IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Adams v. Cusack, 2005 NSSC 186

Date: 20050630
Docket: SH No. 211368
Registry: Halifax

Between:

Harvey Adams

Plaintiff

v.

Mark Cusack, Jack Gallagher, Larry Wilson, Neil Bellefontaine

-and-

Attorney General of Canada

Defendants

Judge:	The Honourable Justice M. Heather Robertson
Heard:	September 23, 2004, in Halifax, Nova Scotia
Final Written Submissions:	April 8, 2005
Written Decision:	June 30, 2005
Revised Decision:	The text of the original judgement has been corrected incorporating the text of the erratum (released June 30, 2005).
Counsel:	Brian Casey, for the plaintiff Jonathan Tarlton, for the defendants

Robertson, J.:

[1] The plaintiff commenced an action against the defendants claiming that the defendants conspired to bring about his dismissal from the Canadian Coast Guard and for wrongful dismissal from the Canadian Coast Guard. The plaintiff is a Master Mariner and was employed with the Canadian Coast Guard from 1969 to 2001.

[2] The defendants now apply to the court to strike out the statement of claim on the grounds that it does not disclose a reasonable cause of action, and is otherwise an abuse of process of the court and is an attempt to re-litigate issues which have been finally decided by an adjudicative decision maker.

[3] The defendants submit that the internal mechanisms provided pursuant to the *Public Service Employment Act* constitute a complete code governing workplace relations between the Federal Crown and its employees and that these employment related issues have already been adjudicated or that the plaintiff failed to avail himself of judicial review in the Federal Court of Canada.

BACKGROUND:

[4] Harvey Adams had served as the captain of Coast Guard vessels. His employment is governed by the *Public Service Employment Act*, the *Financial Administration Act* and the *Public Service Staff Relations Act.* As a ship's captain his responsibilities included responding on behalf of his employer to grievances of the ship's crew at the first step of the departmental grievance procedure. He was therefore excluded from collective bargaining under the terms of the *Public Service Staff Relations Act.* His terms and conditions of employment were set by the Federal Treasury Board. However, he retained the right to grieve certain conditions of his employment including matters relating to discipline, termination or demotion.

[5] Mr. Adams made personal complaints of harassment under the *Treasury Board Harassment in the Workplace Policy.* The complaints were dealt with by both the department, i.e. the Department of Fisheries and Oceans in its internal investigations and later with the involvement of the Public Service Commission ("PSC") who acts as an overseer of the *Public Service Employment Act.*

[6] The PSC may respond to a complaint in two ways. It may direct one of its officers to conduct an investigation of a federal department, in which case, full cooperation by the subject department is required. The PSC can also hold a hearing into a complaint under the Policy, and has the powers under Part II of the *Inquiries Act*, including the summonsing of witnesses to give sworn evidence. If it determines that a complaint is founded, the PSC has the power to take such corrective action as it deems necessary.

[7] Adams' complaints were handled in both these ways.

[8] The affidavit of Laura Wilson of Justice Canada dated May 19, 2004, is properly before the court and outlines his various employment related complaints and the forum in which the complaints were heard.

[9] He had first filed a harassment complaint lodged with Larry Wilson, the Regional Director Canadian Coast Guard against the defendant Mark Cusack, Director of Coast Guard Operations who had required that he take annual leave to reduce his banked leave. This complaint is shown in Exhibit "B" of the affidavit. The plaintiff alleged that this was an unprecedented request and followed many and various written communications he had with Mr. Cusack that were ignored or remained unanswered. These 17 allegations are contained in Exhibit "D" of the affidavit. Many of these communications from Adams to Cusack focussed on Adams' concerns about ship's safety.

[10] The plaintiff describes these communications as "whistle blowing." The complaint was investigated internally by the department who engaged a security investigation service Facts-Probe Incorporated, chosen by the employer. Mr. Murphy of that company investigated and wrote a report making non-binding recommendations to the employer. In his report he stated:

> ...reviewing and analyzing this entire set of circumstances, it has become obvious that there is a serious weakness in the communication mechanism used by Mr. Cusack in responding to the concerns of Captain Adams and the other Commanding Officers. In so many words, Mr. Cusack has admitted this to be the case.

[11] However, Mr. Murphy had concluded that this failure to communicate was not "a deliberate attempt on his part to ignore, belittle or demean" and therefore did

not constitute harassment under Treasury Board guidelines. This investigative process did not allow the opportunity for Adams to challenge any statements made by others to Murphy. It was merely an investigation and a reporting process meant to assist management in resolving employment issues. The defendant Larry Wilson, Regional Director of the Coast Guard accepted Mr. Murphy's report as a final determination of the complaint against Cusack.

[12] On February 2, 2000, Adams filed a formal complaint with the Public Service Commission alleging harassment by the defendants, Cusack, Wilson and Neil Bellefontaine. The complaint is contained in Exhibit "H" of the affidavit.

[13] The plaintiff Adams asked for a formal hearing; first, to review Wilson's acceptance of the investigative report with respect to the actions of the defendant Cusack relating to the initial 17 allegations against him; second, he asked for a formal hearing to deal with his complaints of harassment against the defendant Wilson. This complaint alleged harassment because of Wilson's (1) potential conflict of interest in accepting the Murphy/Facts-Probe Report, (2) his re-assignment of Adams to the laid up vessel the Edward Cornwallis and (3) his requirement that Adams have medical and psychiatric examinations. This later issue arose after unspecified complaints were allegedly made against Adams by members of his crew. The complaints were subject of an informal internal review conducted by Jack Gallagher, Mr. Cusack's replacement. Third, Adams asked for a hearing to deal with his complaints of harassment against the defendant Neil Bellefontaine, Regional Director General of Fisheries and Oceans for his part in supporting Wilson's actions against Adams and for allegedly forcing Adams into retirement by threat of a personal investigation into Adams' own conduct.

[14] In April 2000, the PSC responded to Mr. Adams' request for formal hearings against these three men. With respect to the first, Wilson's acceptance of the internal investigative report dealing with the 17 allegations against Cusack, the PSC declined to hold a hearing and agreed only to a review of the Murphy Facts-Probe investigation. They wrote:

> In reviewing the complaint, I noted that the department has investigation Captain Adams' allegations of harassment and abuse of authority against Mr. Cusack. When the department has conducted its investigation, this Branch does not proceed with a new investigation. Rather, it may review the departmental investigation to ensure that the process has been fair, thorough and without bias and determine what, if any, further intervention is required. However, we will

> only initiate such a review if one of the parties has demonstrated reasonable grounds to do so.
>
> I would like to inform you that the Recourse Branch has accepted to review the departmental harassment investigation conducted into Mr. Adams' allegations of harassment and abuse of authority against Mr. Mark Cusack. The review will be based on the allegation that Mr. Wilson may have been in a conflict situation to analyse the facts gathered during the investigation and to make a final determination given recent events and circumstances involving himself. We have informed the department of our decision.

[15] This response is found in Exhibits "I" and "J" of the affidavit. Gerald LeBlanc of the Recourse Branch of the PSC, conducted a "paper review" of the earlier departmental investigation. He outlined the purpose of his review:

> In the case at hand, the PSC investigation is limited to determine whether or not an absence of bias prevailed during the departmental investigation process or alternately whether or not Larry Wilson interfered or wrongly influenced the outcome of the investigation. As such, the mandate of this investigation does not include a review of Captain Harvey Adams' complaint of harassment against Mark Cusack and/or the findings of the departmental investigation which concluded that there existed a lack of communication but not harassment. The focus of this review is to rather determine whether or not Larry Wilson interfered with the investigation process and its results and if so, to determine what further intervention may be required by the PSC.

[16] He concluded:

> 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.
>
> 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.

[17] The plaintiff sought a judicial review of Mr. LeBlanc's decision in the Federal Court Trial Division. His appeal was dismissed. This is found in Exhibits "J" and "K" of the affidavit. He did not appeal further. In his decision dated January 24, 2002, Justice MacKay concluded:

> In my opinion, in his decision the PSC officer did not err in law by failing to consider the evidence before him or by considering matters that ought to have been ignored. His conclusion on the facts of the case, that the complaint of Captain Adams of bias or of conflict of interest on the part of Mr. Wilson was not established, cannot be characterized as patently unreasonable. Thus there is no basis on which the Court should intervene.

[18] The harassment complaint against the defendant Wilson was investigated by PSC Recourse Officer Adrian Rys. Mr. Rys conducted a hearing into the matters involving the defendants Wilson and Bellefontaine. His 41 page report is found as Exhibit "M" to the affidavit. He states the complaints to be investigated as follows:

> 1. Mr. Wilson failed to inform the complainant of a significant and potential problem which existed in relation to one of his crew members.
>
> 2. Mr. Wilson improperly accused him of not complying with the Treasury Board's *Harassment in the Workplace Policy* when he was aware of an alleged incident of sexual harassment between two of his crew members, and
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> 3. Mr. Wilson improperly removed the complainant from active service as a Captain aboard Canadian Coast Guard (CCG) vessels and required him to undergo medical and psychiatric examinations on the basis of vague and unsubstantiated allegations against him.

[19] Although Mr. Rys determined that the allegation of harassment by Mr. Wilson was unfounded he made the following observation at p. 37-38 of his report:

> I am persuaded that the decision to remove Captain Adams from operational command of CCG ships, even though it was temporary, pending subsequent findings and decisions, had a severe impact on his reputation within the CCG, endangered his job as Commanding Officer, and adversely influenced his career. So many persons had been interviewed by Mr Gallagher that everyone in the Maritimes Region of the CCG would have known about the complaints and that Captain Adams' suitability as a Commanding Officer was in question, particularly once they realized that he was no longer being placed in command of active

> vessels. Even if he was exonerated in a subsequent investigation, it would have been very difficult for Captain Adams to have ever returned to the job he loved with the assurance that he would have the confidence and respect of his crew and thus be capable of functioning effectively. It follows that one of the conditions required for an allegation of abuse of authority to constitute harassment in violation of the Treasury Board Police has been met. I now turn to whether the action itself was an improper use of Mr Wilson's power and authority, the other condition which must be met to demonstrate a violation of the harassment policy.
>
> It is quite clear that the concerns or "allegations" described by several persons interviewed by Mr Gallagher had not been fully investigated and consequently were not substantiated at the time that Mr Wilson reviewed Mr Gallagher's report and chose to continue the complainant's temporary removal from his functions as Commanding Officer. Captain Adams had not at the time been given the opportunity to respond to the allegations. They had also not been fully verified with other crew members who may have been present when the incidents took place. What Mr Gallagher had done was to gather preliminary information in order to determine whether there were sufficient grounds for the department to investigate the complaints further and establish whether they had any validity. Mr Gallagher did not appear to understand this, as he issued a report in which he outlined "findings" and reached a conclusion that Captain Adams no longer had the ability to command a CCG ship at the time.

[20] The harassment complaint against the defendant Neil Bellefontaine was also investigated by Mr. Rys, in a similar manner and that report is found at Exhibit "N" to the affidavit.

[21] The allegations investigated by Mr. Rys were stated by him as follows:

> Captain Harvey Adams alleged that he was harassed by Neil Bellefontaine, Regional Director General, Maritimes Region, Department of Fisheries and Oceans (DFO), in contravention of the Treasury Board's Harassment in the Workplace Policy by:
>
> 1. Participating in and approving inappropriate administrative actions taken against the complainant by Mr. J. Larry Wilson, Regional Director, Canadian Coast Guard (CCG) which resulted in Captain Adams being removed from active service as a Commanding Officer; and
>
> 2. Attempting to force Captain Adams to retire from the Public Service.

[22] In his 28 page report, Mr. Rys found these complaints to be unfounded.

[23] Mr. Rys noted that he had received conflicting reports about what took place at a meeting between the plaintiff Adams, his solicitor Anthony Brunt and Mr. Bellefontaine, held on December 22, 1999. He states at p. 26 of his report:

> 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, not Mr. Bellefontaine, who raised the issue of the complainant's retirement first during the December 22, 1999, meeting. Captain Adams stated that he believed that Mr. Bellefontaine would use the meeting to ask for his resignation. It is clear 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.

[24] The "extortion" relates to complaints made by unspecified crew members against Adams that could have been the subject of a further investigation. Mr. Rys stated at p. 27 of his report:

> 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.

[25] Again Mr. Rys' investigator's reports were directed to the employer, for its internal use but could have been appealed by the plaintiff Adams. He chose not to do so.

[26] *Civil Procedure Rule*:

> 14.25. (1) The court may at any stage of a proceeding order any pleading, affidavit or statement of facts, or anything therein, to be struck out or amended on the ground that,

> (a) it discloses no reasonable cause of action or defence;
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> (b) it is false, scandalous, frivolous or vexatious;
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> (c) it may prejudice, embarrass or delay the fair trial of the proceeding;
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> (d) it is otherwise an abuse of the process of the court;
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> and may order the proceeding to be stayed or dismissed or judgment to be entered accordingly.
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> (2) Unless the court otherwise orders, no evidence shall be admissible by affidavit or otherwise on an application under paragraph (1)(a).

[27] Under *Civil Procedure Rule* 14.25(1)(b) or (d), the first issue that arises is whether the statement of claim discloses a cause of action. In arriving at this decision, the court must assume that the facts as alleged in the claim are true.

> Whether a statement of claim discloses a cause of action is ordinarily to be determined solely by perusing its contents and any relevant statutes. Affidavit evidence may be admitted at the discretion of the chambers judge but should not relate to proof or disproof of the facts alleged in the claim. On an application to dismiss it is assumed that the facts alleged in the statement of claim can be proved. The question is whether a claim in law is shown, assuming the facts to be true.
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> *Teale v. United Church* (1979), 34 N.S.R. (2d) 313 (A.D.) at p. 315.

[28] Assuming the facts to be true, the test of "plain and obvious" must be met.

> While this court has had a somewhat limited opportunity to consider how the rules regarding the striking out of a statement of claim are to be applied, it has nonetheless consistently upheld the 'plain and obvious' test. Justice Estey, speaking for the Court in *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735, stated at p. 740:
>
>> As I have said, all the facts pleaded in the statement of claim must be deemed to have been proven. On a motion such as this a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases and where the court is satisfied that "the case is beyond doubt" . . .

Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959 at p. 979.

[29] In this case, the plaintiff's claim is for wrongful dismissal and for conspiracy of the defendants to bring about his dismissal.

[30] In para. 22 of the statement of claim the plaintiff alleges:

> Unfortunately, the result of Captain Adams' complaint was that he was regarded as a trouble maker and whistle blower, and Cusack, Wilson and Bellefontaine then took steps to remove him from his position as Commanding Officer and to force his resignation from the Coast Guard.

[31] In paras. 36-37 the plaintiff alleges:

> The plaintiff says that the defendants agreed, the one with the other of them, to take steps to bring about Captain Adams' constructive dismissal from the Coast Guard, because of the complaints Adams had made about the management of the Coast Guard (including Cusack and Wilson). Acts in furtherance of the conspiracy include:
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> a) Adams' forced taking of annual leave without warning or advance notice;
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> b) Adams' re-assignment to a laid up ship which took place before the first complaint was received;
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> c) the release of information concerning Adams' re-assignment before he was advised of the decision himself;
>
> d) the soliciting of complaints against him;
>
> e) the arrival of "findings" without interviewing Captain Adams, or any of the other 800 crew members who had served under him;
>
> f) the direction that if Captain Adams withdrew his complaints he would be "permitted" to resign without jeopardizing his pension;
>
> g) the failure to investigate in a timely or effective way the complaints Captain Adams had made;
>
> h) the repeated requirement that Captain Adams submit to seven medical examinations, without any cause or appropriate cause.

> The plaintiff says that his re-assignment to a laid up ship was a demotion, and publicly demonstrated to crew members that Adams was being stripped of his responsibilities. The reassignment, the direction that he would be permitted to retire and draw his pension if he withdrew his complaint together amount to the constructive dismissal of the plaintiff.

[32] A demotion can in law constitute a constructive dismissal and that a forced resignation can also amount to a constructive dismissal. *Chambers v. Axia Netmedia Corp* (2004), 220 N.S.R. (2d) 338 (S.C.), *Dopperon v. Fort MacMurray School District* (Bd of Reference) (1988), 92 A.R. 19, per Justice Matheson.

[33] With respect to the tort of civil conspiracy in the case of *Canada Cement LaFarge v. BC Lightweight Aggregate*, [1983] 1 S.C.R. 452, Justice Estey, defined conspiracy as follows:

> 33. Although the law concerning the scope of the tort of conspiracy is far from clear, I am of the opinion that whereas the law of tort does not permit an action against an individual defendant who has caused injury to the plaintiff, the law of torts does recognize a claim against them in combination as the tort of conspiracy if:
>
> (1) Whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,
>
> (2) Where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.

[34] The plaintiff submits that they are relying on the first branch of this test that

(1) defendants acting in combination;

(2) for the predominant purpose of injuring the plaintiff.

[35] The plaintiff submits that the statement of claim pleads a number of actions by the defendants, the predominant purpose of which was to bring about Adams' dismissal from the Coast Guard and that apart from the issue created by the previous proceedings, the statement of claim properly discloses a cause of action, both in wrongful dismissal and in civil conspiracy.

[36] Issues before the court:

1. Does the court have the jurisdiction to hear this action?

2. If the court decides that it does have jurisdiction, should it use its discretion and decline to hear the claim?

3. Are the matters before the court the subject of *Res judicata* and estoppel?

4. Can the statement of claim be characterized as frivolous, vexatious or an abuse of process?

Jurisdiction:

[37] The principle of exclusive jurisdiction is found in a decision of the Supreme Court of Canada in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 at paras. 50-51:

> This principle precludes actions in the courts where a collective agreement governs the relationship between the parties:
>
> This approach does not preclude all actions in the courts between employer and employee; only disputes which expressly or inferentially arise out of the collective agreement are foreclosed to the courts *(Weber, supra* at para. 54)

[38] Mr. Adams is not a party to a collective agreement, although the defendants submit that he is a part of a legislative scheme that can deal exclusively with employment related matters including his dismissal or resignation from the public service, as distinct from proceedings taken by individuals in the private sector.

[39] The defendant relies upon the operation of the *Public Service Employment Act*, R.S.C. 1985, c. P-33 as amended, and in particular ss. 24 and 26 which deal with tenure and resignation, as well as s. 7.1 which deals with the authority of the PSC to conduct investigations on any matter within its jurisdiction and s. 7.5 which provides that upon completion of an investigation the PSC may take, or order a deputy head of a department to take such corrective action as the Commission considers appropriate. The defendant says the intent of Parliament was to establish

a summary procedure for investigations to be conducted by adjudicators with expertise in the field to whom the courts owe substantial deference. The relevant sections are:

> **7.1** The Commission may conduct investigations and audits on any matter within its jurisdiction.
>
> **7.5** Subject to section 34.5, the Commission may, on the basis of any investigation, report or audit under this Act, take, or order a deputy head to take, such corrective action as the Commission considers appropriate.
>
> **24.** The tenure of office of an employee is during pleasure, subject to this Act and any other Act and the regulations thereunder and, unless some other period of employment is specified, for an indeterminate period. R.S. c. P-32, s. 24.
>
> **26.** An employee may resign from the Public Service by giving to the deputy head notice in writing of the intention to resign and the employee ceases to be an employee on the day as of which the deputy head accepts in writing the resignation. R.S., c. P-32, s. 26.

[40] The defendant also relies on *The Financial Administration Act*, R.S.C. 1985, c. F-11 as amended, and in particular para. 11(2)(f) and (g) dealing with disciplinary termination and suspension, and also providing for non-disciplinary termination or demotion of public servants.

> (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 or rescinded in whole or in part.

[41] The defendant also relies on *The Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 as amended. Sections 91-100 which provides for a scheme of grievance procedures not linked to an employee's collective agreement, and in particular:

91.1(i) Where any employee feels aggrieved

(a) by the interpretation or application, in respect of the employee, of

(i) a provision of a statute, or of a regulation, by-law, direction or other instrument made or issued by the employer, dealing 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 the terms and conditions of employment of the employee, other than a provision described in subparagraph (a)(i) or (ii),

in respect of which no administrative procedure for redress is provided in or under an Act of Parliament, the employee is entitled, subject to subsection (2), to present the grievance at each of the levels, up to and including the final level, in the grievance process provided for by this Act.

[42] The defence suggests that the right of an employee to refer his or her dispute to a third party adjudicator is limited by s. 92 of the *Act* to matters arising out of a collective agreement, discipline or termination of employment. They submit Parliament envisioned a much narrower role for third party adjudicators than it has for the grievance process and says it has created a bifurcated dispute resolution system unique to the PSSRA.

92.(1) Where an employee has presented a grievance, up to an including the final level in the grievance process, with respect to

(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,

> (b) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4),
>
> (i) disciplinary action resulting in suspension or a financial penalty, or
>
> (ii) termination of employment or demotion pursuant to paragraph 11(2)(f) or (g) of the Financial Administration Act, or
>
> (c) in the case of an employee not described in paragraph (b), disciplinary action resulting in termination of employment, suspension or a financial penalty,
>
> and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.

[43] The defence relies on s. 96(3) of the PSSRA for the finality of decisions made by both adjudicators and grievance officers.

> 96.(3) Where a grievance has been presented up to and including the final level in the grievance process and it is not one that under section 92 may be referred to adjudication, the decision on the grievance taken at the final level in the grievance process is final and binding for all purposes of this Act and no further action under this Act may be taken thereon.

[44] The defence submits that the intent of Parliament, in creating this scheme, was to provide a summary procedure for the redress of employment-related disputes in the federal Public Service involving such matters as discipline, demotion or termination of employment. The intent was not to allow collateral attacks on grievable matters. They submit the streamlining of disputes from sections 91 to 92 is confirmed by subsection 96(3) of the PSSRA.

[45] *Weber, supra,* dealt with the application of *The Labour Relations Act* of Ontario and was limited to disputes flowing out of collective agreements. The defence submits that the PSSRA is a very different statutory scheme and does not have a limited dispute resolution approach. They rely on decisions of the Federal Court of Canada. *Johnson-Paquette v. Canada* (2000), 253 N.R. 305 (F.C.A.); *Public Service Alliance of Canada v. Canada (Treasury Board),* [2001] F.C.J. No. 858, affirmed [2002] F.C.J. No. 850 (C.A.); and *Vaughan v. Canada.* [2003] F.C.J.

No. 241 (C.A.), leave to appeal granted [2003] S.C.C.A. No. 165. *Vaughan, supra,* was decided by the Supreme Court on March 18, 2005, and resulted in subsequent written submissions by counsel to this court. Mr. Adams' status as a senior management employee not bound by a collective agreement has been central to argument made on his behalf.

[46] In Nova Scotia, the Court of Appeal in *Pleau v. Canada (Attorney-General)*, [1999] N.S.J. No. 448 (C.A.) did not fall within the principles set out by the Supreme Court of Canada in *Weber,* largely because there was no mechanism for binding arbitration by a third party. Cromwell, J. noted the relevant considerations at paras. 18-21:

> 18. In my view, the judgments of the Supreme Court of Canada in St. Anne Nackowic Pulp & Paper Co. Ltd. v. Canadian Paper Workers Union, Local 219, [1986] 1 S.C.R. 704. Gendron, Weber and O'Leary show that the decision by courts to decline jurisdiction in disputes like this one is not based simply on a clear, express grant of jurisdiction to an alternative forum. For reasons that I will develop, I am of the opinion that there are three main considerations which underpin these decisions of the Supreme Court of Canada. The three considerations are inter-related, but it is helpful to discuss them individually for analytical purposes.
>
> 19. The first consideration relates to the process for resolution of disputes. Where the legislation and the contract show a strong preference for a particular dispute resolution process, that preference should, generally, be respected by the courts. While it takes very clear language to oust the jurisdiction of the superior courts as a matter of law, courts properly decline to exercise their inherent jurisdiction where there are strong policy reasons for doing so.
>
> 20. If the legislature and the parties have shown a strong preference for a dispute resolution process other than the court process, the second consideration must be addressed. It concerns the sorts of disputes falling within that process. This was an important question in the Weber decision. The answer given by Weber is that one must determine whether the substance or, as the Court referred to it, the "essential character", of the dispute is governed, expressly or by implication, by the scheme of the legislation and the collective agreement between the parties. Unlike the first consideration which focuses on the process for resolution of disputes, the second consideration focuses on the substance of the dispute. Of course, the two are inter-related. The ambit of the process does not exist in the abstract, but is defined by the nature of the disputes to be submitted to it.

> 21. The third consideration relates to the practical question of whether the process favoured by the parties and the legislature provides effective redress for the alleged breach of duty. Generally, if there is a right, there should also be an effective remedy.

and at para. 54 he stated:

> As the Ontario Court of Appeal said in Danilov v. Canada (Atomic Energy Board), [1999] O.J. No. 3735 (C.A.), at para. 9, the grievance process under the P.S.S.R.A. does not permit the plaintiffs to taken this dispute to binding adjudication by a third party; it permits no more than raising it as a complaint with the employer. There is no express grant of exclusive jurisdiction to the grievance process; the employee is "entitled", not obliged to use it. Moreover, the Departmental Harassment Policy, which most nearly addresses the substance of the plaintiffs' complaints, expressly contemplates other forms of legal recourse.

[47] In this case the plaintiff has argued that like *Danilov*, Mr. Adams a management employee had a choice of resorting to the PSSRA or of going to court. They further argued that like the situation in *Pleau,* Mr. Adams a "whistle-blower" was pursuing an action founded in conspiracy, an action that could not properly be addressed by the grievance process. Also, as in *Pleau,* Mr. Adams as a policy matter should not be limited to a grievance procedure which is determined by the Deputy Minister of the same department he is complaining about.

[48] The Supreme Court in *Vaughan* has changed the landscape. They have made it clear that the courts should show significant deference to the comprehensive statutory scheme set up by Parliament where employment disputes arise within the federal public service.

[49] While the courts retain residual jurisdiction access to the courts should only be had in a very limited set of circumstances.

[50] In the matter of deference Justice Binne stated at para. 2:

> I agree with the appellant that the statutory language and context of the PSSRA do not amount to the sort of explicit ouster of the jurisdiction of the courts as was the case in *Weber v. Ontario Hydro,* [1995] 2 S.C.R. 929. Nevertheless, while the courts retain a residual jurisdiction to deal with workplace-related issues falling under s. 91 of the PSSRA, but not arbitrable under s. 92, the courts should generally in my view, as a matter of discretion, decline to get involved except on the limited basis of judicial review.

And at para. 27

> The conclusion reached in *Pleau and Guenette,* which I accept, that the wording of the PSSRA is not strong enough to "oust" the court's jurisdiction in all matters grievable under s. 91 but not arbitrable under s. 92, still leaves open the further question of how the court should exercise its residual discretion in light of the labour relations scheme enacted by the PSSRA. As state, the language of the PPSRA is not strong enough to oust the jurisdiction of the ordinary courts with respect to matters grievable but not arbitrable. The question before us is whether the courts should nevertheless defer to the PSSRA grievance procedure in this case. I believe it should.

[51] Recognizing parliamentary intent Justice Binne stated (para. 39):

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

[52] Justice Binne however, recognized two narrow exceptions in which the courts might choose to exercise their residual discretion.

[53] In the "whistle-blower" circumstance he stated at para. 20:

> The courts were understandably reluctant to hold that in such cases the employees only recourse was to grieve in a procedure internal to the very department they blew the whistle on, with final decision resting in the hands of the person ultimately responsible for the running of the department under attack, namely the Deputy Minister (or designate).

[54] In the case where the statutory scheme does not provide a remedy Justice Binne stated at para. 30:

> It is true that the courts will retain jurisdiction if the remedy sought is not one which the statutory scheme can provide *(St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219,* [1986] 1 S.C.R. 704, at p. 724; *Weber,* at pp. 958-59) but that is not a problem here. The statutory decision-

> maker under s. 91(1) of the PSSRA (though not an arbitrator under s. 92) *could* order the respondent to provide the appellant with the ERI benefits.

[55] The real issue in this case is whether Mr. Adams could have received a remedy under the statutory scheme had his concerns been addressed by an independent adjudicator or through third party arbitration. If the answer is yes this court should be loathe to undermine the statutory scheme. I accept that PSSRA proceedings were designed to address employment issues such as disguised discipline, demotion or termination of employment.

[56] Although I was initially concerned that in the circumstances of this case a constructive dismissal could occur absent harassment, as investigated and adjudicated under the *Treasury Board Policy*, I am now satisfied after reviewing all of the materials before me that a comprehensive independent and impartial investigation and adjudication of his complaints did occur through grievance 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.

[57] While he was not required to grieve his claims, this does not now "entitle" him to access the courts for an alternate adjudication, as a matter of choice.

[58] In *Vaughan*, Justice Binne made it clear that the word "entitled" does not mean that the employee can simply opt out of the statutory scheme and seek another forum.

[59] At para. 28 he stated:

> Both courts also fastened on the words in s. 91 that the employee is "entitled" to grieve as showing that the s. 91 procedure is just one of the employee's options. A similar point was taken by the Ontario Court of Appeal in *Danilov v. Atomic Energy Control Board* (1999), 125 O.A.C. 130, at para. 11. For the reasons given by my colleague Bastarache J., I do not agree with this interpretation. The word "entitled" in s. 91 simply recognizes that an employee is not *required* to grieve every decision that he or she disagrees with.

[60] He also noted at para. 37:

> ...the appellant's legal position should not be improved by his failure to grieve the ERI issue. The dispute resolution machinery under s. 91 was there to be utilized. Efficient labour relations is undermined when the courts set themselves up in competition with the statutory scheme (*St. Anne Nackawic,* at p. 718; *Weber*, at p. 953; *Regina Police,* at para 26).

[61] Because remedies were available to Mr. Adams under the legislation, including third party arbitration he does not fit within the narrow exception of a "whistle-blower" as defined by *Vaughan*.

[62] Nor do I accept that the present statement of claim discloses causes of action that could not be addressed by the statutory scheme.

[63] In scrutinizing the pleadings I am required to accept that the facts alleged in the statement of claim are true and can be proved. However, the court is entitled to look at the substance of the claim and determine if these are the same allegations brought before the PSC. I find that they are even if the allegations have been characterized as the civil tort of conspiracy rather than harassment leading to termination or constructive dismissal rather than demotion and termination.

[64] This is not a case where the court should use its residual discretion and allow this action to proceed.

[65] I allow the application. Mr. Adams statement of claim is dismissed pursuant to *Civil Procedure Rule* 14.25(1) as it discloses no reasonable cause of action and is otherwise an abuse of the process of the court.

[66] In the absence of agreement by the parties the court is prepared to address the issue of costs.

Justice M. Heather Robertson