**CITATION:** Howell v. Sun Life Assurance Company of Canada, 2024 ONSC 3908
**COURT FILE NO.:** CV-23-92405
**DATE:** 2024/07/15

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

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| **BETWEEN:** | |
| Joseph Todd Howell<br><br>Plaintiff (Responding Party) | Daria A. Strachan, for the Plaintiff |
| **– and –** | |
| Sun Life Assurance Company of Canada, Attorney General of Canada (Transport Canada) and Francois Collins<br><br>Defendants (Moving Parties) | Patricia Betts, for Sun Life Assurance Company of Canada<br><br>Heather Kennedy, for the Defendant, Attorney General of Canada and Francois Collins |
| | **HEARD:** March 21, 2024 |

## REASONS FOR DECISION ON APPLICATION

**SOMJI J.**

**Overview**

[1] On June 13, 2023, Mr. Howell initiated a claim against Sun Life Assurance Company of Canada (the "insurer" or "Sun Life") for denial of long-term disability benefits ("LTD benefits") and against his employer, Transport Canada ("TC"), and supervisor, Francois Collins, for making misrepresentations to Sun Life that he alleges contributed to the denial of his LTD benefits.

[2] Sun Life has filed a defence, but the co-defendants have not.

[3] The Attorney General of Canada ("AGC") brings a motion to dismiss Mr. Howell's action against TC and Francois Collins on the grounds that the subject matter of his claim against these

defendants lies exclusively under the grievance procedures for federal employees as set out in the *Federal Public Sector Labour Relations Act*, S.C. 2003, c. 22, s. 2 ("Act" or "*FPSLRA*"). More specifically, the AGC argues that s. 236 of the Act removes the Superior Court of Justice's jurisdiction to hear disputes related to the terms and conditions of Mr. Howell's employment, and this action constitutes such a dispute. AGC seeks the court to dismiss the action against TC and Mr. Collins, and should the court not dismiss the action, an extension of 30 days to file a Statement of Defence.

[4] Mr. Howell opposes the motion. Mr. Howell is 59 years of age. He was a professional pilot for 35 years. He worked as a pilot in the federal public service from April 2009 to July 2022. In 2017, Mr. Howell suffered a medical injury and was also later diagnosed with leukemia as a result of which he was deemed unable to fly for a period of time. His employer, TC, takes the position that they adequately accommodated Mr. Howell for several years, but on July 25, 2022, TC terminated his employment for medical incapacity.

[5] Mr. Howell filed two grievances under s. 208 of the Act – one for failure to accommodate and a second for improper termination. The grievances were jointly heard and have now been referred for review to the Federal Public Services Labor Relations Board ("Board") pursuant to s. 209 of the Act.

[6] Mr. Howell concedes that the issues concerning his accommodation and termination are to be determined by the Act. However, several months after his termination, Mr. Howell was denied LTD benefits. Mr. Howell claims the insurer attributed the denial of benefits to representations made by Mr. Collins on behalf of the employer.

[7] Mr. Howell argues that this lawsuit against Sun Life, the AGC, and Mr. Collins addresses Sun Life's decision to deny him disability benefits and the employer's vicarious liability in making misrepresentations that contributed to that decision, both of which the Board has no authority to address or remediate. Therefore, the subject matter of this action is properly before this Court and, if struck, Mr. Howell would be left without any forum to redress and remedy Sun Life's decision or his employer's misconduct in contributing to that decision.

[8] The primary issue to be decided is whether the claims against TC and Mr. Collins are barred by s. 236 of the Act. In coming to this determination, I must address the following:

a. What is the test for dismissal of an action?

b. Does s. 236 of the Act remove this court's inherent jurisdiction to determine any federal employment related disputes?

c. What is the essential character of Mr. Howell's dispute before this court, and is this court barred from hearing any portion of that dispute by virtue of s. 236?

[9] All legislative references are to the Act unless otherwise stated.

**Issue 1: What is the test for dismissal of an action?**

[10] The AGC seeks a dismissal of this action pursuant to rr. 21.01(3)(a) and 21.01(3)(d) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 ("*Rules*") which read as follows:

> **(3)** A defendant may move before a judge to have an action stayed or dismissed on the ground that,
>
> **(a)** the court has no jurisdiction over the subject matter of the action;
>
> …
>
> **(d)** the action is frivolous or vexatious or is otherwise an abuse of the process of the court,
>
> and the judge may make an order or grant judgment accordingly.

[11] To succeed, the AGC must establish that it is "clear and unequivocal" that the court's jurisdiction has been ousted by legislation or an arbitral agreement: *Skof v. Bordeleau*, 2020 ONCA 729, 456 D.L.R. (4th) 236, at paras. 8-9; *Brewers Retail v. Campbell*, 2022 ONSC 850, 20 C.C.L.I. (6th) 261, at para. 38. This requires the court to find that it is plain and obvious that the case cannot succeed: *Currie v. Greater Sudbury (Police Services Board)*, 2019 ONSC 5129, at para. 2;

*Baradaran v. Alexanian*, 2016 ONCA 533, 3 C.P.C. (8th) 131, at para. 15. Claims that have no merit may qualify as frivolous, vexatious, or an abuse of process: *Salasel v. Cuthbertson*, 2015 ONCA 115, 124 O.R. (3d) 401, at para. 8; *Shanks (Ninigiwaydinnoong) v. Office of the Prime Minister of Canada*, 2019 ONSC 1262, at para. 14.

[12] The court may consider evidence on the motion: *Rules*, rr. 21.01(3)(a) and 21.01(3)(d). The AGC filed an affidavit of Mr. Collins dated July 19, 2023, and Mr. Howell filed his own affidavit dated October 31, 2023. During the hearing I requested the parties provide a break down of the specific claims within Mr. Howell's Statement of Claim and for any caselaw on the Board's power to determine issues related to LTD benefits.

[13] Following the motion hearing of March 21, 2024, counsel for Mr. Howell filed an affidavit of Justin Miller dated May 7, 2024, and a four-page supplementary submission. The AGC filed a 56-page supplementary motion record consisting of a one-page affidavit of Ansle John dated May 10, 2024, supporting exhibits, and a 36-page supplementary submission. Counsel for Mr. Howell argues that the AGC's supplementary motion materials exceeded the court's request, constitute a re-argument of the case, and should not be considered.

[14] I agree with counsel for Mr. Howell that the AGC's supplementary submissions were lengthy. However, I find the materials did focus on the questions asked and cited relevant jurisprudence that ought to be considered. Furthermore, I do not find the materials require a further response from Mr. Howell. In coming to this decision, I have considered that the parties wish to have a motion decision soon because the referral of Mr. Howell's grievance to the Board is scheduled to proceed on September 24, 2024.

**Issue 2: Does s. 236 of the Act remove this Court's jurisdiction for all employment disputes?**

[15] The *FPSLRA* governs labour relations and resolution of employment related disputes in the Federal Public Service. Part 2 of the *FPSLRA* sets out a comprehensive grievance process available to all employees of the public service. It is not disputed that this includes employees of Transport Canada: ss. 2(1), 206(1).

[16] Section 208(1)(b) states that, subject to certain exceptions set out in ss. 208(1)(3)-(6) which do not apply here, an employee is entitled to present an individual grievance as a result of any occurrence or matter affecting his or her terms and conditions of employment. The provision reads:

> **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
>
> > **(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.]

[17] The grievance process involves three stages consisting of a first, second, and final level presentation. In some cases, the final presentation is considered a final decision but subject to judicial review before the Federal Court pursuant to s. 18.1 *Federal Courts Act*, R.S.C., 1985, c. F-7. However, other matters including terms and conditions related to a collective agreement or disciplinary actions resulting in termination, demotion, suspension, or financial penalty may be referred to the Board pursuant to s. 209(1). Decisions of the Board are subject to judicial review by the Federal Court of Appeal.

[18] The case law is clear that the right to grieve under s. 208 is to be broadly construed. Following the decisions of the Supreme Court of Canda in *Vaughan v. Canada*, 2005 SCC 11, [2005] 1 S.C.R. 146, and *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, "terms and conditions of employment" as referenced in s. 208(1)(b) have been held to encompass a wide range of issues that can include allegations against an employer or their representatives for defamation, discrimination, harassment, malice, bad faith, breaches of the *Canadian Charter of Rights and*

*Freedoms*, and intentional torts, including the intentional infliction of mental suffering: *Bron v. Canada* (Attorney General), 2010 ONCA 71, 99 O.R. (3d) 749, at paras. 14-15; *Ebadi v. Canada*, 2024 FCA 39, at para. 29 ["*Ebadi (FCA)*"]; *Burlacu v. Canada* (Attorney General), 2021 FC 910, at para. 36.

[19] The Board may award remedies in the form of damages, financial compensation as well as *Charter* remedies: *Weber*, at paras. 66 and 74; see also *Green v. Canada (Border Services Agency)*, 2018 FC 414, at para. 10.

[20] If a matter is grievable under s. 208, an employee is barred from bringing the matter to the court by way of civil action. Specifically, s. 236 ousts the courts' jurisdiction to deal with matter that can be grieved under the *FPSLRA* regime. Section 236(1) reads as follows:

> **No Right of Action**
>
> **Disputes relating to employment**
>
> **236 (1)** The right of an employee to seek redress by way of grievance for any dispute relating to his or her terms or conditions of employment is in lieu of any right of action that the employee may have in relation to any act or omission giving rise to the dispute.

[21] While s. 236 ousts an employee's right to bring a civil action for federal labour disputes, the court retains residual discretion to hear actions related to employment disputes where remedies are not available by the statutory tribunal, where there is a legislative gap in the *FPSLRA* scheme, or where certain events produce a difficulty unforeseen by the legislative scheme: *Vaughan*; *Weber*, at para. 57; *Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v. Canadian Pacific Ltd.*, [1996] 2 S.C.R. 495, at para. 8; *Bron*, at para. 32; *Adelberg v. Canada*, 2023 FC 252, at paras. 14-15 ["*Adelberg (FC)*"], at para. 36, aff'd in part 2024 FCA 106 ["*Adelberg (FCA)*"]; *Robichaud v. Canada (Attorney General)*, 2013 NBCA 3, 398 N.B.R. (2d) 259, at para. 10; *Van Duyvenbode v. Canada (Attorney General)*, 2007 CanLII 26614 (Ont. S.C.), at para. 17; *Davis v. Canada (Royal Canadian Mounted Police)*, 2024 FCA 115, at para. 88 ["*Davis (FCA)*"].

[22] The court may also exercise its residual discretion if there is evidence that the grievance process is corrupt: *Ebadi (FCA)*, at para. 47; *Davis (FCA)*, at para. 89; *Robichaud*, at para. 10.

[23] The situation where the grievance process cannot provide a remedy or where there is a legislative gap will be exceptional: *Adelberg (FC)*, at para. 18; *Van Duyvenbode*, at para. 17; and *Robichaud*, at para. 10. Section 236 was enacted post *Vaughan* and *Weber*, by Parliament with the specific intent to reserve labour disputes to the specialized labour scheme as set out in the *FPSLRA: Bron*, at para. 29.

[24] As recently stated in *Murphy v. Canda (Attorney General)*, 2023 FC 57, to exercise its residual jurisdiction to hear a labour dispute, the court must be satisfied of the following:

a. the grievance process is unavailable and would not provide any remedy; and

b. where it is established that an employee has recourse under the grievance process, the procedure is clearly not available.

[25] In determining whether a matter is grievable, the court must look at the "essential character" of the dispute. This involves assessing the facts of the dispute and not merely the legal characterization of the facts or the label assigned by a party to the dispute: *Ebadi (FCA)*, at paras. 21 and 37. The court must be mindful of attempts to "dress up" claims as falling outside the grievance procedure in order to bypass s. 236 and bring an action before the courts as this risks undermining Parliament's attempt to have a single comprehensive scheme under the *FPSLRA* to address federal employer-employee disputes: *Ebadi (FCA)*, at para. 27; *Vaughan*, at paras. 37, 40, 42. As the Federal Court of Appeal explained in *Ebadi (FCA)*, at para. 36:

> [36] This interpretation aligns with the object of the FPSLRA, which was to establish a comprehensive and exclusive scheme for the resolution of labour disputes (*Vaughan* at para. 39). To allow large categories of claims—such as any claim involving an intentional tort or Charter breach—to escape the operation of the FPSLRA would undermine Parliament's intent. Many if not all workplace grievances could, through artful pleading, be cast as intentional torts: for example, a manager speaking harshly to an employee could be said to be intentionally inflicting mental harm, or the failure to be promoted an act of discrimination. To

> exempt these claims from the grievance process could effectively gut the scheme, reducing it to the most mechanical and administrative elements of employment relationships, such as hours of work, overtime, classification and pay.

[26] The mere fact that the employee's preferred remedy is unavailable through the grievance process is not sufficient on its own for the court to exercise its residual discretion. For example, in *Adelberg (FC)*, the Federal Court found that just because the arbitrator could not grant declaratory relief was not sufficient to allow the court to exercise its residual discretion. All the claims brought by employees in relation to the impact of the federal government's policies and practices in response to COVID-19 were grievable and subject to the grievance process under *FPSLRA* regime: *Adelberg (FC)*, at paras. 32 and 35.

[27] Having said this, there have been decisions in the federal employment context where the court has exercised its residual discretion to intervene notwithstanding s. 236. For example, in *Joseph v. Canada School of Public Service et al.*, 2022 ONSC 6734, Hackland J. stayed those portions of the Plaintiff's statement of claim for negligence and defamation which he found to be grievable under the *FPSLRA* regime. However, His Honour found that some conduct by the employer in reporting employees to the police and triggering police investigations and criminal charges fell outside of workplace disputes and was therefore actionable in the court notwithstanding s. 236: 2022 ONSC 6734, at paras. 26-27, 29. Hackland J ordered the Plaintiff to amend the statement of claim to focus solely on those torts which were actionable in the court.

**Issue 3: What is the essential character of Mr. Howell's dispute before this Court, and is this Court barred from hearing any portion of that dispute by virtue of s. 236?**

[28] Before addressing the essential character of the action, it is necessary to set out a brief timeline of the events relating to the existing grievances and this action.

[29] Mr. Collins is the Director General of the Aircraft Services Directorate of TC. While there would be three other persons in the chain of command between himself and Mr. Howell, Mr. Collins became responsible for managing Mr. Howell's file. Mr. Collins explained in questioning that this was because no other managers had been fully engaged with the file upon his arrival at TC. Mr. Collins had only met Mr. Howell once in a line-up at a cafeteria.

[30] According to Mr. Howell's affidavit, TC suspended his Medical Certificate and all associated flying privileges on the basis that he was not fit on May 3, 2022. Consequently Mr. Howell was unable to exercise his duties as a pilot. Mr. Howell later learned that it was Mr. Collins who requested the Civil Aviation Services to revisit the medical certificate suspension. Mr. Howell alleges this was deliberately done to have him fired. Mr. Collins provided a different explanation in discovery for why he contacted the Civil Aviation Services.

[31] Mr Howell obtained a letter from his physician on June 23, 2022, directed to his employer and requiring that Mr. Collins not have any further contact with Mr. Howell.

[32] On June 27, 2022, Mr. Howell applied for LTD benefits through the Defendant insurer with a disability date of May 11, 2022.

[33] On July 18, 2022, Mr. Collins signed off on the insurer's Employment Statement in relation to Mr. Howell's request for LTD benefits and according to Mr. Howell, made misleading representations. In particular, Mr. Howell alleges that Mr. Collins incorrectly advised the insurer that one, Mr. Howell had not completed his duties since 2018; two, that he had been offered a substitute job when no such offer was made; and three that his date of illness was July 19, 2018 which was inaccurate. Mr. Howell also takes issue with th fact that Mr. Collins filled out the Employer Statement after the medical note restricting Mr. Collin's contact with Mr. Howell.

[34] On July 25, 2022, TC terminated Mr. Howell.

[35] On July 29, 2022, Mr. Howell filed a grievance in relation to his termination. At that time, he had already filed an earlier grievance on July 7, 2021, for TC's failure to accommodate him.

[36] Mr. Howell later learned that after he had been terminated, Mr. Collins made further misrepresentations to Sun Life on August 4, 2022, which he believes impacted Sun Life's decision to deny him benefits. In particular, he alleges Mr. Collins incorrectly stated to Sun Life that Mr. Howell had been unable to complete his duties since 2018 and this his restrictions made it impossible to find a position higher than at the PM-4 level. Mr. Howell argues that there are flight travel logs which demonstrate the inaccuracy of Mr. Collins' representations.

[37] On September 29, 2022, Sun Life denied Mr. Howell entitlement to LTD benefits. Mr. Howell appealed the decision. At this time, Mr. Howell was no longer a public service employee. Consequently, he understood the grievance procedure was not available to him.

[38] On June 13, 2023, Mr. Howell filed this action against TC, Mr. Collins, and Sun Life. He seeks as against Defendants TC and Mr. Collins at para 2 of the Statement of Claim:

a) Payments that would have been made by Sun Life but for the employer's conduct;

b) Aggravated and punitive damages for bad faith and breach of fiduciary duty; and

c) Damages for intentional infliction of emotional distress, mental suffering, nervous shock, and psych traumatic disability.

[39] AGC argues that many of the claims made in the Statement of Claim are not limited to misrepresentations by the employer to Sun Life but involve a wide range of alleged wrongful conduct on the part of TC and Mr. Collins such as harassment, failure to accommodate, and wrongful decision to terminate all of which have been grieved and are referred to the Board.

[40] AGC argues that the claims relating to the employer's misrepresentations to Sun Life are equally grievable under the *FPLSRA* regime. Therefore, this Court's jurisdiction to hear these claims is barred by s. 236.

[41] AGC provided a table identifying the claims in this action.

| Civil Claim | Allegations |
|---|---|
| Intentional infliction of mental distress | ➢ Contacting Civil Aviation Medicine: paras 25, 44<br>➢ Terminating the Plaintiff's employment: paras 37, 40, 44<br>➢ Providing inaccurate info to Sun Life: paras 33- 35, 38, 39, 44 |
| Wrongful Dismissal | ➢ Terminating the Plaintiff's employment: paras 37, 40,<br>➢ Contacting Civil Aviation Medicine: paras 54(b)<br>➢ Providing inaccurate info to Sun Life: paras 33- 35, 38, 39 |
| Negligence | ➢ Contacting Civil Aviation Medicine: para 40<br>➢ Providing inaccurate info to Sun Life: paras 33- 35, 38, 39, 54I |

| | |
|---|---|
| Breach of Fiduciary Duty<br><br>Bad Faith<br><br>Breach of Duty to Accommodate | ➢ Failure to accommodate the Plaintiff: paras 36, 53(a), 54(a)<br>➢ Contacting Civil Aviation Medicine: paras 53(b), 54(b)<br>➢ Harassment: paras 53I, 54(c)<br>➢ Termination of employment: paras 53I, 53(e)<br>➢ Seeking to prevent the Plaintiff's LTD benefits by providing inaccurate information: paras 53(c)(d)(f), 54(d) |



[42] I agree with AGC counsel that there are claims within the Statement of Claim, in particular at paragraphs 53 and 54, regarding the employer's failure to accommodate, harassment, and to terminate, which have already been grieved and have now been referred to the Board. Section 236 ousts this Court's jurisdiction to hear those claims.

[43] The real issue is whether Mr. Howell is entitled to bring an action against TC and Mr. Collins for breach of fiduciary duty, bad faith, intentional infliction of emotional/mental stress mental suffering, nervous shock, and psych traumatic disability as a result of Mr. Collins' communications with Civil Aviation Services and for his alleged misrepresentations to Sun Life on July 18 and August 4, 2022 in relation to Mr. Howell's application for LTD benefits.

[44] Mr. Howell argues that his only recourse to address these claims is through the courts for three reasons. First, the Board does not have jurisdiction to adjudicate the issue of LTD benefits. Second, the *FPSLRA* does not allow for the grievance of matters on which the collective agreement is silent. Third, when the employer's misconduct arose, Mr. Howell was no longer a TC employee and unable to access the grievance procedure. I will address each of these arguments in turn.

### *A. Can a matter be grieved even if it cannot be referred to the Board?*

[45] Pursuant to s. 209, the Board can hear only grievances limited to:

a) the terms and conditions of a collective agreement or arbitral awards;
b) disciplinary actions resulting in termination, demotions, suspension, or financial penalty.
c) demotion or termination for unsatisfactory performance or for any other non-disciplinary reasons;

d) deployment without an employee's consent.

[46] Mr. Howell is correct in that none of these categories specify issues related to access to insurer benefits. Furthermore, while the Board can hear issues related to the terms and conditions of a collective agreement, the collective agreement in this case is silent on LTD benefits other than to indicate that insurer benefits shall be provided by a third party.

[47] In support of his position that the Board lacks jurisdiction, Mr. Howell also relies on the fact that he is unable to obtain union representation on the matter. Justin Miller, previously a Civil Aviation Inspector for Transport Canada for 11 years and presently the National Chair of the Canadian Federal Pilots Association (CFPA), Mr. Howell's union, provided an affidavit dated May 7, 2024 regarding the inability to grieve issues related to LTD benefits.

[48] In his affidavit, Mr. Miller indicated that based on his experience all matters relating to LTD benefits fall outside of the scope of the collective agreement and are not grievable. As such, members and former members of the CFPA are not entitled to representation from their union where disputes arise in relation to LTD benefits. Consequently, when Mr. Howell inquired about bringing a grievance in relation to the denial of LTD benefits and the representations of his employer in contributing to that decision, Mr. Miller advised Mr. Howell on July 18, 2022, that:

> the CFPA was not responsible for providing him with representation in relation to a claim for LTD benefits. There is no internal grievance process with respect to LTD benefits; the union is not a party to the insurance contract between Mr. Howell and the Defendant Sun Life Assurance Company of Canada (hereinafter "Sun Life" or the "insurer").
>
> Specifically, the CFPA is unable to represent Mr. Howell with respect to his LTD claim against the Defendants as LTD claims are not covered under the Agreement Between the Treasury Board and the Canadian Federal Pilots Association (the "Collective Agreement").

[49] I note, however, that in the advice to Mr. Howell, the union does not draw a distinction in the availability of the grievance process for Mr. Howell's claim against the Defendant Sun Life

for its decision to deny him LTD benefits and Mr. Howell's claim for damages against TC and Mr. Collins for making misleading representations that that may have impacted Sun Life's decision.

[50] Mr. Miller went on to state that it was his opinion that the Board had no jurisdiction to hear matters related to LTD benefits. Mr. Miller was not aware of any decisions where the Board had rendered a decision or damages in relation to one of its member being denied LTD benefits. It was his view that had the union attempted to put forth such a claim, the Board would have rejected it.

[51] While Mr. Miller's opinion on the Board's authority to address LTD benefits is certainly not determinative of the issue, it appears to be supported by the Board's own recent commentary in *Mongeon v. Professional Institute of the Public Service of Canada*, 2022 FPSLREB 24. While this decision focused on whether the union had failed to fulfill its duty of fair representation in refusing to assist the complainant with a claim related to access to benefits, the Board commented on the limits of its jurisdiction Citing *Brown v. Union of Solicitor General Employees*, 2013 PSLRB 48, the Board stated at para. 39:

> …The Board has jurisdiction only over matters that fall within the parameters of the *Act* or a relevant collective agreement, which does not include the interactions between the different provincial road-accident allowances, Sun Life disability benefits, and the Canada Pension Plan.

[52] Upon my request for further caselaw addressing the Board's authority to deal with LTD benefits, AGC conceded in its supplementary submission that grievances to do with the denial of benefits do not fall under s. 209. Consequently, there are no Board cases which deal specifically with the denial of benefits. AGC argues, however, that the fact that such grievances cannot be heard by the Board is irrelevant because s. 236 removes this court's jurisdiction irrespective of whether a grievance can be referred for third party adjudication: *Ebadi (FCA)*, at para. 28.

[53] In short, AGC's position is that Mr. Howell may grieve the claims of misrepresentation by his employer to Sun Life under the *FPSLRA* regime, but he would be unable to refer the Final Decision to the Board pursuant to s. 209. For AGC, the issue to be decided by this Court is not whether the matter can be adjudicated by the Board, but whether the matter is grievable. If grievable under s. 208, then s. 236 ousts this Court's jurisdiction to hear the matter. I would agree.

[54] The AGC's position is supported by the Federal Court of Appeal's decision in *Ebadi (FCA)*, rendered on March 6, 2024, just several weeks before this motion was heard, as well as in *Davis (FCA)*, decided on June 24, 2024, following the motion hearing. These decisions reiterated what was previously held in *Vaughan* that the absence of third party adjudication is not determinative of whether a matter can be grieved.

[55] In *Ebadi (FCA)*, the Federal Court of Appeal reviewed the grievance process under the *FPSLRA*, and in particular, the interplay between ss. 208, 209, and the ousting provision of s. 236. In *Ebadi (FCA)*, the Federal Court of Appeal found the essential character of the appellant's allegations was that the Canadian Security Intelligence Service ("CSIS") failed to provide the employee with a safe and harassment-free workplace which "must at the very least be impliedly part of any employee's terms and conditions." Consequently, the court found that the interpretation or application of the CSIS policies could be grieved under s. 208 and there was no legislative gap requiring the court to exercise its residual discretion and hear the matter: *Ebadi (FCA)*, at para. 37.

[56] Furthermore, relying on the Supreme Court of Canada's decision a decade earlier in *Vaughan*, the Federal Court of Appeal found that the fact that no third party adjudication was available to the employee within the grievance process was not determinative: *Ebadi (FCA)*, at para. 26. As the Honourable Justice Binnie explained in *Vaughan*, it is for Parliament to decide what appeal scheme should be available for different types of grievances: *Vaughan*, at para. 26.

[57] In *Vaughan*, the appellant had been denied early retirement incentive ("ERI") benefits. He brought an action in negligence in the courts against the employer alleging the employer ought to have known that a job offer had not been provided to him and that he was eligible for ERI. ERI was not part of the collective agreement The appellant argued the matter could not be grieved because third party adjudication was unavailable. The Supreme Court of Canada held that the employee's action was barred by what are now sections 208 and 209 of the *FPSLRA*.

[58] The Supreme Court of Canada found that while the absence of independent third-party adjudication may in some circumstances impact a court's exercise of its residual discretion to hear a case and suggested whistle blower cases as an example, courts should otherwise generally be

cautious about becoming involved in labor disputes except on the limited basis of judicial review: *Vaughan*, at para. 39; see also *Robichaud*, at para. 8.

[59] The Federal Court of Appeal went on to stated in *Ebadi (FCA)* that the enactment of s. 236 has further entrenched the dicta that the absence of third-party adjudication does not entitle the court to exercise its residual discretion: see also *Davis (FCA)*, at para. 91. Citing the Ontario Court of Appeal decision in *Bron*, the Federal Court of Appeal explains as follows in *Ebadi (FCA)*, at para. 28:

> Following *Vaughan*, Parliament added section 236 to the FPSLRA, which provides that the court's jurisdiction is ousted by grievance processes even where there is no third-party adjudication. The Ontario Court of Appeal in *Bron v. Canada (Attorney General)*, 2010 ONCA 71, [2010] O.J. No. 340 [*Bron*] noted that this effectively patched the "whistle-blower exception" coming out of *Vaughan*, leaving courts with residual discretion to hear grievable claims only where the grievance process cannot provide an appropriate remedy (*Bron* at paras. 27-30). [Emphasis added.]

And at para 58:

> I note again that a lack of third-party adjudication does not itself make a scheme less worthy of deference, and does not itself allow a court to exercise its residual discretion (*Vaughan* at para. 38). [Emphasis added.]

[60] In *Davis*, the Plaintiff filed a harassment complaint with the RCMP wherein she alleged among other things that her supervisor engaged in a pattern of behaviour that included making "misleading and exaggerating concerns and omitting to provide information" which led to her being denied LTD benefits: *Davis v. Canada (Royal Mounted Police)*, 2023 FC 280, at para. 11 ["*Davis (FC)*"]. The Plaintiff later filed an action in the Federal Court for allegations of unfair labour practices during her employment including harassment: *Davis (FC)*, at para. 19.

[61] The Federal Court found that the workplace concerns of harassment, discrimination, a unilateral change in the contract of employment, animosity, a failure to accommodate her disability, and disguised demotion and dismissal, were of a nature that permitted her to Plaintiff to avail herself of the grievance process which in fact she did: *Davis (FC)*, at paras. 83 and 84. The Federal Court found that s. 236 of the Act represented a clear ouster of the court's jurisdiction to

hear the matter and the Plaintiff had not established she fell under one of the exceptions that would allow the court to exercise its residual discretion: *Davis (FC)*, at paras. 86-89.

[62] The decision was upheld on appeal: *Davis (FCA)*. The Federal Court of Appeal agreed that Ms. Davis' claims related to the terms and conditions of her employment and were therefore grievable. The Federal Court of Appeal went on to conclude as follows, at para. 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.

[63] It is clear that if Mr. Howell files a grievance for Mr. Collins' alleged misrepresentations to Sun Life, a referral of the Final Decision to the Board for review pursuant to s. 209 is unlikely. However, this does not mean that the employer's alleged misrepresentation cannot be grieved pursuant to s. 208.

[64] The essential character of Mr. Howell's claims is that Mr. Collins one, inappropriately contacted Civil Aviation Services and interfered with their decisions relating to his medical suspension and two, made misleading representations in the Employer Form and in later correspondence to Sun Life that resulted in Sun Life denying him LTD benefits. Mr. Howell alleges that this conduct resulted in the mental infliction of stress and constituted a breach of the employer's fiduciary duty and duty of good faith towards Mr. Howell as an employee.

[65] Broadly construed, these are grievable claims because they relate to the employer's misconduct vis-à-vis information about the employee. That the misrepresentations were made in relation to the subject matter of LTD benefits is of no consequence. Managers are obliged to provide employee information directly to Sun Life and in this respect alone, the representations formed part of the terms and conditions of employment. One can also reasonably conclude that it is a term and condition of employment that managers conduct themselves honestly and fairly when making representations about an employee to a third party, including in support of an employee's application for insurer benefits. Consequently, I find these claims are grievable under s 208. The

Final Decision of the adjudicator would be subject to judicial review before the Federal Court: *Ebadi (FCA)*, at para. 59; *Davis (FCA)*, at para. 102.

### *B. Does the essential character of the dispute have to fall within the collective agreement?*

[66] Mr. Howell argues that not all unjust treatment alleged against an employer can be addressed through a grievance and the essential character of the dispute must be found within the collective agreement. Mr. Howell argues that where the subject matter of the dispute falls into an area on which the collective agreement is unclear or silent, an arbitrator may not have authority to address or remedy the matter within the grievance procedure.

[67] In this regard, Mr. Howell relies on a series of cases where the court found that disputes related to decisions by third party insurers who administer the government's insurance program fell outside the collective agreement and could not be remedied through the grievance process. As a result, the court retained its residual inherent jurisdiction to hear the matter: *Piko v. Hudson's Bay Co.* (1998), 167 D.L.R. (4th) 479 (Ont. C.A.); *Connerty v. Coles*, 2012 ONSC 2322; *Sunjka v. Manufacturers Life Insurance Co.*, 2010 ONSC 2900, 86 C.C.L.I. (4th) 144; *Perlett Estate v. Riverside Health Care Facilities Inc.* (2005), 254 D.L.R. (4th) 338 (Ont. C.A.).

[68] While these cases are comparable to Mr. Howell's current factual situation, I find they are distinguishable because they were decided under provincial legislation which does not have the sweeping language of s. 208(1)(b), which brings any "occurrence or matter" affecting an employee's "terms and conditions of employment" within the purview of a grievance.

[69] For these same reasons, I also find the decision of *Bell Canada v. Unifor*, 2020 CanLII 14444, decided under the *Canada Labour Code* without any consideration of the jurisprudence governing the *FPSLRA* regime is of limited weight and assistance in this matter.

[70] S. 208(1)(b) allows an employee to grieve "any occurrence or matter affecting his or her terms and conditions of employment." Mr. Howell has not presented any authority that only matters falling under the terms of an employee's collective agreement are grievable under the *FPSLRA* regime. On the contrary, and as discussed earlier, the prevailing jurisprudence is that s.

208(1) is to be interpreted broadly and can includes a wide range of disputes. In *Joseph*, Hackland J. specifically states "I would emphasize that what is grievable is not restricted only to issues arising from the collective agreement but also includes the application of federal statutes regulations and government directives in the workplace": at para 10.

[71] While I would agree that an adjudicator or the Board may not be able to determine the merits of Sun Life's decision to deny Mr. Howell LTD benefits as Sun Life is not incorporated into the Collective Agreement and is a third party insurer independent of the employer. However, this does not mean that an adjudicator cannot determine whether Mr. Collins breached his duties and responsibilities as a manager by making misleading representations to Sun Life and consequently, determine any damages that Mr. Howell would be entitled to because of this alleged misconduct.

[72] Furthermore, Mr. Howell has not provided any evidence to this court that remedies are unavailable for such employer misconduct under the grievance process should such a finding be made: *Ebadi (FCA)*, at para. 60. The Federal Court of Appeal reiterated in *Davis (FCA)*, at para. 94, that damages are available through the grievance process.

[73] Mr. Howell has also not tendered any evidence that the grievance process would be ineffective in this case: *Adelberg (FCA)*, at para. 59.

### *C. Is the grievance process available to Mr. Howell given the timing of the misconduct?*

[74] Mr. Howell argues that the grievance process was not available to him because he received the decision from Sun Life and information regarding the employer's alleged misrepresentations after he was terminated from TC. I do not find the timing of the occurrence disentitles Mr. Howell to the grievance process.

[75] Former employees have a right to grieve "where the matter giving rise to the grievance arose during the course of the individual's employment, where the individual was aggrieved as an employee": *Salie v. Canada (Attorney General)*, 2013 FC 122, at paras. 61 and 63; *Ebadi v. Canada*, 2022 FC 834, at para. 40; *Price v. Canada*, 2016 FC 649, at paras. 26-31.

[76] In this case, Mr. Howell applied for LTD benefits before his termination. More importantly, Mr. Collin's contact with Civil Aviation Services and his representations to Sun Life on July 18, 2022 occurred before Mr. Howell's termination of July 25, 2022. Hence, the employer's conduct giving rise to the grievance occurred during the course of Mr. Howell's employment and while he was still an employee entitling him the right to grieve.

[77] While Mr. Collins did make further representation to Sun Life on August 4, 2022, after Mr. Howell was terminated, there is no evidence that upon filing a grievance, the adjudicator would adopt a strictly technical approach and fail to consider all the misrepresentations, including the one made after Mr. Howell's termination, if it is relevant to the determination of whether the employer engaged in misconduct. Moreover, this is not a situation as was the case in *Martell v. Canada (Attorney General)*, where the claims of employer abuse, threats, and harassment occurred long after the employment relationship ended and could not be considered matters in which the essential character of the dispute arose during the course of employment: 2016 PECA 8, 376 Nfld. & P.E.I.R. 91, at para. 37. In this case, there is only one set of alleged misrepresentations on August 4, 2022, and it is made within a short period after Mr. Howell's termination from TC.

**Conclusion**

[78] In conclusion, I find that the essential character of the dispute as it relates to the Defendants TC and Mr. Collins is that Mr. Collins engaged in communications with Civil Aviation Services and made misrepresentations to Sun Life that caused Mr. Howell harm by impacting Sun Life's decision to deny him benefits. I find Mr. Howell is entitled to grieve this matter under s. 208 and bring a claim for damages against TC and Mr. Collins for their alleged misconduct. Consequently, this Court does not have jurisdiction to hear these claims pursuant to s. 236.

[79] The action against the Defendants TC and Mr. Collins is stayed without leave to amend pursuant to Rules 21.01(3)(a) and (d).

**Costs**

[80] The AGC is successful party on this motion. The parties are encouraged to resolve the issue of costs. If the parties cannot resolve the issue of costs for this proceeding, they may file brief written submissions not exceeding two pages exclusive of Bills of Costs. The AGC shall file their submissions by August 1st, and Mr. Howell shall file his submissions by August 15th. Costs submissions are to be sent to scj.assistants@ontario.ca and to my attention.

Somji J.

**Released:** July 15, 2024

**CITATION:** Howell v. Sun Life Assurance Company of Canada, 2024 ONSC 3908
**COURT FILE NO.:** CV-23-92405
**DATE:** 2024/07/15

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

Joseph Todd Howell

Plaintiff (Responding Party)

**– and –**

Sun Life Assurance Company of Canada, Attorney General of Canada
(Transport Canada) and Francois Collins

**Defendants (Moving Parties**

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**REASONS FOR DECISION ON APPLICATION**

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Somji J.

**Released:** July 15, 2024