IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Doe v. Canada (Attorney General),* 2023 BCSC 1701

Date: 20230929
Docket: S221456
Registry: Vancouver

Between:

Jane Doe

Plaintiff

And

Attorney General of Canada

Defendant

Before: The Honourable Justice Tammen

Reasons for Judgment

Counsel for the Plaintiff:	N. Panah
Counsel for the Defendant:	S. Pereira C. Ko
Place and Date of Hearing:	Vancouver, B.C. July 11, 2023
Place and Date of Judgment:	Vancouver, B.C. September 29, 2023

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Introduction and Overview

[1] From September 2018–December 2021, the plaintiff, Jane Doe, worked for the Canadian Security Intelligence Service ("CSIS"). Her employment with CSIS ended on December 10, 2021. Ms. Doe pleads that she was constructively dismissed on that date. The underlying issues leading to her loss of employment were complaints she made about a broad spectrum of misconduct perpetrated by Individual E, including allegations of serious sexual assault and workplace harassment for which Ms. Doe says CSIS is vicariously liable.

[2] Ms. Doe filed a notice of civil claim in February 2022. Ms. Doe filed amended pleadings in April 2022 and further amended pleadings in March 2023 ("FANoCC"). In those pleadings, Ms. Doe seeks damages for breach of contract, breach of fiduciary duty, breaches of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, as well as aggravated and punitive damages.

[3] The defendant, Attorney General of Canada ("AGC"), filed its initial response to civil claim in July 2022 and an amended response in March 2023. The AGC denies all liability. One of the bases pleaded is that the action is barred by s. 236 of the *Federal Public Sector Labour Relations Act*, S.C. 2002, c. 22, s. 2 [*FPSLRA*].

[4] A trial is scheduled to occur in January 2024.

[5] In this application, the defendant seeks summary dismissal of the action pursuant to R. 9-6 of the *Supreme Court Civil Rules* [*SCCR*], relying on ss. 208 and 236 of the *FPSLRA*. In short, the defendant submits that the *FPSLRA* is a comprehensive scheme for dealing with all labour disputes for federal employees, including various grievance mechanisms, and that the courts lack jurisdiction to entertain the plaintiff's claims. The plaintiff submits that the Court retains a residual discretion to adjudicate her claims, and should exercise that discretion and do so in this case.

Background

[6] Ms. Doe commenced her employment at CSIS on September 4, 2018. She attended a three-and-a-half-month course at the outset of her work, at which she claims she was sexually assaulted by one of the course instructors.

[7] Thereafter, Ms. Doe commenced a two-year probationary period with CSIS. For the first nine months, commencing in January 2019, Ms. Doe worked closely with Individual E on a surveillance unit that required the two of them to spend ten hour shifts together in a vehicle.

[8] Ms. Doe pleads that Individual E sexually harassed her, and on numerous occasions sexually assaulted and raped her during work shifts.

[9] Ms. Doe claims that some of the conduct of Individual E was witnessed by other CSIS employees, including several people in supervisory roles, all of whom did nothing to stop the conduct.

[10] On November 10, 2021, Ms. Doe filed a formal complaint with CSIS pursuant to its internal harassment and violence in the workplace policy.

[11] Following the complaint, Ms. Doe claims that she was subjected to treatment by CSIS personnel which rendered her continued employment intolerable. On December 10, 2021, Ms. Doe ended the employment relationship. She pleads constructive dismissal in her FANoCC. According to CSIS, Ms. Doe remains employed there, and is officially on leave.

[12] The investigation into Ms. Doe's complaints is ongoing.

[13] Of particular importance to the present application are paras. 16 and 17 of the FANoCC, added at the time of the most recent amendment:

> The Public Assault and the Inaction gave the Plaintiff the reasonably held belief that any grievance procedure available to her was corrupted and would be ineffectual in providing an appropriate remedy.
>
> This belief was further corroborated when the Plaintiff was advised that the Defendant intentionally placed another young female colleague in a position

> of vulnerability with Individual E in order to test whether the Plaintiff's complaint was accurate (the "Baiting"). The Baiting exemplified to the Plaintiff that the Defendant held little to no regard for the safety and dignity of its vulnerable female employees and that there was no safe avenue for recourse within the internal processes of the Defendant.

Statutory Framework

[14] The two main provisions at play are ss. 208 and 236 of the *FPSLRA*. Section 208 confers to federal employees a right to grieve, in these terms:

> (1) Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved
>
> (a) by the interpretation or application, in respect of the employee, of
>
> (i) a provision of a statute or regulation, or of a direction or other instrument made or issued by the employer, that deals with terms and conditions of employment, or
>
> (ii) a provision of a collective agreement or an arbitral award; or
>
> (b) as a result of any occurrence or matter affecting his or her terms and conditions of employment.
>
> [Emphasis added.]

[15] Section 236 prevents a federal employee from bringing an action if there is a right to grieve:

> (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.
>
> [Emphasis added.]

[16] The defendant submits that the *FPSLRA*, in particular the sections quoted above, creates a comprehensive and exclusive scheme for resolving employment-

related disputes. All the matters about which Ms. Doe complains are subject to the grievance procedures, and consequently not subject to a civil lawsuit.

[17] The defendant relies principally on R. 9-6 of the *SCCR*, specifically Rules 9-6(4) and (5), which read:

> (4) In an action, an answering party may, after serving a responding pleading on a claiming party, apply under this rule for judgment dismissing all or part of a claim in the claiming party's originating pleading.
>
> (5) On hearing an application under subrule (2) or (4), the court,
>
> (a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly,
>
> (b) if satisfied that the only genuine issue is the amount to which the claiming party is entitled, may order a trial of that issue or pronounce judgment with a reference or an accounting to determine the amount,
>
> (c) if satisfied that the only genuine issue is a question of law, may determine the question and pronounce judgment accordingly, and
>
> (d) may make any other order it considers will further the object of these Supreme Court Civil Rules.

[18] Applying this summary judgment procedure, the Court is entitled to consider evidence, but must not weigh the evidence. Thus, I will assume the facts pleaded in Ms. Doe's FANoCC to be true. I will also consider the facts she sets out in her affidavit. Likewise, I will consider the facts contained within the affidavit filed by the defendant of L.E.B., the Director General, Health and Wellness Management at CSIS. In that affidavit, L.E.B. provides information about the grievance procedures available to Ms. Doe, and the status of the investigation into Ms. Doe's complaints.

[19] Ms. Doe acknowledges that the *FPSLRA* applies to her employment, but submits that the Court should nonetheless permit the action to proceed. Her submissions in that regard may be distilled to the following four points:

a) The defendant's application does not address Ms. Doe's claim of breach of fiduciary duty;

b) Ms. Doe had “tangible reasons” to believe the internal grievance mechanisms were ineffectual or corrupt;

c) Ms. Doe’s reasons for so believing will be bolstered by the discovery process, and thus, this application is premature; and

d) The Court should exercise its discretion in favour of letting the action proceed, based on the corruption of the grievance process and the claim for breach of fiduciary duty.

Discussion

[20] In *Vaughan v. Canada*, 2005 SCC 11, the Supreme Court of Canada affirmed that where legislation provides a comprehensive scheme for dealing with employment issues between parties, the courts should generally defer to that scheme and its internal dispute mechanisms. Among the reasons given by the majority was this:

> [39] Sixthly, where Parliament has clearly created a comprehensive scheme for dealing with labor disputes, as it has done in this case, courts should not jeopardize the comprehensive dispute resolution process contained in the legislation by permitting routine access to the courts. While the absence of independent third-party adjudication may in certain circumstances impact on the court's exercise of its residual discretion (as in the whistle-blower cases) the general rule of deference in matters arising out of labor relations should prevail.

[21] The Court also noted that, where the legislative scheme includes a grievance mechanism, a plaintiff’s legal position should not be improved by their own failure to grieve: *Vaughan* at para. 37.

[22] In *Bron v. Canada (Attorney General)*, 2010 ONCA 71, the Ontario Court of Appeal considered the very provisions at issue here. Justice Doherty noted that s. 208 provides employees with “a very broad right to grieve any occurrence or matter affecting the terms or conditions of their employment” (at para. 14), and that s. 236 “explicitly ousts the jurisdiction of the court over claims that could be the subject of a grievance under s. 208” (at para. 33).

[23] On this application the defendant has filed an affidavit from L.E.B. L.E.B. provides considerable detail about the potential resolution mechanisms available pursuant to the *FPSLRA*, the CSIS Grievance Resolution policy, and also the federal *Work Place Harassment and Violence Prevention Regulations*, SOR/2020-130. The two streams of dispute resolution created by the grievance procedures and the harassment complaint process may be accessed simultaneously by someone such as Ms. Doe, who feels aggrieved by the conduct of co-workers.

[24] In the instant case, Ms. Doe made a complaint pursuant to the Harassment provisions. That process is not yet complete. At the completion of the process, Ms. Doe would be entitled to grieve the final workplace harassment and violence process or the implementation of recommendations, or challenge a final decision by way of judicial review in the Federal Court.

[25] Ms. Doe could have, but did not, grieve the occurrences of workplace harassment and violence pursuant to s. 208(1)(b) of the *FPSLRA*. According to L.E.B., who has reviewed the FANoCC, Ms. Doe could still grieve all of the allegations she makes in that claim.

[26] Ms. Doe could also grieve her claim of constructive dismissal.

[27] Based on L.E.B.'s affidavit, and a plain reading of the statutory provisions, I have no hesitation concluding that there is a comprehensive legislative scheme in place which provides Ms. Doe with an avenue of recourse for all the matters complained of in her FANoCC.

[28] Thus, subject to any residual discretion I may have to permit the claim to proceed, it must be dismissed. The Court's jurisdiction to entertain the claim is effectively ousted by the statutory scheme, most particularly s. 236 of the *FPSLRA*.

[29] The argument that the present application is silent on the issue of breach of fiduciary duty is without merit. I agree with the defendant's submission that what matters is the essential character of the allegations, not the way in which a plaintiff characterizes those allegations. Here, all the allegations relate to matters occurring

within the workplace, and all such claims may be considered within the complaint resolution scheme available to Ms. Doe outside the courts.

[30] The courts retain the discretion to hear complaints that can be grieved through a statutory grievance process if the integrity of that grievance process is shown to be compromised or otherwise corrupted: *Lebrasseur v. Canada*, 2007 FCA 330 at para. 18; *Adelberg v. Canada*, 2023 FC 252 at para. 17. This residual discretion should be exercised only in truly exceptional cases. The onus is on the plaintiff to establish that, due to its improprieties, the grievance procedure would be unable to provide effective redress: *Lebrasseur* at para. 19; *Bron* at para. 29.

[31] The facts in *Smith v. Royal Canadian Mounted Police*, 2007 NBCA 58, provide a useful example of a corrupted grievance process. There, an RCMP officer had filed a grievance and harassment complaint against two of his supervisors. Those supervisors oversaw the grievance process and made attempts to influence that process in a way that would benefit them. For example, after an investigation was conducted into the officer's grievance, the supervisors requested the removal of various conclusions and recommendations found in the investigative report. The Court concluded that "an administrative scheme that does not provide independent third-party adjudication with respect to workplace harassment complaints is not owed any deference": *Smith* at para. 56.

[32] In this case, Ms. Doe has not satisfied me that the internal grievance process is corrupted.

[33] Ms. Doe complains about the pace at which the investigation was progressing and the failure of the investigating body to provide her with timely progress reports. These complaints do not cause me to question the ability of the grievance process to provide Ms. Doe with an appropriate remedy.

[34] Additionally, Ms. Doe pleads that the conduct of senior employees at CSIS, in conjunction with the general culture at the organization, has caused her to reasonably believe that the internal grievance process is corrupt. In particular,

Ms. Doe pleads that CSIS intentionally placed another female employee in a position of vulnerability with Individual E to test the veracity of the plaintiff's complaint. Further, Ms. Doe states that on at least once instance she was sexually assaulted publicly, in the presence of senior employees.

[35] I note that it is not sufficient for Ms. Doe to establish that she reasonably believed that the internal grievance processes are corrupt. There must be actual evidence that the process itself is corrupt.

[36] Here, there is no such evidence. While I acknowledge that the conduct alleged against the CSIS senior employees is problematic and deeply troubling, Ms. Doe has failed to connect that conduct with the internal grievance process itself. Ms. Doe does not allege, for instance, that the senior employees who witnessed Individual E's alleged misconduct are in any way involved with the grievance process or the investigation into Ms. Doe's complaint. In this regard, I find that the allegations of corruption found within Ms. Doe's pleadings do not establish that the grievance process itself is unable to provide her with effective redress.

[37] To summarize, Ms. Doe has not met her burden of showing that the integrity of the internal grievance process is compromised or otherwise corrupted. As noted, there is no evidence that the process is flawed in any material respect. The complaint process, including the initial investigation, may not be proceeding as swiftly as Ms. Doe would like, and she may have sound reasons for her subjective belief that the process is unsatisfactory. However, that is a far cry from actual evidence that the process is not working or is incapable of providing an appropriate remedy. To the contrary, on the evidence before me, the process is unfolding as it was intended, to the extent that Ms. Doe has chosen to engage with it, and the grievance mechanisms are capable of providing an appropriate remedy to Ms. Doe in respect of any claims that are proven.

Conclusion

[38] For the foregoing reasons, I allow the application of the defendant. Pursuant to R. 9-6(5)(a), I am satisfied that there is no genuine issue for trial. The claim of Ms. Doe is dismissed.

[39] The defendant is entitled to costs of the proceeding at Scale B.

"Tammen J."