Federal Court Cour fédérale

Date: 20240126

Docket: T-1583-21

Citation No.: 2024 FC 137

2024 FC 137 (CanLII)

Ottawa, Ontario, January 26, 2024

PRESENT: Case Management Judge Benoit M. Duchesne

BETWEEN:

KURT SUSS

Plaintiff

and

HIS MAJESTY THE KING

Defendant

REASONS FOR ORDER AND ORDER

[1] The Defendant has brought a motion to strike the Plaintiff's statement of claim without leave to amend on the basis that the pleading discloses no reasonable cause of action, or is otherwise an abuse of the process of the Court pursuant to Rules 221(a) and (f) of the *Federal Courts Rules* (the *"Rules"*). The Plaintiff contests the motion.

[2] For the reasons that follow, the Defendant's motion is granted.

I. THE LAW APPLICABLE TO A MOTION TO STRIKE

a) Rule 221(1)(a) – no reasonable cause of action

[3] The law applicable to a motion to strike pursuant to Rule 221(1)(a) is well established and was summarized by Justice Pentney in *Fitzpatrick v. Codiac Regional RCMP Force, District 12, and Her Majesty the Queen*, 2019 FC 1040, as follows:

> *[13] Rule 221(1) of the Federal Courts Rules, SOR/98-106 [Rules], sets out the framework that applies to this motion:*
>
> | ***Motion to strike*** | ***Requête en radiation*** |
> |---|---|
> | *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* | *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) discloses no reasonable cause of action or defence, as the case may be,* | *a) qu'il ne révèle aucune cause d'action ou de défense valable;* |
> | *(b) is immaterial or redundant,* | *b) qu'il n'est pas pertinent ou qu'il est redondant;* |
> | *(c) is scandalous, frivolous or vexatious,* | *c) qu'il est scandaleux, frivole ou vexatoire;* |
> | *(d) may prejudice or delay the fair trial of the action,* | *d) qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;* |
> | *(e) constitutes a departure from a previous pleading, or* | *e) qu'il diverge d'un acte de procédure antérieur;* |
> | *(f) is otherwise an abuse of the process of the Court,* | *f) qu'il constitue autrement un abus de procédure.* |

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and may order the action be dismissed or judgment entered accordingly.	*Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.*

[14] As noted above, the law governing a motion to strike seeks to protect the interests of the plaintiff in having his or her "day in court," while also taking into account the important interests in avoiding burdening the parties and the court system with claims that are doomed from the outset. In order to achieve this, the courts have developed an analytical approach and a series of tests that apply in considering a motion to strike.

[15] The test for a motion to strike sets a high bar for defendants, and the onus is on the defendant to satisfy the Court that it is plain and obvious that the pleading discloses no reasonable cause of action, even assuming the facts alleged in the statement of claim to be true: R v Imperial Tobacco Canada Ltd, 2011 SCC 42 at para 17; Hunt v Carey Canada Inc, 1990 CanLII 90 (SCC), [1990] 2 SCR 959 at p 980. Rule 221(2) reinforces this by providing that no evidence shall be heard on a motion. In view of this Rule, the further evidence submitted by the Plaintiff in his response to the motion to strike cannot be considered.

[16] The facts set out in the statement of claim must be accepted as true unless they are clearly not capable of proof or amount to mere speculation. The statement of claim must be read generously, and mere drafting deficiencies or using the wrong label for a cause of action will not be grounds to strike a statement of claim, particularly when it is drafted by a self-represented party.

[17] Further, the statement of claim must set out facts that support a cause of action – either a cause of action previously recognized in law, or one that the courts are prepared to consider. The mere fact that a cause of action may be novel or difficult to establish is not, in itself, a basis to strike a statement of claim. Related to this, the claim must set out facts that support each and every element of a statement of claim.

[18] As explained by Justice Roy in Al Omani v Canada, 2017 FC 786 at para 17 [Al Omani], "[a] modicum of story-telling is required." The law requires, however, a very particular type of story to be set out in a statement of claim – one which describes the events which are alleged to have harmed the plaintiff, focused only on the "material facts," and set out in sufficient detail that the defendant (and the Court) will know what the specific allegations

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> *are based on, and that they support the specific elements of the various causes of action alleged to be the basis of the claim.*
>
> *[19] The Court generally shows flexibility when a party is self-represented, but this does not exempt the party from complying with the rules set out above: Barkley v Canada, 2014 FC 39 at para 17. The reason for this is simple – it is not fair to a defendant to have to respond to claims that are not explained in sufficient detail for them to understand what the claim is based on, or to have to deal with claims based on unsupported assumptions or speculation. Neither is it fair to the Court that will have to ensure that the hearing is done in a fair and efficient manner. A court would have difficulty ruling that a particular piece of evidence was or was not relevant, for example, if the claim is speculative or not clear. This will inevitably lead to "fishing expeditions" by a party seeking to discover the facts needed to support their claims, as well as to unmanageable trials that continue far longer than is appropriate as both sides try to deal with a vague or ever-changing set of assertions.*
>
> *[20] A degree of flexibility is needed to allow parties to represent themselves and to have access to the justice system; but flexibility cannot trump the ultimate demands of justice and fairness for all parties, and that is what the Rules and the principles set out in the cases seek to ensure.*

[4] As mentioned above, Rule 221(2) provides that no evidence shall be heard on a motion for an order under Rule 221(1)(a). The effect of Rule 221(2) is that none of the affidavit and documentary evidence contained in either party's motion record is admissible to be considered on the issue of whether Mr. Suss' pleading discloses a reasonable cause of action subject to the exception that documents incorporated by reference into the statement of claim as a result of having of been identified and being relied upon may be considered if filed (*Paul v. Canada (Attorney General)*, 2001 FCT 1280 (CanLII), at para. 23; see also *McLarty v. Canada*, 2002 FCA 206 (CanLII), at para. 10; *Harris v. Canada*, 2000 CanLII 15738 (FCA), [2000] 4 F.C. 37 (F.C.A.) approving of the judgment of the Ontario Court of Appeal in *Web Offset Publications Limited et al. v. Vickery et al*. (1999), 1999 CanLII 4462 (ON CA), 43 O.R. (3d) 802 (C.A.).

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[5] The prohibition against affidavit and documentary evidence being admitted on motion pursuant to Rule 221(1)(a) is also inapplicable where it is argued that there is no reasonable cause of action pleaded because the Court does not have the jurisdiction to hear and determine the claims advanced. Affidavit and other evidence is admissible for the purposes of determining whether the Court has or does not have the jurisdiction to hear and determine the proceeding (see *Tuharsky v O'Chiese First Nation*, 2022 CanLII 20057 (FC) at para 13; *MIL Davie Inc v Société d'Exploitation et de Développement d'Hibernia Ltée*, [1998] FCJ No. 614, 1998 CanLII 7789 (FCA) at para 8).

[6] The test applicable on a motion to strike for want of jurisdiction is the same as the test applicable on a motion to strike a pleading on the basis that it discloses no reasonable cause of action: the lack of jurisdiction must be plain and obvious to justify striking out a pleading (*Hodgson v. Ermineskin Indian Band No. 942*, 2000 CanLII 15066 at para. 10).

[7] In determining whether it is plain and obvious that there is lack of jurisdiction, the Court must apply the well known test for Federal Court jurisdiction as set out in *ITO International Terminal Operators Ltd. v. Miida Electronics Inc.,* 1986 CanLII 91 (SCC), [1986] 1 S.C.R. 752 at 766, and reaffirmed in *Windsor (City) v. Canadian Transit Co*., 2016 SCC 54 (*"Windsor"*), at para. 34 (the *"ITO-Windsor Test"*). Pursuant to the *ITO-Windsor Test* this Court's jurisdiction will not be engaged unless:

1. There is a statutory grant of jurisdiction for the Court by the federal Parliament;

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2. There is an existing body of an existing body of federal law which is essential to the disposition of the case and which nourishes the grant of jurisdiction; and,

3. The law on which the case is based is *"a law of Canada"* as the phrase is used in s. 101 of the *Constitution Act, 1867*.

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[8] The *ITO-Windsor Test* can be applied only after determining the essential nature or character of the claim advanced in the statement of claim. In doing so, the Court must take a realistic appreciation of the practical result sought by the claimant and look beyond the words used, the facts alleged and the remedy sought to ensure that the statement of claim is not a disguised attempt to reach before this Court a result otherwise unreachable before it (*Windsor*¸ at paras. 25 and 26).

b) Rule 221(1)(f) – Abuse of Process

[9] The law applicable to a motion to strike pursuant to Rule 221(1)(f) is the same as the law applicable to a motion to strike pursuant Rule 221(1)(a). It must be plain and obvious that the claims advanced by the pleading are doomed to fail. Rule 221(2) does not apply with respect to a motion that seeks to strike a pleading on the basis that it is an abuse of the Court's processes pursuant to Rule 221(1)(f). Affidavit and other evidence is therefore admissible and may be considered by the Court in determining whether to strike the pleading because it constitutes an abuse of process.

[10] Abuse of process is a flexible doctrine that is rooted in the Court's power to control its own process. The doctrine aims to protect the integrity of the adjudicative process against abuses

and to achieve fairness for all parties involved (*Toronto (City) v Canadian Union of Public Employees, Local 79*, 2003 SCC 63 at paras 37, 51).

II. THE STATEMENT OF CLAIM

[11] Mr. Suss commenced this action by way of a statement of claim issued on October 19, 2021.

[12] The prayer for relief pleaded in the statement of claim sets out that Mr. Suss is claiming:

a) compensation in the nature of damages and punitive damages pursuant to s.24 of the *Charter* for breaches of his section 7 *Charter* rights arising from:

i) the breach of his privacy through the unlawful, unauthorized and improper interception of his cell phone by the Defendant's servants, the management, employees and agents of the Correctional Service of Canada (*"CSC"*), contrary to the *Corrections and Conditional Release Act*, S.C. 1992, c.20 and the *Privacy Act*, R.S.C. 1985, c.P-21 and to his common law rights of privacy;

ii) the resultant and concomitant misconduct of the Defendant and his servants, or any of them, consisting in the harm caused to him subsequent to their breach of his privacy;

iii) such other compensable harm suffered him set out in the statement of claim as may be discovered in the course of this action;

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b) damages in the amount of $300,000 for:

i) intentional infliction of emotional distress upon his arising from the Defendant's servants' intrusion upon his privacy and personal integrity, in breach of their fiduciary duties, incident to their unlawful interception of his cell phone and their transmission of harmful personal information acquired by the intercepts;

ii) the resultant assaults and threats of harm toward him made by fellow servants of the Defendant, caused by the reckless or negligent disclosure to other persons of the illegally obtained and disclosed false and defamatory information concerning him;

iii) his public humiliation and ostracizing incident to the violation of his employment rights subsequent to the impugned interceptions and disclosure of same to other employees;

c) damages in the amount of $200,000 for harm arising from his wrongful dismissal, wrongful deprivation of his income and employment benefits, and the denial of his opportunities for advancement resulting from their breach of his privacy and *Charter* rights;

d) damages in the amount of $200,000.00, for harm arising from intimidation by the Defendant's servants in threatening him with unlawful financial penalties unless he agreed to a patently unfair agreement with his employer regarding

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compensation for the harm caused in the present matter and patently unreasonable terms related to his retirement and pensions; and,

e) punitive damages in the amount of $ 100,000 for the arrogant, high-handed, egregiously insidious and deliberate acts of the Defendant's servants, or any of them, in flagrantly breaching his right to privacy and in subjecting him to scorn, abuse and emotional distress by their interception of his cell phone and unlawful dissemination of harmful, false information about him.

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[13] Mr. Suss' allegations are set out in 74 paragraphs in his statement of claim. Without being exhaustive, but while being careful to appreciate the essential nature and character of the pleading, what follows are Mr. Suss' main pleaded allegations, all of which are accepted as being true for the purposes of this motion unless they are incapable of proof or demonstrated to be incorrect by the evidence filed on this motion.

[14] In or about May 2015, CSC launched an undercover surveillance operation at the Warkworth Institution (the *"Institution"*) to capture persons' cell phone information on the premises of the Institution. The operation was part of a CSC investigation into the importation of drugs by Institution staff and inmates as well as into other undescribed misconduct.

[15] His personal cell phone was identified as being electronically captured during CSC's surveillance operation in September 2015 without his knowledge.

[16] On October 21, 2015, he was informed by CSC that his personal cell phone information had been captured and that local police and the RCMP would be conducting an investigation. Neither CSC nor its staff at the Institution took any steps to clarify to him or to anyone else that Mr. Suss had not committed any offence or engaged in any misconduct despite his personal cell phone being captured through the surveillance operation.

[17] He was thereafter sent home by CSC staff for two weeks while CSC staff investigated the situation. When he returned to work after the two week period, he was informed that he had been removed from the work schedule at the Institution for an indefinite period of time. He remained at home and away from his work for approximately 8 months.

[18] He was first considered as being on paid leave for some time. He was then informed that he had been placed on Workers Compensation without his knowledge. The workers compensation claim indicated that he was on leave for psychological trauma. He was kept off the Institution's work schedule without explanation despite his repeated requests to return to work.

[19] He alleges that other CSC staff at the Institution became or were made aware that Mr. Suss had been away from work because his cell phone had been intercepted during the surveillance operation. This information, left unqualified, caused Mr. Suss to believe that he would be labelled by other CSC staff as someone who conspired to introduce drugs into the Institution for inmates' use. This was very distressing for him.

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[20] There was a sudden change in the warden position at the Institution and a new warden was installed. The new warden ordered Mr. Suss back to work. The work he went back to was work that isolated him from other staff at the Institution. The other staff at the Institution had begun to harass him. He was further marginalized by CSC managers at work.

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[21] He lodged three complaints of harassment pursuant to the *Federal Public Sector Labour Relations Act*, SC 2003, c 22 (the *"FPSLRA"*). He also formed the belief that the harassment he was suffering was intended to prompt him to leave his employment without compensation.

[22] He engaged in discussions with CSC representatives as well as his Union bargaining agent for the purpose of,

a) determining the compensation payable to him for the harm suffered because of the interception of his cell phone and the ensuing actions of various persons within the Institution;

b) providing him reasonable compensation for the time he had been away from work; and,

c) providing him with reasonable notice and compensation for early retirement should he choose to accept it.

[23] He received an offer from the CSC but that offer was suspended following his receipt of a letter from the Public Safety Minister informing him of the suspension of discussions pending the completion of a police investigation into the matter.

[24] He finally signed a settlement agreement with the CSC in late 2018. The settlement agreement settles several of his harassment complaints as well as a complaint he filed pursuant to Part XX of the *Canada Labour Code.* He alleges that he executed the settlement agreement under duress. He alleges that the settlement agreement he entered into provided him with compensation for the time he had been away from work and stipulated that he would retire from the CSC. It also contained a confidentiality and non-disclosure clause that required him to not disclose any information he had about the intercepts and other information arising from the incident.

[25] The settlement agreement was adduced into evidence on this motion. The allegations made by Mr. Suss with respect to the 2018 settlement agreement are contradicted by the terms of the settlement agreement itself other than with respect to the existence of confidentiality provisions regarding the terms of settlement and that he received consideration for the settlement. He continues to be employed by the CSC to this date and nothing in the settlement agreement reflected that he would retire. There is no mention of the intercepts or other information relating to the intercepts in either the grievances settled by the settlement agreement or in the settlement agreement itself.

[26] Mr. Suss attempted to resolve the issues he encountered through the grievance procedure available to him pursuant to the *FPSLRA*, through workers compensation negotiations, and through a complaint pursuant to the *Privacy Act*.

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[27] The Privacy Commissioner determined in October 2018 that the cell phone surveillance operation that had been carried out in the Institution breached correctional officers and civilians' rights with respect to the monitoring of meta data, but that no breach had occurred as a result of the capture of any individual's cell phone information or personal information.

[28] He alleges that he pursued administrative remedies rather than litigation until such time as he became persuaded that he could not count on further administrative steps to assist him in achieving redress, and that the interception of his cell phone and the disclosure of his personal information under the guise of a security investigation constituted a breach of his rights to privacy under the *Privacy Act* and the common law.

[29] Mr. Suss filed another complaint to with the Privacy Commissioner. This complaint resulted in a response dated August 6, 2021, which contained the Privacy Commissioner's investigator's conclusion that the cell phone intercept and disclosures breached his privacy rights.

[30] As to liability, he alleges that:

a) CSC staff captured his cell phone as well as his personal information and caused these facts to be known by others:

i) in breach of his privacy rights, and,

ii) knowing, or should have known, that the disclosure of these facts would probably cause him harm.

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b) The disclosure of these facts was intentional or as a result of negligence that has caused him to suffer ongoing emotional distress, loss of employment, humiliation and the loss of income.

c) The CSC's staff and employees had a duty of care to keep him from harm and failed to do so.

d) The CSC's staff and employees breached his security of the person rights pursuant to section 7 *Charter* rights and at common law by:

i) illegally operating a machine that they knew, or ought to have known, would illegally intercept his phone and reveal personal information stored therein without the his consent – and which did in fact cause him harm;

ii) permitting the intercept and permitting foreseeable misinformation about the his role in assisting with drug importation to be made known to other staff when the servants knew, or ought to have known, that the information transmitted to other staff was false and that the other staff would react adversely and threaten or harass or otherwise harm him;

iii) threatening him with dismissal and by attempting to pressure him to leave employment without reasonable compensation, knowing that he Plaintiff had done no wrong and should not be required to leave his employment;

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iv) constructively dismissing him without reasonable notice or cause by placing him in precarious, isolated work situations which did not conform to his regular duties, and by unlawfully removing him from his duties on the Defendant's premises; and,

v) either causing or permitting him to be subjected to harassment and removal from his employment, without justification under s.1 of the *Charter*.

e) The Defendant's servants, or any of them, have also breached his right to privacy under the *Privacy Act* and are liable for the breach, *per se*, and the harm arising from the breach.

f) He also seeks punitive damages as a result of the CSC's high-handed conduct

g) He pleads that the CSC breached the fiduciary duty it owed him to provide a respectful, safe and lawful working environment.

[31] He pleads that the Defendant is vicariously liable for the actions of his servants in the course of their employment, and is therefore liable for the harms he has suffered and alleges in his pleading.

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III. THE EVIDENCE ON THIS MOTION

[32] The parties each filed affidavit evidence and transcript of cross-examinations on affidavits in support of their respective arguments. The affidavits filed include the following documents as exhibits:

a) copies of the relevant grievance provisions of the collective bargaining agreements that bind Mr. Suss and a member of the Union of Canadian Correctional Officers;

b) copies of various Treasury Board workplace harassment policies as well as Treasury Board workplace harassment resolution processes;

c) copies of Mr. Suss' various complaints regarding his co-workers regarding his workplace and working conditions;

d) letters dismissing Mr. Suss' workplace harassment complaints;

e) internal investigation reports regarding Mr. Suss' workplace harassment complaints;

f) copies of letters dismissing Mr. Suss' dangerous work refusals to work;

g) a copy of signed, executed and performed terms of settlement between Mr. Suss as a grievor, the Union of Canadian Correctional Officers as Bargaining Agent, and the CSC as Mr. Suss' employer settling two grievances, one harassment

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complaint, and a Section XX *Canada Labour Code* complaint filed by Mr. Suss; and,

h) copies of additional grievances by Mr. Suss regarding his employment, sick days, statutory holiday pay, and monetizable employment benefits.

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[33] What is determinable from these documents and is not contested by either party is that from the period of 2015 to approximately 2018, Mr. Suss was employed as a correctional officer at the Institution, as he had been since 1989. Regardless of the events that gave rise to the number of complaints led into evidence, all of the complaints made by Mr. Suss, including his complaints of workplace harassment, his refusal to work in what he considered to be dangerous conditions, regarding his office being moved, that he was being intimated, was being threatened, was placed in an unsafe work environment, was bullied, suffered the intentional infliction of mental suffering, was deprived of work opportunities, income and monetizable employment benefits, relate solely and exclusively to his workplace and the conditions of his employment as a federal employee.

[34] These complaints are alleged repeatedly in the statement of claim and give the statement of claim its essential character as the description of a sequence of workplace events that followed an initial workplace event: the interception of Mr. Suss' personal cell phone information by or for the Institution while he was at work at the Institution. While the statement of claim repeatedly alleges and relies upon the interception of Mr. Suss' personal cell phone information as the *sine qua non* of the workplace issues that followed, it is plain that that the allegations and the relief sought sound in employment damages and the reparation of the alleged violation of Mr.

Suss' privacy and *Charter* rights in the workplace as a result of the acts of various federal employees in their shared workplace.

[35] The evidence on this motion also establishes that Mr. Suss does not know what, if any, of his personal information was captured during the workplace intercept event of October 2015. The Plaintiff has no knowledge of and has not alleged what personal information has been captured, or how or to whom and when that information may have been disseminated without his consent other than that police authorities and the RCMP had been notified of the fact of the interception of his personal cell phone while he was at work at the Institution. There was no follow up by either local police authorities or the RCMP.

[36] Mr. Suss remains a federal employee and an employed correctional officer at the Institution. He has been on leave since approximately 2018. He has not filed any grievance with respect to the interception of his personal cell phone and the alleged breach of his privacy rights by and at the Institution in October 2015.

IV. ANALYSIS

[37] The Defendant argues that Mr. Suss's statement of claim should be struck without leave to amend because this Court does not have the requisite jurisdiction to hear the dispute framed by the statement of claim, the claims are statute barred, and, in the alternative, that the proceeding is an abuse of process in light of the settlement agreement entered into by the parties in late 2018.

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[38] The Defendant argues that this Court has no jurisdiction over the dispute alleged by Mr. Suss because it is properly understood as a dispute between a federal public service employee and his employer pertaining to his terms or conditions of employment. As such, he was and is a federal employee subject to the *FPSLRA*. As is set out in the *FPSLRA*, Mr. Suss' remedy lay exclusively through the grievance process identified at section 208 of the *FPSLRA* in lieu of any right of action before this or any other Court, the whole as is required by section 236 of the *FPSLRA*.

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[39] Mr. Suss argues that his employment relationship with the Defendant is not exclusively governed by the *FPSLRA* because the causes of action advanced are based on the breach of his *Charter* rights and of his rights pursuant to the *Privacy Act.* The nature of the claims advanced are such that the *FPSLRA* does not apply to oust this Court's jurisdiction to hear and determine his action against the Defendant. Further, even if the *FPSLRA* applied and constituted a complete remedy, it is inadequate to address the harms suffered by Mr. Suss, and the investigations that have been carried out pursuant to grievances were in any case carried out by the Defendant's employees in an unlawful manner, in bad faith, replete with intentional misconduct with the intention to impose a purported resolution of the dispute on the Plaintiff through duress and unconscionable means.

[40] Section 208 of the *FPSLRA* sets out that an employee is entitled to present an individual grievance if he or she feels aggrieved as a result of any occurrence or matter affecting his or her terms and conditions of employment. Section 236 of the *FPSLRA* sets out that 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. Section 236 applies whether or not the employee avails himself of the right to present a grievance in any particular case and whether or not the grievance could be referred to adjudication. Section 236 is part of Part 2 of the *FPSLRA* and is part of a comprehensive scheme to be followed by federal employees who have any grievance as described in section 208.

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[41] Mr. Suss' allegations begin with the interception of his personal cell phone without his consent while he was at work. The evidence filed on this motion establishes that correctional officers such as Mr. Suss working within the Institution were not supposed to have their personal cell phones with them inside the Institution while at work unless the warden provided them with the authority to have their personal cell phones with them while working. Mr. Suss' evidence is that he would usually, but did not always, leave his personal cell phone in his vehicle outside the Institution when he went to work. The key factual point is that the interception of his personal cell phone, whether lawful or not, occurred while Mr. Suss was at work and occurred during his employment.

[42] The remainder of the allegations and complaints as discussed above relate to his workplace and the conditions of his employment as a federal employee. The allegations of harassment are allegations of workplace harassment. The allegations of financial deprivation arise from his employment income and related work entitlements. Indeed, the $700,000 in damages sought as damages are specifically related to or arising out of *"any occurrence or*

matter affecting his or her terms and conditions of employment" as is contemplated by section 208 of the *FPSLRA.*

[43] Where there is a comprehensive legislative scheme to deal with labour disputes such as is set out in Part 2 of the *FPSLRA,* courts should defer to the legislated process and decline jurisdiction as a matter of course subject to the court's residual jurisdiction where the legislated process does not provide effective redress (*Vaughan v Canada*, 2005 SCC 11, at paras 18-25 *"Vaughn"*). The mere fact that a legislated process does not provide identical remedies or procedures as courts is not sufficient on its own for the Court to exercise jurisdiction (*Vaughan* at paras 22, 36). There must be a gap that causes a *"real deprivation of ultimate remedy"* (*McMillan v. His Majesty the King,* 2023 FC 1752, at para. 22 (*"McMillan")*; *Hudson v Canada*, 2022 FC 694 [Hudson] at para 74; *Weber v Ontario Hydro,* [1995] 2 SCR 929 at para 57, citing *St Anne Nackawic Pulp & Paper Co v Canadian Paper Workers Union, Local 219,* [1986] 1 SCR 704 at p 723).

[44] This Court as well as other courts have consistently held that section 236 of the *FPSLRA* completely ousts this Court's jurisdiction over the disputes that are captured by it (*McMillan,* at para. 24, citing *Bron v Canada (Attorney General),* 2010 ONCA 71, at paras 4, 29; *Ebadi v Canada*, 2022 FC 834 (*"Ebadi"*) at paras 32-33; *Adelberg v Canada*, 2023 FC 252 at para 13).

[45] Section 236 of the *FPLSRA* will apply and oust this Court's jurisdiction when its conditions of application are met. Those conditions of application are that (*McMillan,* at para.25):

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a) the Plaintiff must be an “employee” within the meaning of section 2(1) of the FPSLRA;

b) the Plaintiff must not fall within the exception described at ss. 236(3) FPLSRA;

c) the dispute pleaded must be in relation to the employee’s terms and conditions of employment;

d) the dispute must pertain to a matter than can be grieved pursuant to Part 2 of the FPSLRA; and,

e) the matter in dispute must have arose on or after the coming into force of section 236 on April 1, 2005.

[46] All of these conditions are met in this case.

[47] Mr. Suss is an employee within the meaning of section 2(1) of the *FPSLRA* and does not fall within the exception described at ss. 236(3) of the *FPLSRA*. The pleading sets out that the dispute pleaded is in relation to the employee’s terms and conditions of employment.

[48] Whether the dispute can be grieved pursuant to Part 2 of the *FPSLRA* requires the consideration of jurisprudence.

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[49] The Ontario Court of Appeal held in *Bron*, at paras. 14 and 15, that the right to grieve is *"very broad"* and *"[a]lmost all employment-related disputes can be grieved under s 208 of the FPSLRA"*.

[50] In *Hudson v Canada*, 2022 FC 694, at para 103, the Court held that allegations of harassment and of failing to provide a harassment free and safe workplace, as alleged by Mr. Suss here, were grievable issues.

[51] In *Ebadi, supra*, at paras 1, 43 and 44, the Court held that claims for damages for the alleged torts of intentional infliction of mental suffering, assault, and battery, and claims for the alleged breaches of rights under sections 2, 7 and 15 of the *Charter*, and for the torts of intentional infliction of mental suffering, assault, and battery are all grievable disputes pursuant to Part 2 of the *FPSLRA*.

[52] Mr. Suss' pleaded claims and allegations fall within these types of disputes and should proceed on the same basis as those disputes proceeded, that is, that they be grieved pursuant to Part 2 of the *FPSLRA*.

[53] If any of the relief claimed in this proceeding by Mr. Suss is not grievable then that determination falls to be made exclusively by the authority hearing the grievance and not by this Court (*Murphy v Canada (Attorney General*), 2022 FC 146, at para 25).

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[54] I therefore agree with the Defendant that this Court is without jurisdiction to hear this proceeding because there is an express statutory grant of jurisdiction set out in sections 208 and 236 of the *FPSLRA* that the grievance process there described is to be used and followed by Mr. Suss for the disputes and the relief he seeks in this proceeding. The Court's jurisdiction has been ousted.

[55] The Court is not persuaded by Mr. Suss that this Court has any residual jurisdiction to consider his privacy complaints as those are intrinsically tied to his workplace and should be resolved through the grievance process available to him. The allegations that the investigations of Mr. Suss' previous complaints were unlawful, made in bad faith, replete with intentional misconduct and intention to impose a resolution upon Plaintiff through duress and unconscionable means reflect a subjective view of the process are contradicted by a review of the investigation reports and materials filed on this motion. The Court has no reason to believe that Mr. Suss cannot obtain a remedy to his admissible claims through the *FPSLRA* grievance process he is bound by law and by collective bargaining agreement to pursue.

[56] As a result, Mr. Suss' statement of claim discloses no reasonable cause of action pursuant to Rule 221(1)(a) of the *Rules* and will be struck.

[57] In light of the foregoing I do need to make any determination on the Defendant's arguments that Mr. Suss' claim should be struck on the basis of the expiry of an applicable limitation period or is an abuse of process pursuant to Rule 221(1)(f) of the *Rules*.

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[58] Mr. Suss has not sought leave to amend his pleading in his response to the Defendant's motion. There is therefore no basis for the Court to grant leave to amend. I would not have granted leave to amend had it been requested as the nature of the proceeding itself requires that it be grieved and not heard before this Court. The *FPSLRA's* ousting of this Court's jurisdiction cannot be cured by an amendment to Mr. Suss' pleading.

[59] Mr. Suss' action will therefore be dismissed pursuant to Rule 168 of the *Rules* as it is not possible for Mr. Suss to continue this proceeding as a result of this Order.

V. COSTS OF THIS MOTION

[60] The Court strongly encourages the parties to confer and attempt to agree on the costs of this motion and of this proceeding prior to **February 9, 2024**. If the parties agree on costs by then, they may deliver a letter on consent to the case management office in Ottawa to my attention that sets out their agreement as to costs and, if the Court considers such costs as appropriate, a subsequent Order as to costs consistent with the agreement as to costs will issue.

[61] In the event that the parties do not agree on the costs of this motion, then the Defendant shall have until **February 16, 2024**, to serve and file his costs submissions that do not exceed three pages, double-spaced, exclusive of schedules, appendices and authorities. The Plaintiff will then have until **March 1, 2024** to serve and file his costs submissions, also limited to three pages, double-spaced, exclusive of schedules, appendices and authorities.

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[62] If no agreement as to costs is filed by **February 9, 2024**, and no costs submissions are served and filed by **February 16, 2024**, then no costs will be awarded on this motion.

[63] The Court thanks the solicitors for the parties for their written and oral submissions.

THIS COURT ORDERS that:

1. The Defendant's motion to strike the Plaintiff's statement of claim on the basis that it discloses no reasonable cause of action pursuant to Rule 221(1)(a) of the *Rules,* without leave to amend, is granted.

2. The Plaintiff's action is dismissed pursuant to Rule 168 of the *Rules.*

3. Costs of this motion are reserved to be determined in accordance with the directions given above.

"Benoit M. Duchesne"
Case Management Judge

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FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1583-21
STYLE OF CAUSE:	KURT SUSS v HIS MAJESTY THE KING
PLACE OF HEARING:	OTTAWA, ONTARIO (VIDEOCONFERENCE)
DATE OF HEARING:	JANUARY 25, 2024
REASONS FOR JUDGMENT AND JUDGMENT:	ASSOCIATE JUDGE BENOIT M. DUCHESNE
DATED:	JANUARY 26, 2024

APPEARANCES:

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Jennifer L. Caruso Sean Gaudet	FOR THE DEFENDANT

SOLICITORS OF RECORD:

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Attorney General of Canada Department of Justice Ontario Regional Office Ottawa, Ontario	FOR THE DEFENDANT

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