NOVA SCOTIA COURT OF APPEAL
Citation: ***Adams v. Cusack***, 2006 NSCA 9

Date: 20060125
Docket: CA 250804
Registry: Halifax

Between:

Harvey Adams

Appellant

v.

Mark Cusack, Jack Gallagher,
Larry Wilson, Neil Bellefontaine
and Attorney General of Canada

Respondents

Revised Decision: The text of the decision has been revised according to the erratum dated May 23, 2006.

Judges: MacDonald, C.J.N.S.; Cromwell and Fichaud, JJ.A.

Appeal Heard: November 29, 2005, in Halifax, Nova Scotia

Held: Appeal dismissed per reasons for judgment of Cromwell, J.A.; MacDonald, C.J.N.S. and Fichaud, J.A. concurring.

Counsel: Brian Casey, for the appellant
Jonathan Tarlton and Pamela Boisvert, for the respondents

Reasons for judgment:

I. INTRODUCTION AND ISSUES:

[1] Workplace disputes should generally not go to court when there is a comprehensive statutory scheme for dealing with them: **Vaughan v. Canada**, [2005] 1 S.C.R. 146. The question on appeal is whether this principle bars the appellant's court action. A judge of the Supreme Court of Nova Scotia found that it did and dismissed the appellant's action. The appellant appeals, submitting that this principle does not apply to persons like him who are excluded from collective bargaining and that the statutory scheme available to him did not afford effective redress.

[2] In my view, neither of these points is well founded. Contrary to the appellant's submission, the principle that courts should defer to a comprehensive statutory scheme for resolving workplace disputes applies to him and the employment dispute resolution processes available to the him could provide effective redress for his complaints.

[3] I would dismiss the appeal.

II. BRIEF OVERVIEW OF THE FACTS AND THE DECISION UNDER APPEAL:

[4] Captain Harvey Adams made his career in the Coast Guard. He joined in 1969 and served for more than 25 years, attaining his Master Mariner certification. His responsibilities excluded him from collective bargaining. The terms and conditions of his employment were set by Treasury Board and were regulated by a number of statutory provisions including the **Public Service Employment Act**, R.S.C. 1985, c. P-33, as am. ("**PSEA**"), the **Financial Administration Act**, R.S.C. 1985, c. F-11, as am. ("**FAA**") and the **Public Service Staff Relations Act**, R.S.C. 1985, c. P-35 ("**PSSRA**").

[5] Captain Adams claimed that management harassed and pressured him to retire. He made complaints both to his department and to the Public Service Commission, but they rejected them as unfounded. He retired under protest in April of 2001.

[6] Over two years later, in November of 2003, he sued the Crown and four managers for conspiracy to bring about his dismissal from the Coast Guard and for wrongful dismissal. He alleged, among other things, that he had been demoted by being assigned to a laid-up ship and told that if he persisted in his complaints, his pension could be jeopardized. These actions together, he claimed, constituted constructive dismissal. He sought damages for his economic loss as well as aggravated damages for the manner of his dismissal.

[7] The defendants applied successfully to strike out the statement of claim. Robertson, J. in Supreme Court chambers held that there was a comprehensive statutory scheme to address the appellant's workplace complaints and that remedies had been available to him under that scheme. Citing **Vaughan v. Canada**, the chambers judge found that "... courts should show significant deference to the comprehensive statutory scheme set up by Parliament where employment disputes arise within the federal public service..." and that "[w]hile the courts retain residual jurisdiction access to the courts should only be had in a very limited set of circumstances.": paras. 48 - 49. She stated that the "real issue" was whether the appellant "... could have received a remedy under the statutory scheme..." . She accepted that the **PSSRA** proceedings were designed to address employment issues such as disguised discipline, demotion or termination of employment.

[8] The judge concluded that "... a comprehensive independent and impartial investigation and adjudication of his complaints did occur through grievance [sic] proceedings. However, he abandoned the process, not liking the initial results. But remedies were available to him under ss. 91- 92 relating to the same set of allegations now before this court." (I take the judge's reference to the "grievance proceedings" as intended to refer to the harassment proceedings culminating in the investigations by the Public Service Commission ("PSC"), as the appellant did not invoke the grievance procedure under the **PSSRA**.) The judge found, at para. 63 of her reasons, that the substance of the statement of claim related to the same allegations that had been brought before the PSC. At para. 61, she found that remedies had been available to the appellant which included "third party arbitration" and that therefore he did "not fit within the narrow exception of a "whistle-blower" as defined by *Vaughan*."

[9] In summary, the judge appears to have concluded that both the PSC harassment process and the grievance and adjudication provisions in ss. 91- 92 of the **PSSRA** provided adequate remedies for the complaints advanced in the

appellant's action and that the court should not, therefore, exercise its residual discretion to allow the action to proceed.

[10] I should note that the respondent says the judge also based her conclusion on the principles of *res judicata* and issue estoppel. It is unclear to me whether the judge, in fact, did so and in any case, it is not necessary for me to address this aspect of the case in view of my conclusion on the other issues.

III. ISSUES:

[11] The appellant attacks the judgment at first instance on two main bases:

1. The principles of deference to the comprehensive dispute resolution process as established in **Weber v. Ontario Hydro**, [1995] 2 S.C.R. 929 and **Vaughan, supra** and as applied by the chambers judge do not apply to management, non-union employees like the appellant.

2. Alternatively, if those principles apply, the judge erred by failing to exercise her discretion to allow the action to proceed because: (a) the **PSSRA** did not provide a remedy for his complaints and, in any event, (b) he was a "whistleblower".

IV. ANALYSIS:

[12] Before turning to consider the issues, it will be helpful to set out the legal framework in which they arise.

1. General Principles:

[13] Since at least the mid 1980's, the Supreme Court of Canada has recognized that the courts should be cautious not to undermine " ... a comprehensive statutory scheme designed to govern all aspects of the relationship of the parties in a labour relations setting.": **St. Anne Nackawic Pulp & Paper v. Canadian Paper Workers Union, Local 219**, [1986] 1 S.C.R. 704 at 721. To avoid doing "violence" to such a scheme, the courts ought to show "judicial deference" by not routinely hearing cases that fall within it: **St. Anne** at 721. This hands-off policy applies not only where there are clear legislative provisions which expressly oust court jurisdiction. It also applies where the scheme as a whole makes it clear that the courts were intended to have "... but a small role if any to play in the determination of disputes covered by the statute.": **Gendron v. Supply & Services**

Union of the Public Service Alliance of Canada, Local 50057, [1990] 1 S.C.R. 1298 at 1321.

[14] **Weber v. Ontario Hydro**, **supra** is still the leading case in this area. Its holding was recently summarized in **Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)** (the "Morin" case), [2004] 2 S.C.R. 185 at para. 11:

> (i) **Weber** holds that the model that applies in a given situation depends on the governing legislation, as applied to the dispute viewed in its factual matrix. In **Weber**, the concurrent and overlapping jurisdiction approaches were ruled out because the provisions of the Ontario **Labour Relations Act**, R.S.O. 1990, c. L.2, when applied to the facts of the dispute, dictated that the labour arbitrator had exclusive jurisdiction over the dispute.
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> (ii) **Weber** does not stand for the proposition that labour arbitrators always have exclusive jurisdiction in employer-union disputes. Depending on the legislation and the nature of the dispute, other tribunals may possess overlapping jurisdiction, concurrent jurisdiction, or themselves be endowed with exclusive jurisdiction; see, for example, **Goudie v. Ottawa (City)**, [2003] 1 S.C.R. 141, 2003 SCC 14; **Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v. Canadian Pacific Ltd.**, [1996] 2 S.C.R. 495.
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> (iii) Because the nature of the dispute and the ambit of the collective agreement will vary from case to case, it is impossible to categorize the classes of case that will fall within the exclusive jurisdiction of the arbitrator.

[15] To carry out the required analysis, the court must follow two main steps. The first is to examine the dispute resolution scheme in order to determine its intended ambit and the second is to examine the dispute to determine whether it falls within that intended ambit. At this second step, the court must look at the essential character of the dispute, determined according to its full factual context,

not the legal characterization which the parties have chosen to place on it: see e.g. **Morin** at paras. 15- 20; **Vaughan** at para. 11; **Weber** at para. 49.

[16] Many of the cases have dealt with whether disputes should go to court or to a labour arbitrator acting under a collective agreement. However, the Supreme Court has made it clear that the analysis from **Weber** applies much more generally. The **Weber** analysis should be used "... whether the choice of forums is between courts and a statutorily created adjudicative body or between two statutorily created bodies.": **Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners**, [2000] 1 S.C.R. 360 at para. 39; **Vaughan v. Canada**, **supra** at para. 14.

[17] It is now settled that the **PSSRA** sets up a comprehensive workplace dispute resolution scheme to which the courts ought generally to defer: **Pleau v. Canada (Attorney General)** (1999), 181 N.S.R. (2d) 111; 1999 NSCA 159 (C.A.) leave to appeal dismissed [2000] S.C.C.A. No. 83, para. 102; **Vaughn**:, para. 2, paras. 33-41. Even though the **PSSRA** scheme, unlike **Weber**, does not contain language clear enough to oust court jurisdiction, judicial deference is nonetheless appropriate given the clear legislative intent that employment disputes should generally be resolved within the legislative dispute resolution scheme: **Pleau**, para. 33; **Vaughn**, paras. 21 and 29-41.

[18] The final general point is this. Deference may be due to a comprehensive dispute resolution scheme even if it does not address every conceivable complaint or provide access to third-party neutral adjudication. As Binnie, J. pointed out in **Vaughan**, even in the collective bargaining setting, many matters are reserved for the discretion of management and not every dispute is grievable, much less arbitrable: at para. 26.

[19] Against the background of these general principles, I will now turn to the appellant's submissions.

2. Does **Vaughan** apply to non-union employees?

[20] The appellant says that the rationale of the decisions in **Weber** and **Vaughan** does not apply to management employees, like the appellant, who are not covered by a collective agreement. The launching pad for this submission is

the reasoning of the Supreme Court in **Attorney General of Quebec v. Labrecque, et al.**, [1980] 2 S.C.R. 1057 and **Wells v. Newfoundland**, [1999] 3 S.C.R. 199. These cases affirm the principle that the employment of non-unionized public servants is essentially governed by contract. The appellant reasons that those public servants retain the right to sue on their contracts of employment and that **Weber** and **Vaughan** have not changed this.

[21] The appellant says that the courts defer to the choice the parties have made to have their disputes settled under the collective agreement because it is a reasoned choice made in good faith, it fosters collective bargaining to enforce the choices the parties have made and it permits the speedy and effective resolution of disputes. However, there is no reason, submits the appellant, to extend that rule to management employees who have not made the election to be covered by a collective agreement. Captain Adams is not similarly situated with a unionized, government employee. For the appellant, it does not logically follow that the regime which has been selected by unionized employees, supported by their trade union, is the only one available to a management employee who has not made that choice, and does not have that support.

[22] In my view, these submissions misread **Wells** and **Labrecque** and fail to recognize the effect of **Regina Police Assn.** and **Vaughan**.

[23] The Supreme Court held in **Wells** and **Labrecque** that the legal relationship between non-unionized public servants and the Crown is, in substance, one of contract. The Court recognized, however, that , "... the terms and conditions of the contract may be dictated, in whole or in part, by statute ... " which may supercede the general law of contract: per Major, J. in **Wells** at para. 30. **Wells** and **Labrecque** simply affirm that employment in the public service is not a matter of feudal servitude or monarchical patronage. They do not deal with the general principles of deference as more recently set out in **Regina Police Assn.** and **Vaughan**.

[24] The appellant relies on some appellate decisions in support of its position that federal, non-union employees are not "caught" by the **Weber**/**Vaughan** principle. In my view, these cases are either distinguishable or the aspects of them relied on by the appellant have been effectively overruled by **Regina Police Assn.** and **Vaughan**. Specifically, I reject the appellant's assertion that the principles that underlie the rule in **Weber** do not apply to management employees governed by the **PSSRA**.

[25] As the appellant says, some appellate courts have allowed court proceedings to go ahead, partly because the plaintiffs in those cases had not agreed through collective bargaining to be governed by the dispute resolution process in the **PSSRA**: **Danilov v. Canada (Atomic Energy Control Board)** (1999), 125 O.A.C. 130, **Yearwood v. Canada (Attorney General)** (2002), 216 D.L.R. (4th) 462 (BC.C.A.) and **Bell v. Canada (Transport)** (2002), 209 Nfld & PEIR 32 (N.L.S.C.C.A.). In my respectful view, that aspect of the reasoning in these cases should not be relied on.

[26] In my respectful view, the Supreme Court's decisions in **Regina Police Assn.** and **Vaughan** put an end to the view that there should be no deference unless the dispute resolution processes result from collective bargaining. As noted earlier, the Court in **Regina Police Assn.** held unanimously that the principles of **Weber** apply where the choice of forum is between a court and "a statutorily created body": at para. 39. In that case, the Court upheld the jurisdiction of the statutory process under the **Police Act** in preference to an arbitrator's jurisdiction under the collective agreement. While **Vaughan** dealt with a party covered by a collective agreement, the benefit at issue was conferred, not by the collective agreement, but by regulation. Nothing in the decision turns on any distinction between whether Mr. Vaughan was or was not subject to a collective agreement. As Binnie, J. framed the issue in the case, it was whether the **Weber** principles apply to "the statutory labour relations scheme set out in the **PSSRA**": at para. 15. The focus of the decision is on the statutory grievance scheme established under the **PSSRA** and no reference is made to the provisions of the collective agreement in this regard.

[27] My conclusion is this. A comprehensive statutory scheme for resolving workplace disputes may be entitled to judicial deference even though the employee did not agree to it through collective bargaining. I respectfully adopt the observations of Steel, J.A. in **Phillips v. Harrison**, [2001] 3 W.W.R. 589 (Man.C.A.) that the absence of a collective agreement between the parties is not determinative of whether curial deference ought to be paid to a comprehensive dispute resolution mechanism such as the **PSSRA**: at paras. 41, 61, 85 and 86. I therefore reject the appellant's first point and would hold that while provisions of a collective agreement may affect the analysis, the fundamental principles set out in **Weber** and **Vaughan** apply equally to unionized and non-unionized employees who are subject to the **PSSRA**.

2. Effective redress:

[28] The crux of the appellant's second point is that he has no access under the statutory scheme to an adequate remedy for his complaints.

[29] The essence of the appellant's complaints is that managers conspired to get him to leave the public service and achieved their objective by constructively dismissing him. The constructive dismissal allegation relies on two main acts, his reassignment to a laid up ship and Mr. Bellefontaine's alleged direction that he would be permitted to retire and draw his pension if he withdrew his complaint.

[30] While the reassignment could be grieved under s. 91, the appellant says that the grievance could not be referred to adjudication under s. 92. This is so, says the appellant, because the reassignment was not a disciplinary action resulting in suspension or a financial penalty, a termination of employment or a demotion as required by s. 92(1)(b) of the **PSSRA**. Relying on the PSSRB decision in **Rinke v. Canadian Food Inspection Agency**, [2004] P.S.S.R.B. No. 143 (Q.L.) ; (2004) CarswellNat3301 P.S.S.R.B., the appellant says that his resignation may only go to adjudication under the **PSSRA** grievance process if he shows that it was the result of disciplinary action or was extracted under the threat of disciplinary action. The unavailability of adjudication in this case, says the appellant, takes this case outside the proper scope of curial deference to the dispute resolution scheme in the **PSSRA**.

[31] The respondent, on the other hand, submits that the appellant's claim deals with allegations of disguised discipline, demotion and termination, all of which are grievable and referable to adjudication under the **PSSRA**. The respondent also relies on the provisions to address workplace harassment which the appellant invoked as providing effective redress for his complaints.

[32] **Vaughan** is of assistance with the question of what constitutes effective redress. First, it affirms that the availability of effective redress within the scheme is a relevant consideration in relation to whether the courts should entertain the action: para. 22. Second, what constitutes effective redress must be considered in light of the nature of the particular dispute. Not every conceivable complaint an employee can make must have a remedy: even in the collective bargaining sphere, many matters are left to the discretion of management: para. 26. Third, in assessing what redress the scheme provides, the court should look to the facts giving rise to the dispute, not the legal characterization which the party has

attached to it: paras. 11, 41. Fourth, effective redress does not necessarily require access to third party neutral adjudication for all manner of disputes: para. 26. Fifth, as Steel, J.A. noted in **Harrison** (in a passage approved in **Vaughan** at para. 36), the dispute resolution mechanism does not have to provide for exactly the same remedy as would a court: what is important is that the scheme provide a solution to the problem.

[33] Thus, while the capacity of the scheme to afford effective redress is a factor for consideration, whether it does must be considered in light of the facts giving rise to the particular dispute and whether the system can provide a solution to the problem. That solution need not be the same one which a court would provide and the absence of independent adjudication as the means to obtain the solution is not conclusive.

[34] Underlying the appellant's position is the view that this is a case in which access to some type of dispute resolution process independent of management is necessary in order to sustain judicial deference to that process. I agree with this view. It cannot have been Parliament's intention that, even with the safeguard of judicial review, a person with the appellant's complaints could be left only with the remedy of complaining to the harassers or those higher in the management structure who are responsible for their actions. In my view, the critical question is not whether effective redress of the appellant's complaints required that some form of third party redress capable of addressing the substance of his complaints was available. The question is whether the processes available to the appellant provided for this. The focus of the case, therefore, is not whether such a process was required, but whether it was available.

[35] It will be helpful now to look more closely at the allegations in the appellant's court action and the processes available to him. In my view, this examination shows there was effective redress available to the appellant within those procedures.

(a) The workplace harassment process:

[36] The essence of the appellant's complaints, as pleaded in his statement of claim, consists of two matters. First, he says that the defendants agreed with each other to take steps to bring about his constructive dismissal. These steps are alleged to include reassigning him to a laid up vessel and threatening that if he did not withdraw his complaints and resign, his pension could be in jeopardy. Second,

he alleges that his reassignment to a laid up ship was a demotion and that the reassignment, together with the alleged direction that he would be permitted to retire and draw his pension if he withdrew his complaint, amount to constructive dismissal. As we shall see, these allegations could be and were advanced by the appellant through the workplace harassment process.

(i) Overview of the harassment process:

[37] The appellant could complain about workplace harassment to his department or to the Public Service Commission ("PSC"). In the case of a complaint to the PSC, it may conduct an independent investigation and order whatever corrective action it considers appropriate.

[38] The regulatory basis for this process is as follows. The **PSEA** sets up the PSC: s. 3. It is empowered, among other things, to perform such duties and functions with reference to the Public Service as are assigned to it by the Governor in Council: s. 5(f). The Governor in Council has assigned to the PSC "... the duty to investigate any complaint made by the employees in the Public Service with respect to personal harassment, as that term is used in the Treasury Board policy on personal harassment at the work place ...": *Order Assigning to the Public Service Commission the Duty to Investigate Public Service Employee Complaints Respecting Personal Harassment* SI/86-194, 29 October, 1986. The PSC, by virtue of s. 7.1 of the **PSEA**, has the authority to conduct investigations on any matter within its jurisdiction. When doing so, the PSC has all the powers of a Commissioner under Part II of the **Inquiries Act**, R.S.C. 1985, c. I-11. These powers include broad access to documents and records and the power to summon witnesses: **Inquiries Act**, s. 7 and 8. (The PSC may also delegate its investigative functions to any person who, subject to any reservation the PSC may make, also has the powers of a Commissioner under Part II of the **Inquiries Act**.) In light of the investigative findings, the PSC has the power to take such corrective action as it considers appropriate or order a deputy head to do so: s. 7.5 **PSEA**.

[39] We are advised that the Treasury Board Policy on Harassment in the Workplace of December 15, 1994, was in place at the relevant times. It defined harassment as follows:

> **Harassment** means any improper behaviour by a person employed in the Public Service that is directed at, and is offensive to, any employee of the Public Service and which that person knew or ought reasonably to have known would be unwelcome. It comprises objectionable conduct, comment or display made on

> either a one-time or continuous basis that demeans, belittles, or causes personal humiliation or embarrassment to an employee.
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> It includes harassment within the meaning of the *Canadian Human Rights Act*, i.e. harassment based on the following prohibited grounds of discrimination: race, national or ethnic origin, colour, religion, age, sex, marital status, disability or conviction for an offence for which a pardon has been granted.

(ii) The appellant's complaints:

[40] The appellant submitted two harassment complaints. The first was submitted to the department. It was dealt with within the department and then reviewed by the PSC. The second was filed directly with and investigated by the PSC. Both complaints were ultimately rejected as unfounded.

(1) the first complaint:

[41] In March of 1999, the appellant submitted a formal harassment complaint to the Department of Fisheries and Oceans against the respondent, Mark Cusack, who was the Director of Operational Services for the Coast Guard. (The Department of Fisheries and Oceans is the department responsible for the relevant aspects of the Canadian Coast Guard: see Order Transferring from the Department of Transport to the Department of Fisheries and Oceans the Control and Supervision of the Canadian Coast Guard, SI/95-46, 19 April, 1995.) The complaint eventually particularized 17 actions by Mr. Cusack which were alleged to have been harassment. The allegations covered the period between May of 1997 and December of 1998 and related to a broad assortment of matters. In the main, the allegations were that Mr. Cusack had failed to respond appropriately or at all to a stream of letters and memoranda from the appellant dealing, among other things, with equipment safety, allegedly inadequate training and human resource issues.

[42] The department retained an independent third party (Harry Murphy of Facts-Probe Inc.) to investigate the facts underlying the appellant's complaint. He completed a preliminary report on which the appellant's counsel and Mr. Cusack were given the opportunity to comment. Mr. Murphy submitted his final report in November of 1999. He found that Mr. Cusack's actions did not constitute harassment under the Treasury Board Policy, although he pointed to a lack of communication, late communication and poor communication by Mr. Cusack. The department accepted the results of the investigation.

[43] The PSC agreed to review the earlier departmental investigation into the complaint against Mr. Cusack, but only to determine whether Mr. Wilson, the Regional Director, interfered or wrongly influenced its outcome. The PSC noted that its mandate did "... not include a review of [the appellant's] complaint of harassment against Mark Cusack and/or the findings of the departmental investigation.... The focus of this review is to rather determine whether or not [Mr. Wilson] interfered with the investigation process and its results and if so, ... to determine what further intervention may be required by the PSC."

[44] In September of 2000, the PSC issued a Final Investigation Case Report with respect to the departmental investigation of the complaint against Mr. Cusack and found the appellant's complaint unfounded. The report noted that the appellant and his then counsel had not challenged the choice of the investigator (that is, Mr. Murphy) or his handling of the investigation. They did not submit evidence showing that Mr. Wilson influenced or coerced the investigator. The PSC concluded that the evidence showed that Mr. Wilson had no involvement with the investigation process until after its results were established by the investigator. The PSC found that there was no evidence that Mr. Wilson interfered with the rights of the parties during the investigation. In summary, the PSC concluded as follows:

> The information presented during the course of this review does not support the allegation that Larry Wilson was biased when he proceeded to outline the corrective action to address certain flaws in his organization but not harassment following the results of a departmental investigation.
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> The PSC investigator further concludes that Larry Wilson adhered to the TB policy requirements with respect to his obligations as a manager in relation to the investigation process and the rights of the parties.
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> In view of the above, the PSC Recourse Branch has no basis to further intervene with the departmental investigation following Captain Adams' complaint of harassment against Mark Cusack.

[45] The PSC's decision was upheld on the appellant's application for judicial review to the Federal Court Trial Division: **Adams v. Canada (Attorney General)** (2002), 216 F.T.R. 190; F.C.J. No. 98 (Q.L.)(F.C.T.D.)

(2) the second complaint:

[46] In February of 2000, the appellant filed a further harassment complaint, this time with the PSC. This complaint repeated the 17 allegations against Mr. Cusack which had been the subject of the previous complaint and added allegations against Mr. Wilson (Regional Director of the Coast Guard for the Maritimes) and Mr. Bellefontaine (Regional Director of Fisheries and Oceans). I note that while the respondent, Mr. Gallagher, the Director of Operations, is not formally named as an object of this complaint, his name and alleged actions figure prominently in it.

[47] In relation to Mr. Wilson, the complaint made two allegations, the first of which is most relevant here. The complaint alleged that, at Mr. Wilson's direction, the appellant had been re-assigned to a laid up vessel, removed completely from active service and required to undergo medical and psychiatric examinations. It claimed that there had been no factual basis for these actions and that they had been taken with malice towards the appellant as a result of his complaints against Mr. Cusack.

[48] In relation to Mr. Bellefontaine, the complaint also made two main allegations. The first was that he had engaged in a joint effort with Mr. Wilson with respect to allegedly inappropriate administrative actions. The second allegation against Mr. Bellefontaine relates to his coercion of the appellant to retire. The appellant claimed that at a meeting in December of 1999, Mr. Bellefontaine attempted by "extortion" to force the appellant to resign from the Coast Guard by saying that if he remained, investigations would be undertaken into his conduct which might place both his employment and his pension in jeopardy.

[49] With respect to the complaint against Mr. Wilson, the PSC held five days of fact finding meetings in March and April of 2001. Witnesses, including Mr. Gallagher, testified. (As noted, the appellant resigned on April 5, 2001, before the hearings concluded.) Most pertinent here is the PSC's conclusion respecting the allegation that Mr. Wilson improperly removed the appellant from active service by assigning him to a laid up ship and requiring him to undergo medical and psychiatric examinations on the basis of vague and unsubstantiated allegations. At the risk of oversimplification, management's position was that it had responded appropriately to concerns raised by various persons about Captain Adams' fitness to command. Captain Adams' position was that management had acted precipitously on the basis of unsubstantiated and largely uninvestigated allegations.

[50] The PSC noted that the appellant's allegation against Mr. Wilson related to his alleged abuse of his authority. The use of management authority constitutes

harassment, the PSC said, if it is improper use of authority which results in adverse consequences for the victim. The PSC concluded that while the decision to reassign the appellant to a laid up vessel had adverse consequences for him, Mr. Wilson had not improperly used his management authority in making that reassignment:

> 8. ... The allegations put forward by various personnel who had sailed under Captain Adams' command related to very serious safety issues as well as issues related to the proper management of a Coast Guard vessel. Captain Adams agreed with this at the fact finding meeting. These were not isolated allegations. They came from various ships' officers who had sailed with Captain Adams at different times over many years. ... It was not enough to prove the allegations, particularly given that Captain Adams had not presented his side of the story. But it was sufficient to put Captain Adams's competence as a Commanding Officer in question and to justify looking into the concerns further. Under these circumstances, Mr. Wilson would have been derelict in his managerial duties if he had chosen to reinstate Captain Adams back in command of an active vessel.
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> 9. I thus do not find the decision to temporarily remove the complainant from command of active vessels to have been improper, even though he had not yet responded to the allegations. To permit Captain Adams to command a vessel when there remained a possibility that the concerns were valid would have placed the complainant, his crew and his vessel at unacceptable risk.
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> 10. ... Therefore, although the decisions themselves had a serious impact on Captain Adams' career and credibility, they were not an improper exercise of authority by Mr. Wilson; consequently, the Treasury Board's *Harassment in the Workplace Policy* has not been contravened.
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> (Emphasis added)

[51] With respect to the complaint against Mr. Bellefontaine, the PSC held two days of fact finding meetings in November of 2001 and then issued a report, in March of 2002, concluding that the allegations were unfounded. Most pertinent for present purposes is the finding in relation to the allegation that Mr. Bellefontaine attempted to force the appellant to retire from the Public Service. Simply put, the finding was that there had been no such attempt.

> 4. I am not persuaded that Mr. Bellefontaine tried to coerce Captain Adams to retire or resign. I have noted in particular that, according to the information provided by Captain Adams himself, it was Mr. Brunt [Captain Adams' then counsel], not Mr. Bellefontaine, who raised the

> issue of the complainant's retirement first during the December 22, 1999, meeting. Captain Adams stated that he tried to take advantage of this in order to obtain the best departure deal possible. This is evidenced by Mr. Brunt's inquiry early in the meeting as to whether any additional benefits, such as a cashout, might be available above and beyond the complainant's normal entitlements were he to retire. I cannot reconcile the allegation that Mr. Bellefontaine tried to force the complainant through "extortion" to retire with the evidence that the complainant was seriously considering the retirement option when he went into the meeting and brought the matter up first.
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> 5. Mr. Bellefontaine's unrefuted evidence at the fact finding meeting was that he was asked what would happen if the investigation into the ten allegations was carried through to completion. Captain Adams' evidence that the respondent advised that the allegations were serious was also unrefuted. The evidence suggests that Captain Adams fully understood the seriousness of the allegations before he went into the meeting. Mr. Bellefontaine's reference to their seriousness was thus nothing more than a statement of fact already known by the complainant. The complainant might have felt threatened, depending on the context and the manner in which the respondent expressed it. However, Mr. Bellefontaine and the complainant agreed that the meeting ended cordially. It is unlikely that the meeting would have ended cordially if Mr. Bellefontaine had outlined the consequences of a potential investigation in the manner and context alleged by the complainant.
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> . . .
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> 10. There is no question that Captain Adams' career was threatened by the circumstances which existed at the time of his meeting with the respondent. I accept as well that Captain Adams was not satisfied with any of the options put forward by Mr. Bellefontaine during the meeting of December 22, 1999, and was disappointed that he would not consider an arrangement which would have permitted him to retire from the Public Service with a financial package which was larger than his regular entitlement. Nevertheless, the information obtained in this investigation does not demonstrate that Mr. Bellefontaine tried to coerce the complainant into retiring from the Public Service.

[52] The appellant did not seek judicial review of either of these reports from the PSC.

(b) The Grievance Procedure:

[53] The **PSSRA** provides for a grievance procedure and, in some cases, referral to adjudication. The appellant did not avail himself of whatever rights he had under these provisions. It will helpful to describe the provisions now and return to their relevance to the appellant's situation later.

[54] It is common ground that the **PSSRA** applied to Captain Adams' employment in the Coast Guard. The **PSSRA** applies to all portions of the Public Service, a term which is defined to mean "the several positions in or under any department or other portion of the public service of Canada specified in Schedule I": ss. 2(1), 3. Schedule I to the **PSSRA** includes the departments named in Schedule I to the **FAA**, which in turn refers to the Department of Fisheries and Oceans, the department responsible for the Coast Guard.

[55] Section 91 of the **PSSRA** sets out the right to grieve. This right is available to "any employee", a term which, by virtue of the definition of "grievance" in s. 2(1) of the **PSSRA**, includes a person like the appellant who is excluded from collective bargaining. The scope of the grievance procedure is very broad; it is not limited to matters relating to the terms or conditions of employment, but extends to situations in which "... any employee feels aggrieved ... as a result of any occurrence or matter affecting the terms and conditions of employment of the employee ... in respect of which no administrative procedure for redress is provided in or under and Act of Parliament ...": s. 91(1).

[56] The sorts of grievances that may be referred to adjudication, however, are more restricted. In the appellant's case, following presentation of a grievance up to and including the final level in the process, only those matters which constitute "disciplinary action resulting in suspension or financial penalty or termination of employment or demotion pursuant to para. 11(2)(f) or (g) of the Financial Administration Act..." may be referred to adjudication: s. 92 (1)(b). Subsections 11(2)(f) and (g) of the **FAA** provide that the Treasury Board may establish standards of discipline, prescribe financial and other penalties including termination of employment and provide for termination or demotion for reasons other than breaches of discipline and misconduct. The subsections provide:

> 11(2) Subject to the provisions of any enactment respecting the powers and functions of a separate employer but notwithstanding any other provision contained in any enactment, the Treasury Board may, in the exercise of its responsibilities in relation to personnel management including its responsibilities

> in relation to employer and employee relations in the public service, and without limiting the generality of sections 7 to 10,
>
> ...
>
> (f) establish standards of discipline in the public service and prescribe the financial and other penalties, including termination of employment and suspension, that may be applied for breaches of discipline or misconduct, and the circumstances and manner in which and the authority by which or whom those penalties may be applied or may be varied or rescinded in whole or in part;
>
> (g) provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, for reasons other than breaches of discipline or misconduct, of persons employed in the public service, and establishing the circumstances and manner in which and the authority by which or by whom those measures may be taken or may be varied in whole or in part.

(c) The facts underpinning the harassment complaint and the court action:

[57] It will helpful here to note the similarities between the facts pleaded in the statement of claim and those advanced by the appellant in his harassment complaints. Briefly put, the action repackages the alleged acts of workplace harassment set out in the appellant's 1999 and 2000 complaints: all of the factual allegations in the statement of claim had been asserted in them. The reassignment to a laid up ship and Mr. Bellefontaine's "extortion" in late 1999, as described in the 2000 harassment complaint, reappear in the statement of claim as alleged constructive dismissal. Most of the other alleged acts of harassment, from both the 1999 and 2000 harassment complaints, are transformed by the statement of claim into an allegation of a conspiracy among Messrs. Cusack, Gallagher, Wilson and Bellefontaine to bring about the appellant's dismissal from the Coast Guard. In the table below, I summarize the allegations in the statement of claim and cross-reference them to the allegations made in the earlier harassment complaints.

Statement of claim	Harassment Complaints
paragraphs 1 - 8 are introductory in nature	

paragraphs 9 - 17 relate to the various alleged failures by Mr. Cusack to respond appropriately or at all to the appellant's various memos, etc. and to Mr. Cusack's order that the appellant proceed immediately on annual leave.	1999 complaint, paragraphs 1 - 4, 6 - 11 and 14, 15
paragraphs 18 - 21 deal with meetings between the appellant, Bellefontaine, Wilson and Cusack leading to the appellant's formal complaint of harassment against Cusack in March of 1999.	
paragraphs 22 - 30 deal with the reassignment to a laid up vessel, the allegations of misconduct against the appellant and the medical and psychiatric examinations.	These allegations are substantially the same as found in the 2000 complaint against Mr. Wilson, item 1 and against Mr. Bellefontaine, item 1
paragraphs 31 - 33 relate to the alleged "extortion" by Mr. Bellefontaine at a December 22, 1999 meeting	These allegations are substantially the same as found in the 2000 complaint against Mr. Bellefontaine, item 2.
paragraphs 34, 35, and 27 allege that the reassignment to the laid up vessel and the "extortion" constituted constructive dismissal.	These alleged acts were both the subject of the 2000 harassment complaint against Messrs. Wilson and Bellefontaine.
paragraph 36(a) - (h) summarize the various acts alleged to be in furtherance of the conspiracy	All of these acts were alleged in the 1999 and 2000 complaint.
paragraphs 38 - 41 relate to remedies	

(d) Did the statutory provisions afford effective redress?

[58] This leads me back to the competing submissions of the appellant and the respondent about whether the scheme afforded the appellant effective redress in this case.

[59] I have already described the substance of the appellant's allegations in his statement of claim. He says, in essence, that the defendants agreed among themselves to take steps to bring about his constructive dismissal from the Coast Guard and, by his assignment to the laid up vessel (which he claims is a demotion) and coercing his resignation, succeeded in achieving their objective. In short, he claims that managers agreed to harass him out of the Coast Guard and carried out their agreement.

[60] Under the harassment policy, which I have discussed earlier, the appellant had access to the complaint process to the PSC. In the case of the second complaint, which dealt with both the assignment to the laid up vessel and the alleged coercion, it resulted in fact finding hearings occupying several days before an independent investigator appointed by the PSC. As noted earlier, the PSC has a broad remedial authority to take or order a deputy head to take such corrective action as it considers appropriate: **PSEA**, s. 7.5. There is no suggestion that the PSC's investigation lacked independence or failed to provide appropriate opportunities to the appellant to provide evidence and challenge the evidence which he contested.

[61] The PSC considered whether, in reassigning the appellant to a laid up ship, Messrs. Wilson and Bellefontaine had improperly used their management authority resulting in adverse consequences to the appellant. While not clothed in the language of conspiracy, the essence of the appellant's complaint regarding his reassignment to the laid up vessel was considered on its merits by the PSC in a detailed fact finding process conducted by a person independent of management and in a context in which the PSC had the power to take or order taken such corrective actions as it considered appropriate. The added safeguard of judicial review was available (although not pursued) with respect to the results of that process.

[62] Turning to the appellant's claim that his resignation was coerced, that factual allegation was the centrepiece of his complaint to the PSC against Mr. Bellefontaine. Once again, the allegation was addressed by the PSC process.

[63] In my view, the PSC process afforded effective redress for the appellant's complaints as advanced in his law suit. The factual substance of his complaints fell within the authority of the PSC. It provided a fact finding forum which was independent of the management structure whose decisions were being scrutinized. The process provided the opportunity to the appellant to adduce oral evidence and

subject the opposing evidence to testing through questioning of witnesses. The PSC had extensive remedial powers. In short, the central contentions now advanced in the appellant's court action could have been, and in fact were, carefully considered and flatly rejected by the PSC process available to the appellant through his statutory workplace dispute resolution process. Had the PSC concluded in the appellant's favour, it had a broad power to require corrective action.

[64] During oral argument, much was made of the question as to whether the appellant's claim of common law "constructive dismissal" could be adjudicated under s. 92 of the **PSSRA**. The gist of the appellant's argument on the point was that the adjudication process under the **PSSRA** does not capture all of the situations which at common law would be recognized as constructive dismissal.

[65] The appellant notes, in my view correctly, that the common law notion of constructive dismissal is concerned with any act by the employer which demonstrates an intention no longer to be bound by the contract of employment: see for example, **Farber v. Royal Trust Co.**, [1997] 1 S.C.R. 846 at para. 33; **Sobeys Inc. v. Mills** (2000), 186 N.S.R. (2d) 254; 2000 NSCA 91 at para. 18; Randall Scott Echlin (now Echlin, J.) and Jennifer M. Fantini, *Quitting for Good Reason — The Law of Constructive Dismissal in Canada* (Aurora: Canada Law Book Ltd.,2001) at 15; Geoffrey England, Roderick Wood and Innis Christie, *Employment Law in Canada*, 4th ed., looseleaf updated to October 2005, vol. 2 (Markham: LexisNexis Canada, 2005) at para. 13.24. However, it seems that under the **PSSRA**, the appellant's resignation could only be found to be adjudicable if it had been involuntary and there was a disciplinary element in the sense that it had been the result of actual or threatened disciplinary action: **Rinke**. The appellant says, therefore, that not all aspects of his common law claim for constructive dismissal are adjudicable under the **PSSRA** and that as a result, it fails to provide effective redress for his complaint.

[66] With respect, this submission misses the point. In my view, it is not necessary in order to justify curial deference that the scheme under the **PSSRA** provides the same remedies as the common law for "constructive dismissal". For that matter, it be may that the legal concept of constructive dismissal itself does not fit any more comfortably into the scheme set up by the **PSSRA** than it does into the collective bargaining employment relationship: see, for example, Bryan Williams and Maria Giardini, "*Constructive Dismissal at Arbitration*", (1992) Lab. Arbit. Y.B. 113 at 125; Donald J.M. Brown and David Beatty, *Canadian Labour*

Arbitration, 3rd ed., looseleaf updated to November 2005 (Aurora: Canada Law Book, 2005) at para. 7:1100. It is not necessary to resolve that broader question here. The real issue is whether the processes available to the appellant within the public service provided an answer to the problem he raised. In my view, they did.

[67] To the extent that he complained of the abuse of management's power in his reassignment or in coercing his resignation, the PSC process provided effective redress. To the extent that his resignation was involuntary and obtained through the threat of disciplinary action, it could according to **Rinke** (and I would note, many other decisions of both the PSSRB and the Federal Court), be referred to adjudication under s. 92 of the **PSSRA**. In sum, the factual matters at the root of all the appellant's complaints could be independently assessed and appropriately redressed within the processes available to him under the **PSEA** and the **PSSRA**.

[68] The appellant says that he falls within the whistleblower exception outlined in **Vaughan**. In my view, the whistleblower cases simply provide examples of situations in which a grievance process internal to management does not provide effective redress. As Binnie, J. put it in **Vaughan**, the courts are understandably reluctant to say that the whistleblowers "... only recourse [is] to grieve in a procedure internal to the very department they blew the whistle on, with the final decision resting in the hands of the person ultimately responsible for the running of the department under attack ...": para. 20. As in my view the appellant had access to processes that were independent of management to address the substance of his complaints, the whistleblower exception does not apply to him even if he was a whistleblower.

[69] The appellant finally submits that none of the grounds supporting deference referred in **Vaughan** apply here and that the chambers judge, therefore, erred in refusing to let the court action proceed. The crux of this point, however, is the one which I have already addressed. The appellant argues that there was no independent recourse available and, therefore, deference was not justified. For the reasons I have already set out, I disagree with the premise of the appellant's argument. In my view, there were available to the appellant processes independent of management which could provide a solution to the problems the appellant claimed to have. That being the case, the foundation for the exercise of the court's residual discretion as claimed by the appellant does not exist.

V. DISPOSITION

[70] I would dismiss the appeal with costs to be taxed if demanded.

Cromwell, J.A.

Concurred in:
MacDonald, C.J.N.S.
Fichaud, J.A.