of law, not a fact.

[17] It is plain and obvious, on the face of the Statement of Claim, that the Plaintiffs’ complaint is in respect of the validity of the Policy as it applies to them, as employees of Canada, in the context of their employment, and having regard to its effect on their employment income and benefits. The issues raised in the Statement of Claim are firmly based on the status of the Plaintiffs as employees, on the status of the Government as their employer, and on the effects of the Policy on the terms and conditions of their employment. Such a dispute falls squarely within the scope of s 208(1) of the FPSLRA, as relating to the interpretation or application, in their respect as employees, of a direction or other instrument made or issued by the employer, that deals with terms and conditions of employment.

[18] The Plaintiffs argue that the breadth of the Policy’s effects, its wide-ranging objectives and its character as “thinly disguised legislation” raise reasonable issues as to whether its application and validity should properly be characterized as a simple labour-relations matter. This argument is without merit. The Policy, as described in the Statement of Claim, is directed exclusively at Canada’s employees and its primary effect on the Plaintiffs is to visit upon them

employment-related consequences, namely, the placement on leave without pay with all attendant consequences. The fact that the Policy is part of a broader suite of measures implemented by the Government relating to the Covid-19 pandemic response in numerous sectors of activity does not detract from the fact that the Policy itself is a purely employment-related matter. The apparent complexity of the constitutional arguments raised against it does not make its validity less of an employment-related issue.

[19] Finally, the Plaintiffs make the same argument as they made in the context of the motion to strike the judicial review application in T-1765-22. They argue that subsections 208(6), 238.24, 215(7)(8) and 220(4)(5) prohibit individual, policy or group grievances against an instruction, direction or regulation made by or on behalf of the Government of Canada “in the interest of the safety or security of Canada”. They argue that as a result of this prohibition, it is not plain and obvious that there is indeed another available remedy. As mentioned in the Order striking the application in T-1765-22, this Court’s decision in *Murphy v Canada (Attorney General)* 2023 FC 57 is determinative of this argument. The Court held, at paragraph 77 of that decision:

77 To conclude on the first issue, the fact that the limitations contained in subsections 208(2) through (6) may result in an individual grievance being inadmissible does not render the grievance process inadequate or ineffective such that it permits an applicant to bring a judicial review prior to completing the statutory grievance process.

[20] I am thus satisfied that it is plain and obvious that the Plaintiffs have the right to seek redress by way of grievance in respect of all issues raised in their Statement of Claim. As

provided by s 236 of the FPSLRA, this right is in lieu of any right of action that the Plaintiffs may otherwise have had, and constitutes an explicit ouster of this Court's jurisdiction.

[21] Following the hearing, at the request of the Court, the parties advised that costs on this motion should be awarded to the successful party, in the amount of \$2250.

THIS COURT ORDERS that:

1. This action struck.
2. The style of cause is varied so that the sole named Defendant be His Majesty the King.
3. Cost, in the amount of \$2250, are awarded in favour of the Defendant.

“Mireille Tabib”

Associate Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1704-21

STYLE OF CAUSE: ADAM WOJDAN, ET AL. v HIS MAJESTY THE KING

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: OCTOBER 31, 2022

REASONS FOR ORDER AND ORDER: TABIB P.

DATED: FEBRUARY 7, 2023

APPEARANCES:

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