

CANADA / JUDGMENT

Craig v His Majesty the King

2024 FC 2004

COURT

Federal Court

DECIDED

10 December 2024

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Craig v. Canada (Fisheries and Oceans)

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T-2359-24

Decision Content

Date: 20241210

Docket: T-2359-24

Citation: 2024 FC 2004

Toronto, Ontario, December 10, 2024

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

JOSEPH CRAIG

FIRST PLAINTIFF

and

MICHELLE CRAIG

SECOND PLAINTIFF

and

HIS MAJESTY THE KING IN RIGHT OF CANADA AS REPRESENTED BY FISHERIES AND OCEANS
CANADA

FIRST DEFENDANT

and

WILLIAM MCGILLIVRAY

SECOND DEFENDANT

ORDER AND REASONS

I. Overview [1] The Defendants, His Majesty the King in Right of Canada as represented by Fisheries and Oceans Canada (“DFO”) and William McGillivray, bring a motion to strike the Plaintiffs’ claim pursuant to Rule 221(1)(a) of the Federal Courts Rules, SOR/98-106 (the “Rules”). In the alternative, the Defendants seek an extension of time to file their Statement of Defence.

[2] The Defendants submit that the Plaintiffs’ statement of claim (the “Statement of Claim”) “discloses no reasonable cause of action,” as section 236 of the Federal Public Sector Labour Relations Act, SC 2003, c 22, s 2 (“FPSLRA”) bars the Court from adjudicating the First Plaintiff’s claim and the Plaintiffs have not pleaded the necessary facts for the Second Plaintiff’s claim (Rules, s 221(1)(a)).

[3] For the reasons that follow, I agree. The Defendants’ motion to strike the Plaintiffs’ Statement of Claim pursuant to Rule 221(1)(a) of the Rules is granted.

II. Facts

[4] The First Plaintiff, Joseph Craig, is employed by the DFO. He is a member of the Professional Institute of the Public Service of Canada (the “Union”). His position is governed by the Applied Science and Patent Examination Group Agreement (the “Collective Agreement”). The Second Plaintiff, Michelle Craig, is a professional engineer and the First Plaintiff’s spouse.

[5] In 2015, the DFO launched an investigation into allegations of workplace misconduct against the First Plaintiff. The First Plaintiff was asked not to attend at his regular office during the investigation. He continued to work from home until 2022.

[6] In 2017, the First Plaintiff received authorization from the DFO to obtain a PhD. Pursuant to article 17.20(a) of the Collective Agreement, the First Plaintiff was placed on leave to enroll in full-time doctoral studies on full salary and benefits.

- [7] In June 2022, DFO communicated the results of the workplace misconduct investigation. Although the First Plaintiff was found to have engaged in workplace violence, no disciplinary action was imposed against him.
- [8] In November 2022, the Second Defendant, William McGillivray, informed the First Plaintiff that the DFO would no longer be supporting his doctoral studies. The First Plaintiff would be required to return to work, although in a separate office space from his colleagues. The First Plaintiff was devastated by these updates. Due to psychological distress, the First Plaintiff went on paid sick leave.
- [9] By May 2024, the First Plaintiff had exhausted his paid sick leave. He then went on vacation leave, which he exhausted in September 2024. Since then, the First Plaintiff has been on unpaid sick leave.
- [10] In August 2024, the First Plaintiff filed a grievance pursuant to section 208 of the FPSLRA (the “Grievance”). The Grievance is currently in abeyance.
- [11] In September 2024, the Plaintiffs filed their Statement of Claim, alleging Charter breaches and intentional, or, in the alternative, negligent infliction of mental suffering.
- [12] The Defendants now move to strike the First Plaintiff’s claim for want of jurisdiction pursuant to section 236 of the FPSLRA and strike the Second Plaintiff’s claim for failing to disclose a reasonable cause of action pursuant to Rule 221(1)(a) of the Rules. In the alternative, the Defendants request an extension of time to file their Statement of Defence.

III. Issues and Legal Test

- [13] There are two issues in this motion:

Should the First Plaintiff’s claim be struck on jurisdictional grounds, pursuant to section 236 of the FPSLRA?

Should the Second Plaintiff’s claim be struck for failing to disclose a reasonable cause of action, pursuant to Rule 221(1)(a) of the Rules?

- [14] To strike out pleadings on jurisdictional grounds, it must be “plain and obvious...that this Court lacks jurisdiction over the [Plaintiffs’] claim” (*Ebadi v Canada*, 2022 FC 834 at para 26 (“*Ebadi*”)).
- [15] To strike out pleadings for failing to disclose a reasonable cause of action, the Court must determine whether “it is plain and obvious that the action cannot succeed, assuming the facts advanced in the statement of claim to be true” (*Lauer v Canada (Attorney General)*, 2017 FCA 74 at para 22; see also *Kakuev v Canada*, 2022 FC 1721 at para 11 (“*Kakuev*”)).

IV. Analysis

A. It is Plain and Obvious that the Court Lacks Jurisdiction to Adjudicate the First Plaintiff's Claim
[16] In the Statement of Claim, the Plaintiffs allege that the Defendant breached the First Plaintiff's Charter rights and engaged in intentional, or, alternatively, negligent infliction of mental suffering.

[17] The Defendants submit that section 236 of the FPSLRA is a "complete bar" to the First Plaintiff's claim. According to the Defendants, the First Plaintiff's claim is rooted in a "dispute relating to his...terms or conditions of employment" (FPSLRA, s 236(1)). Since section 236 of the FPSLRA stipulates that federal public sector employees have no right of action in relation to such disputes, the Court does not have jurisdiction over the First Plaintiff's claim.

[18] The Plaintiffs submit that section 236 of the FPSLRA does not apply, as the First Plaintiff's employment is subject to a new agreement formed when he enrolled in doctoral studies in 2017 (the "2017 Agreement"). In the Statement of Claim, the Plaintiffs submit that "[t]he 2017 Agreement fundamentally altered the terms of employment and created a separate agreement outside the terms of the Collective Agreement." Relying on the "whistleblower" cases, namely *Pleau v Canada (Attorney General)*, 1999 NSCA 159 ("Pleau") and *Guenette v Canada (Attorney General)*, 2002 CanLII 45012 (ON CA) ("Guenette"), the Plaintiffs submit that the Court should exercise its residual jurisdiction to hear the First Plaintiff's claim, as "the substance of the dispute is not addressed in any way by the Collective Agreement" and "there is no possibility of recourse...to adjudication" (Pleau at para 88).

[19] I agree with the Defendants.

[20] The Plaintiffs' submission that the 2017 Agreement severed the First Plaintiff's position from the Collective Agreement is meritless. The First Plaintiff was authorized to pursue a PhD pursuant to article 17.20(a) of the Collective Agreement. Although the activities undertaken by the First Plaintiff may have "fundamentally" changed when he began his studies, this change was anticipated by and authorized through the Collective Agreement. I therefore do not find that a new agreement was formed when the First Plaintiff enrolled in doctoral studies.

[21] Even if this Court were to accept that a new agreement was formed in 2017, section 236 of the FPSLRA would nonetheless apply. The Plaintiffs do not seek relief exclusively for alleged breaches of the 2017 Agreement, or to be restored to the conditions of the 2017 Agreement. In fact, the First Plaintiff seeks damages for the isolation and hopelessness he felt during this time. Instead, the Plaintiffs seek to be restored to their status from before the workplace misconduct investigation against the First Plaintiff was launched in 2015. For instance, the Plaintiffs seek special damages for loss of career advancement opportunities and resultant loss of pay and benefits since 2015. Similarly, the Plaintiffs allege that the First Plaintiff's Charter rights were breached by "his home being used as his employer's workplace" through the telework arrangement instituted in 2015. The Plaintiffs allege further Charter breaches

due to the First Plaintiff being ordered “not to speak to anyone at the DFO,” an order which also dates to 2015.

- [22] Consequently, I agree with the Defendants that section 236 of the FPSLRA is a complete bar to the First Plaintiff’s claim. As noted by the Federal Court of Appeal at paragraph 56 of *Adelberg v Canada*, 2024 FCA 106 (“Adelberg”) [citations omitted, emphasis added]:

The bar in section 236 of the FPSLRA applies to matters that may be grieved as opposed to those that may be adjudicated. In determining whether an issue is one that may be grieved, what matters is the essence of the claim made and not the way the claim is characterized in the Statement of Claim. Thus, it matters not that the plaintiffs allege a Charter breach or various tort claims; one must instead look to the essential character of the dispute to determine if it raises a matter that could have been the subject of a grievance.

- [23] In my view, the “essential character” (Adelberg at para 56) of the Plaintiffs’ dispute is the “out of sight, out of mind” strategy allegedly employed by the Defendants from 2015 onward, “which allowed the DFO to pacify” the First Plaintiff’s coworkers at the expense of the Plaintiffs’ mental wellbeing and the First Plaintiff’s Charter rights. The First Plaintiff seeks redress for issues of pay, advancement, benefits, working conditions, and his treatment by the DFO. In other words, he raises a “dispute relating to his...terms or conditions of employment,” pursuant to section 236 of the FPSLRA. Furthermore, the Plaintiffs’ allegations, including negligence, Charter breaches, intentional infliction of mental suffering, negligent infliction of mental suffering, and malice and bad faith, are grievable issues under section 208 of the FPSLRA (*Joseph v Canada School of Public Service et al*, 2022 ONSC 6734 at para 32; *Duval c Canada (Procureur général)*, 2005 CanLII 44516 at para 50 (QC CS) (“Duval”); *Bron v Canada (Attorney General)*, 2010 ONCA 71 at paras 9 and 19 (“Bron”); *Price v Canada (Attorney General)*, 2016 FC 649 at paras 33-34). Pursuant to section 236 of the FPSLRA, the First Plaintiff must therefore “seek redress by way of grievance.”

- [24] The “whistleblower” cases, *Pleau* and *Guenette*, do not assist the Plaintiffs on this issue. *Pleau* and *Guenette* were decided prior to the coming into force of the FPSLRA. Consequently, section 236 of the FPSLRA was not considered in either decision.

- [25] In any event, the “whistleblower” cases are distinguishable from the present proceeding. The plaintiffs in *Pleau* and *Guenette* alleged that they experienced professional retaliation after accusing their employers of misconduct (*Pleau* at para 81; *Guenette* at para 4). The First Plaintiff in this case alleges that the Defendants caused him harm by mismanaging a conflict among employees. The overtly antagonistic relationship between employee and employer which characterizes whistleblower cases is not present here. Consequently, the “essential character of the dispute” is not one of whistleblower and “the very department...they blew the whistle on” – as the Plaintiffs put it – but of an employee seeking redress for their employer’s failure to abide by the terms and conditions of their employment. Furthermore, a central issue in *Pleau* and *Guenette* was the foreclosure of adjudication by the grievance process, which was conceded by the defendants in both cases (*Pleau* at para 54; *Guenette* at

para 14). Here, the Defendants argue the opposite, submitting that “[the First Plaintiff]’s grievance is referable to independent adjudication...under s. 209 of the FPSLRA.”

- [26] The Plaintiffs submit that institutional bias precludes effective redress through the grievance process and that an exception to section 236 of the FPSLRA is warranted on this basis. However, the Plaintiffs have not brought sufficient evidence that “departmental officials have an interest in denying” the First Plaintiff relief (*Vaughan v Canada*, 2005 SCC 11 at para 37). The record demonstrates that the DFO accommodated the First Plaintiff, providing him paid leave to pursue his doctoral studies, offering him the chance to use his vacation leave when his paid sick leave ran out, and electing not to impose disciplinary measures despite finding that the First Plaintiff’s actions “constituted sexual harassment and amounted to work place violence.” The Plaintiffs’ evidence is not sufficient to demonstrate institutional bias, particularly bias of the magnitude required to justify an exception to section 236 of the FPSLRA.
- [27] I find this to be the case despite the Plaintiffs’ allegations about Union collusion in the Defendants’ alleged misconduct. The Plaintiffs submit that the Union instigated the Defendants’ “out of sight, out of mind” strategy and withdrew from representing the First Plaintiff due to “[c]onflicts of interest by union representatives.” Consequently, there is “no reasonable basis to expect the [U]nion” to support the First Plaintiff, foreclosing adjudication pursuant to Article 35.25 of the Collective Agreement and subsection 209(2) of the FPSLRA.
- [28] Although I recognize that the First Plaintiff has lost trust in the Defendants and the Union, I find his allegations of bias to be premature and speculative. This Court has previously determined that a union’s withdrawal of representation does not create an exception to section 236 of the FPSLRA (*Horsman v Canada (Fisheries, Oceans and Coast Guard)*, 2023 FC 929 at paras 18-19). Moreover, the Grievance was submitted a month before the Statement of Claim and is currently in abeyance. It is not known whether the issues alleged by the Plaintiffs will arise, nor whether the internal complaints process will be sufficient to resolve potential breaches of the Union’s duty of fair representation (see *Hudson v Canada*, 2022 FC 694 at paras 87, 101 (“Hudson”)). “[T]he onus is on a plaintiff to demonstrate that the integrity of internal recourse mechanisms is compromised,” not that there is a possibility for this to be the case (*Hudson* at para 93 [emphasis added]). Given the limited evidence provided by the Plaintiffs, I find that this high threshold has not been met.
- [29] Neither do I find that section 24 of the Charter entitles the Plaintiffs to circumvent the grievance process. The Court has rejected this argument in the past (*Green v Canada (Border Services Agency)*, 2018 FC 414 at paras 9-10). The Court has also determined that Charter breaches are grievable issues (*Duval* at para 50 (QC CS)). Consequently, the First Plaintiff must seek redress through the grievance process (*Bron* at para 33; *Attorney General of Canada, on behalf of Correctional Service of Canada v Robichaud and MacKinnon*, 2013 NBCA 3 at para 16).

[30] For these reasons, I find that “it is plain and obvious...that this Court lacks jurisdiction over the [First Plaintiff]’s claim” (Ebadi at para 26). The First Plaintiff’s claim is struck pursuant to section 236 of the FPSLRA.

B. It is Plain and Obvious that the Second Plaintiff’s Claim Discloses No Reasonable Cause of Action [31] The Second Plaintiff alleges intentional, or, in the alternative, negligent infliction of mental suffering.

[32] The Defendants submit that the Plaintiffs have disclosed no reasonable cause of action for the Second Plaintiff’s claim. According to the Defendants, the Plaintiffs have not pleaded the necessary facts to satisfy the test for intentional infliction of mental suffering or establish a duty of care for negligent infliction of mental suffering.

[33] The Plaintiffs submit that the Second Plaintiff’s claim discloses a reasonable cause of action. Highlighting their allegations that “[the Second Plaintiff’s] residence...was co-opted by government as a workplace,” that the Defendants failed to act despite knowing that the First Plaintiff’s tension and anxiety were affecting his family, and that the Second Plaintiff experienced financial and health problems due to the First Plaintiff’s ordeal, the Plaintiffs argue that they have established the necessary facts to ground intentional or, in the alternative, negligent infliction of mental suffering.

[34] I agree with the Defendants.

[35] To prove intentional infliction of mental suffering, the Plaintiffs must demonstrate “(1) flagrant or outrageous conduct; (2) calculated to produce harm; and (3) resulting in a visible and provable illness” (Prinzo v Baycrest Centre for Geriatric Care, 2002 CanLII 45005 at para 48 (ON CA) (“Prinzo”).

[36] The Plaintiffs have failed to establish the second element of the test in Prinzo. The Statement of Claim contains one reference to actions which were “calculated to produce harm” against the Second Plaintiff (Prinzo at para 48). In this statement, the Plaintiffs alleged that both the First and Second Plaintiffs were “hurt” by the Defendants’ conduct, and that this conduct “was calculated to punish [the First Plaintiff], or to produce the damaging effect of the kind that was produced” [emphasis added]. This bald assertion discloses no material facts to demonstrate that the Defendants’ actions were calculated to harm the Second Plaintiff. It is therefore “plain and obvious” that the Second Plaintiff’s claim of intentional infliction of mental suffering has “no reasonable prospect of success” (Kakuev at para 11).

[37] To prove negligent infliction of mental suffering, the Plaintiffs must establish that the Defendants owe a duty of care to the Second Plaintiff with respect to her mental wellbeing. The Defendants rightly note that “[t]here is no established duty of care between a federal employer and the family member of a federal employee” of the nature alleged in this case. The Plaintiffs therefore bear the onus of demonstrating that the Court should recognize a novel duty of care, based on “the closeness of the relationship between the plaintiff and the

defendant and...whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant” (Cooper v Hobart, 2001 SCC 79 at para 34).

- [38] The Plaintiffs have not pleaded the necessary facts to establish a new duty of care.
- [39] In their submissions on this motion, the Plaintiffs anchor the Second Plaintiff’s negligence claim in the telework arrangement, which they characterize as “an imposition of government activity in [the Second Plaintiff’s] home.” However, this allegation is not made in the Statement of Claim.
- [40] The Statement of Claim contains few references to the Second Plaintiff. Where the Second Plaintiff is discussed, the Plaintiffs do not plead material facts about her relationship with the Defendants. Instead, the Plaintiffs state that “[b]oth [the First Plaintiff], and by extension [the Second Plaintiff], were hurt by” the Defendants’ conduct [emphasis added]. This framing does not address the relationship between the Defendants and the Second Plaintiff, which is the central issue in the test for establishing a new duty of care. It is not sufficient to plead that the Second Plaintiff was harmed “by extension” of the relationship between the Defendants and the First Plaintiff. A new duty of care cannot be recognized on this basis.
- [41] As a result, I find that the Second Plaintiff’s claim of negligent infliction of mental suffering has “no reasonable prospect of success” (Kakuev at para 11). The facts pleaded, even if “read generously,” fail to “disclose to the defendant the who, when, where, how and what, that give rise to the claimed liability” (Kakuev at para 11).
- [42] As the Plaintiffs’ claims have been struck, it is not necessary to consider the Defendants’ request for an extension of time to file their statement of defense.

V. Conclusion

- [43] For these reasons, I grant the Defendants’ motion to strike the Plaintiffs’ Statement of Claim. The First Plaintiff’s claim falls outside the jurisdiction of the Court (FPSLRA, s 236). The Second Plaintiff’s claim discloses no reasonable cause of action. The Defendants’ motion to strike is therefore granted pursuant to Rule 221(1)(a) of the Rules. Costs are awarded to the Defendants.

ORDER in T-2359-24

THIS COURT ORDERS that:

1. The Defendants’ motion to strike out the Statement of Claim is granted, without leave to amend.

Costs are awarded to the Defendants.

“Shirzad A.”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:

T-2359-24

STYLE OF CAUSE:

JOSEPH CRAIG AND MICHELLE CRAIG v HIS MAJESTY THE KING IN RIGHT OF CANADA AS
REPRESENTED BY FISHERIES AND OCEANS CANADA AND WILLIAM MCGILLIVRAY

PLACE OF HEARING:

by videoconference

DATE OF HEARING:

NOVEMBER 21, 2023

ORDER and reasons:

AHMED J.

DATED:

December 10, 2024

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