Federal Court  Cour fédérale

Date: 20230228

Docket: T-1387-21

Citation: 2023 FC 280

Ottawa, Ontario, February 28, 2023

PRESENT: The Honourable Madam Justice Rochester

BETWEEN:

DREENA DAVIS

Plaintiff

and

ROYAL CANADIAN MOUNTED POLICE

Defendant

JUDGMENT AND REASONS

[1] The Plaintiff, Dreena Davis, is self-represented. She brings the present motion pursuant to Rule 51 of the *Federal Courts Rules*, SOR/98-106 [Rules] to appeal an Order of the Case Management Judge, Associate Judge Catherine A. Coughlan, who granted the Defendant's motion to strike the Statement of Claim, without leave to amend [Order].

[2] The Plaintiff is employed by the Royal Canadian Mounted Police [RCMP] in the Employee & Management Relations Office Workplace Responsibility Unit, as an Internal

Conflict Management Practitioner. The Plaintiff is an unrepresented employee who is not subject to a collective agreement. She is not a member nor an officer of the RCMP. The Statement of Claim alleges that the Defendant "engaged in a long standing course of conduct of unfair labour practices beginning in 2014 to the present day".

[3] The Defendant moved to strike the Statement of Claim on the basis of section 236 of the *Federal Public Sector Labour Relations Act*, SC 2003, c 22 [Act], submitting that public servants are statutorily barred from bringing actions in respect of matters that may be grieved. Based on section 236 of the Act, Associate Judge Coughlan concluded that the Court lacked jurisdiction to entertain the Plaintiff's action, and struck the Statement of Claim.

[4] The Plaintiff brings the present appeal seeking to set aside the Order. Given the Plaintiff is self-represented, it is worthwhile stating my role at the outset. The standard of review of Associate Judge Coughlan's Order is not whether I would have rendered the same order. An appeal is not an opportunity to re-argue one's case and ask for a different outcome. Rather, in order for this Court to set aside the Order, the Plaintiff must demonstrate that Associate Judge Coughlan made a serious error of law or that her decision rests on a misapprehension of the facts that rises to the level of a palpable and overriding error.

[5] As I will explain in the reasons below, I have concluded that the Plaintiff has not demonstrated an error warranting this Court's intervention. Consequently, the Plaintiff's motion is dismissed.

I. Background

[6] In 2014, the Plaintiff was hired by the RCMP as an Internal Conflict Management Practitioner. As noted above, the Plaintiff is a public servant. Her position is unrepresented and is not subject to a collective agreement.

[7] In her Statement of Claim, the Plaintiff states that she "explained in her interview that she had Brain Injury and Chronic Fatigue Syndrome", and that the RCMP accepted her disability when they hired her. In her motion materials for the present appeal, the Plaintiff includes a 2019 letter from a doctor confirming that she has been diagnosed with chronic fatigue syndrome and fibromyalgia syndrome since 1999. This 2019 doctor's letter was not included in the record before Associate Judge Coughlan. I shall refer to the foregoing conditions as her disability.

[8] In her Statement of Claim, the Plaintiff provides an overview of her experience with the RCMP:

> 3. The defendant is the plaintiff's employer. The employer engaged in a long standing course of conduct of unfair labour practices beginning in 2014 to present day.
>
> 4. The plaintiff was subjects to a very negative and toxic environment since 2014. The plaintiff has been denied adequate accommodation due to a disability. The plaintiff's employment contracts has been unlateral change by a disguised demotion and disguised dismissal. The plaintiff has endured much harassment and discrimination. The plaintiff has been denied her fundamental participatory rights.

[9] In May 2017, the Plaintiff went on sick leave. As she did not return to work, in June 2017, leave without pay commenced. In November and December 2017, there were exchanges and a meeting about a return to work for the Plaintiff and a possible mediation.

[10] In late 2017, the Plaintiff's manager, Sgt. MacNeil, commenced an administrative investigation with respect to the Plaintiff [Administrative Investigation]. The status of the investigation is unclear, as the Plaintiff mentions that it is a barrier to her return to work.

[11] On December 27, 2018, the Plaintiff filed a harassment complaint with the RCMP, consisting of twenty incidents identified by the Plaintiff. The allegation of harassment stated:

> Between January 1,2014 and December 28, 2017, at or near the city of Regina, Saskatchewan, during the course of her duties in respect of Public Service Employee Dreena DAVIS, Staff Sergeant Kim MACNEIL did adversely impact the Complainant by engaging in a pattern of behavior, including but not limited to: lodging vexatious or baseless accusations against the Complainant; failing to provide support to the Complainant; denying career opportunities to the Complainant; not providing the Complainant with documentation or information that was required for her duties; siding with others and not addressing the Complainant's complaints; yelling at the Complainant; dismissing the Complainant's expertise; bypassing the Complainant; not letting the Complainant speak; Ignoring the Complainant; pressuring the Complainant; requesting personal and medical information from the complainant; ignoring the Complainant 's doctor 's orders; misleading and exaggerating concerns and omitting to provide information which lead to the Complainant being denied for LTD benefits; Launching a retaliatory investigation against the Complainant, that caused the Complainant to cry, feel tarnished, stressed, isolated, disadvantaged, irritable, tired, anxious, humiliated, and deflated. It is therefore alleged that Staff Sergeant Kim MACNEIL has failed to treat others with respect and courtesy, and has engaged in harassment, contrary to section 2.1 of the Code of Conduct.

[12] A Preliminary Investigation Report was provided to the Plaintiff and the Defendant Sergeant MacNeil, who both submitted rebuttals. On February 13, 2020, the Assistant Commissioner Mark Fisher issued his decision with respect to the harassment complaint [Record of Decision]. He concluded on a balance of probabilities that the complaint of harassment had not been established and Sergeant MacNeil had not contravened the RCMP Code of Conduct. He further concluded that the Plaintiff was not discriminated against as she had received various accommodations throughout her tenure as an employee and further accommodations were being considered at the time she was preparing to return to work – albeit she did not return to work.

[13] On March 9, 2020, the Plaintiff submitted a grievance pursuant to the Act regarding the Record of Decision and her harassment complaint. In the introduction to her grievance, she describes the Record of Decision as "greatly flawed and not impartial at all", and having ignored the majority of the evidence she submitted. The Plaintiff's grievance states that it contains twenty incidents and "is about the respondent's arrogance: the arrogance that she knew more than subject matter expert; the arrogance that best practice, policy, and legislation is mute; and the arrogance of not being able to say that she made a mistake or that she was in over he head."

[14] By agreement of the parties, the grievance was sent directly to the third grievance level. A hearing was held on March 2, 2021. On June 23, 2021, the Plaintiff's grievance was denied [Grievance Decision]. The decision maker, the Chief Human Resources Officer [Officer], found that there was no evidence to support the allegation that Assistant Commissioner Mark Fisher did not consider all the information before him. The Officer concluded that she did "not find that there has been any contravention of the RCMP Investigation and Resolution of Harassment

Complaints policy or process in the handling of [the Plaintiff's] complaint. Nor do I find any evidence of harassment or discrimination under the *Canadian Human Rights Act*."

[15] In the Statement of Claim, the Plaintiff states that she filed a complaint with the "Federal Labour Board" on April 20, 2020, with respect to the RCMP processes and seeking a review the Record of Decision. The Defendant states that it is unclear which administrative body this is and that there does not appear to be an outstanding complaint before the Federal Public Sector Labour Relations and Employment Board with respect to the Plaintiff.

[16] The Defendant states that on April 20, 2020, the Plaintiff filed a complaint against the RCMP regarding workplace violence with Employment and Social Development Canada, and that the complaint is ongoing. In the Statement of Claim, albeit when referring to the Federal Labour Board, the Plaintiff refers to an exchange in April 2021, where she requested that the competent person conducting the workplace violence investigation, use the "harassment standard".

[17] On July 23, 2021, the Plaintiff filed an application for judicial review in Court file T-1186-21 seeking review of the Grievance Decision and an April 1, 2021 decision to "change the scope of the investigation from the Harassment Standard to the Workplace Violence Standard". The Plaintiff sought to quash the Record of Decision and the Grievance Decision on the basis of bias and procedural unfairness, along with quashing the Administrative Investigation. She also sought an unredacted copy of the competent person's investigation report, and a decision on harassment. Finally, she sought compensation, aggravated damages and punitive damages.

[18] On September 3, 2021, the Plaintiff filed a Notice of Discontinuance of her application for leave and judicial review.

[19] On September 9, 2021, the Plaintiff filed the present Statement of Claim that makes numerous allegations concerning unfair labour practices during her employment. Notably, that she was subject to an administrative investigation; the RCMP withheld information; she was denied accommodation for her disability; there was a unilateral change of her contract; she suffered harm to her reputation; harassment; discrimination; and her numerous attempts at resolution were affected by issues of procedural fairness.

[20] The Statement of Claim seeks an order: quashing the Record of Decision and the Grievance Decision on the basis of lack of impartiality and procedural unfairness; requiring the RCMP to discontinue the Administrative Investigation; disclosing an unredacted copy of the competent person's investigation report; rendering a decision on harassment; for compensation related to her salary and benefits; for aggravated damages for mental distress; for damage to her reputation; and punitive damages.

[21] On November 5, 2021, Associate Judge Coughlan was assigned to this matter as the Case Management Judge. The Plaintiff filed written representations objecting to case management in the belief that it would delay the proceedings by permitting the Defendant to bring motions and would preclude her from "cross-examin[ing] the staff or documents". Nevertheless, the proceeding moved forward as a specially managed proceeding.

[22] On December 4, 2021, the Plaintiff filed a letter addressed to the Chief Justice requesting that Associate Judge Coughlan be replaced on the basis that she had acted for the Attorney General and the RCMP prior to her appointment to the judiciary. The Plaintiff raised concerns that the Associate Judge would be in a conflict of interest situation, suffer from unconscious bias, have her ability to be impartial impacted, and the situation would give rise to an appearance of potential bias.

[23] On December 9, 2021, following a case management conference in which the parties made submissions on the issue of bias, Associate Judge Coughlan concluded that she had no bias, actual or apprehended. The Plaintiff did not appeal the order of December 9, 2021.

[24] On January 14, 2022, the Defendant moved to strike the claim on the basis that: (i) the essential character of the Plaintiff's claims are employment issues which are regulated by an exclusive labour relations regime, therefore pursuant to section 236 of the Act the Plaintiff has no right of action; (ii) the Plaintiff's recourse is to grieve each of her employment-related allegations and proceed with those grievances until their final resolution, as to do otherwise would create a parallel system; (iii) if there are allegations relating to her dissatisfaction with administrative decisions then the proper remedy is judicial review of any final decision after proceeding through the complaints process; and (iv) the claim is an abuse of process as the Plaintiff is seeking to make a collateral attack on administrative findings.

[25] In response to the motion to strike, the Plaintiff submits that "Part 2 of the [Act] does not apply to the excluded and unrepresented employees due to the Legislative error." She alleges that

legislative error occurred in 2003 when Parliament attempted to import the excluded and unrepresented employees into the Act by changing the definition of an “employee”. She submits that the grounds of the Defendant’s motion relating to the complete code as comprised in the Act, including section 236, are therefore “moot” because the Act does not apply to unrepresented employees on the basis of this legislative error.

[26] The Plaintiff further submitted in response that “there is no grievance procedure for the unrepresented employee within the RCMP”. She requests that the Court use its residual discretion on the basis that harassment and systemic negligence constitute extraordinary circumstances. The Plaintiff alleges that the grievance process was a sham and corrupt, as was the grievance system generally. Alternatively, the Plaintiff requested that she be able to apply in the appropriate forum.

[27] The Plaintiff also filed a lengthy affidavit which contained both statements of facts and allegations, including that the “grievance procedure was tainted by dishonest and fraudulent misrepresentations”, and “there is no authority that the plaintiff can legally and legitimately access the process”. The Plaintiff further alleged that the “one-hour grievance hearing at the third level is willfully inadequate as there is no time to present a complex case”, and “the process welcomes fraudulent misrepresentations as there is nowhere in the process where either side can cross-examine to establish credibility.”

[28] On February 1, 2022, prior to the hearing of the motion to strike, the Plaintiff wrote to Associate Judge Coughlan stating, “I have a disability that occurred in infancy that occasionally

impedes my ability to articulate specific verbal and written words." The Plaintiff described how on occasions she may need to spell a word rather than say it, and it may take her a few extra moments to find a specific word she wishes to say. The letter concludes with "[p]lease advise how you would like these issues to be dealt with during the hearing".

[29] On February 2, 2022, Associate Judge Coughlan granted leave for the Plaintiff, if she chooses, to be accompanied by a representative who may assist her as necessary.

[30] On February 10, 2022, the Plaintiff informed the Court that she tested positive for COVID-19 and could not get certain documents sworn. She also informed the Court that "I am showing mild symptoms and can work from home so I prefer the hearing go ahead as planned and not have another delay."

[31] The hearing of the motion to strike took place as scheduled on February 17, 2022.

[32] On March 16, 2022, Associate Judge Coughlan ordered that the Statement of Claim be struck. The Associate Judge made a preliminary observation that the Statement of Claim did not comply with the Rules as it was unfocused, argumentative, and convoluted. While she found that "it fails to disclose to the Defendant the who, when, where, how and what gives rise to its liability", she nevertheless considered the merits of the motion to strike.

[33] Associate Judge Coughlan concluded that the Plaintiff's workplace concerns were of a nature that permitted a grievance to be brought and the Plaintiff was able to do so. The Associate

Judge found that section 236 of the Act explicitly ousts the jurisdiction of this Court over those matters. She rejected the Plaintiff's argument that there was a legislative gap or error, and found that the Court has no jurisdiction to entertain the Plaintiff's action. The Associate Judge found that given her conclusion on jurisdiction, there was no reason to address the Defendant's arguments regarding abuse of process and failure to raise a justiciable cause of action.

[34] The Plaintiff filed a Notice of Motion to Appeal the Order, alleging that the Associate Judge made numerous errors of fact and law including: not considering the impact of the Plaintiff's disability; failing to provide access to appropriate accommodations; failing to provide the Plaintiff with "information about the law and evidentiary requirements in replying to a motion to strike"; failing to apply the law in an even-handed way; failing to "explain the procedural options to challenge a legislative error"; failing to provide analysis on the exceptions that permit the Court to intervene; failing to permit the Plaintiff to save the Statement of Claim; failing to ask further questions about the Plaintiff's disability and provide options to her; preventing her from arguing her full case and distracting her with interactions; and ignoring the Plaintiff's argument on "poor advice".

[35] The Plaintiff's written representations identify the following errors, namely, that: the case management process did not provide any services to the Plaintiff with respect to her Statement of Claim; the Associate Judge did not permit her to challenge Part 2 of the Act nor present her arguments on that point; and erred by finding that her assertion of a legislative error had no merit. The Plaintiff further alleges that the Associate Judge did not analyze her argument, did not

address whether the process could provide an adequate redress, and did not address her arguments of bad faith.

[36] The Defendant submits that the Associate Judge did not err, and the Plaintiff seeks to re-argue the merits of her Statement of Claim. The Defendant submits that the Plaintiff largely seeks to overturn the Order on the basis that the Court did not properly accommodate her disability nor appropriately assist her as a self-represented Plaintiff. The Defendant pleads that given that the Court does not have the jurisdiction to hear the claim, no amendment could cure this deficiency. In addition, the Defendant raises concerns that the Plaintiff's written representations include additional arguments and grounds of appeal that were not included in the Notice of Motion.

[37] The present motion to appeal was heard over two days. It was initially scheduled for 1 hour on May 26, 2022, however upon commencement of the hearing, I was advised by the Plaintiff that she believed she would need an hour for her submissions alone. I also raised with the Plaintiff the contents of her affidavit filed on appeal, which indicated that due to her disability she should not be interrupted while speaking and questions should be held until the end of her presentation. I also informed her I would be amenable to going slightly over time should she need a break during the hearing.

[38] The Plaintiff informed the Court that she had divided her submissions into three parts, and would pause after each part to permit the Court to ask questions should the Court wish. The hearing proceeded and the Plaintiff's submissions lasted 1 hour and 45 minutes until the hearing

had to be adjourned. A second date was set into to permit the Defendant to make submissions. On June 6, 2022, the hearing continued for an additional hour and 50 minutes, during which the Plaintiff responded to questions from the Court arising from the first hearing and made further submissions in relation to those issues for just over 30 minutes, the Defendant made its submissions for 45 minutes, and the balance of time was spent by the Plaintiff making submissions in reply.

II. Issues

[39] The central issue in the present appeal is whether Associate Judge Coughlan erred in granting the Defendant's motion to strike the Statement of Claim without leave to amend. The issues raised on appeal may be reformulated and subdivided as follows:

A. Did Associate Judge Coughlan fail to accommodate the Plaintiff's disability and account for the fact that she is a self-represented litigant?

B. Did Associate Judge Coughlan err in concluding that the Court lacks jurisdiction to hear the Plaintiff's claim on the basis of section 236 of the Act?

III. Standard of Review

[40] Decisions made on motions to strike are discretionary in nature (*Feeney v Canada*, 2022 FCA 190 [*Feeney*]). The applicable standard of review for an appeal under Rule 51 of a discretionary order of an Associate Judge is set out in *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 [*Hospira*] at paragraphs 64, 66 and 79. Such orders are to be reviewed on the civil appellate standard (*Housen v Nikolaisen*, 2002 SCC 33

[*Housen*]) and "should only be interfered with when such decisions are incorrect in law or are based on a palpable and overriding error in regard to the facts" (*Hospira* at para 64). Questions of mixed fact and law are subject to the palpable and overriding error standard while questions of law, and mixed questions where there is an extricable question of law, are subject to the standard of correctness (*Worldspan Marine Inc v Sargeant III*, 2021 FCA 130 at para 48).

[41] An exercise of discretion by an Associate Judge involves applying legal standards to the facts as found. For the purposes of the *Housen* framework, exercises of discretion are questions of mixed fact and law (*Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 at para 72 [*Mahjoub*]). Such questions of mixed fact and law, including exercises of discretion, can be set aside only on the basis of palpable and overriding error unless an error on an extricable question of law or legal principle is present (*Mahjoub* at para 74).

[42] The palpable and overriding error standard is a highly deferential one (*Feeney* at para 4). "Palpable" means an error that is obvious, while "overriding" means an error that goes to the very core of the outcome of the case (*Canada v South Yukon Forest Corporation*, 2012 FCA 165 at para 46 [*South Yukon*]). When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing, rather the entire tree must fall (*South Yukon* at para 46; *Mahjoub* at para 61).

[43] Associate Judge Coughlan is the case management judge in the present proceedings. As stated by my colleague Justice Andrew D. Little, on a Rule 51 appeal "a case management judge is assumed to be very familiar with the particular circumstances and issues in a proceeding" and

their "decisions are afforded deference, especially on factually-suffused questions" (*Hughes v Canada (Human Rights Commission)*, 2020 FC 986 at para 67).

IV. Analysis

A. *Accommodation for the Plaintiff's Disability and Self-Represented Litigant Status*

[44] The Plaintiff makes a number of allegations in her Notice of Motion, her written representations and orally at the hearing, relating to the lack of accommodation for her disability and the failure of Associate Judge Coughlan to provide information and "advice" with respect to issues of procedure and what points ought to have been included in her Statement of Claim. The Defendant pleads that at no point in time did the Plaintiff indicate to Associate Judge Coughlan that the accommodations provided were inadequate. Moreover, the Defendant submits that the Plaintiff has unrealistic expectations of what the Court is able to provide in the way of assistance to self-represented litigants bearing in mind the duty of impartiality.

[45] I turn first to the question of accommodation for the Plaintiff's disability. As noted previously, the Statement of Claim states that she "explained in her [RCMP] interview that she had Brain Injury and Chronic Fatigue Syndrome". In the affidavit included in her motion record before Associate Judge Coughlan, she referenced suffering "a severe relapse of Chronic Fatigue Syndrome". In addition, in her affidavit, she refers to her disability and a lack of accommodation at the RCMP, but without expanding further as to what providing accommodation would entail - save for assisting her with a new job search or promoting her to another department with lower stress. She notes she faced difficulties applying for other jobs because her disability "makes it

near impossible to pass an exam" and indicates the barriers that multiple-choice questions can pose.

[46] On February 1, 2022, seventeen days prior to the hearing of the motion to strike, the Plaintiff wrote to Associate Judge Coughlan the following letter:

> To Prothonotary Catherine Coughlan
>
> I have a disability that occurred in infancy that occasionally impedes my ability to articulate specific verbal and written words.
>
> What you see on paper and what I see on paper may be significantly different. I usually deal with this by asking the other person to read and then say what I meant it to read.
>
> Names are especially difficult for me to say and I can't substuite another word for it. The best I can do is to spell the name for the court.
>
> Sometimes it also takes me a few extra moments to find the word I want or I say the wrong word and need to correct it.
>
> Please advise how you would like these issues to be dealt with during the hearing.
>
> Sincerely
>
> Dreena Davis

[47] In response to the letter, the following day Associate Judge Coughlan issued the following direction:

> "The Court is in receipt of a letter dated February 1, 2022, from the Applicant, Ms. Davis advising of certain difficulties she may have in orally communicating her argument to the Court. Upon return of the Respondent's to Strike on February 17, 2022, Ms. Davis has leave of the court to appear, if she chooses, to be accompanied by a representative who may assist her as necessary."

[48] On February 10, 2022, the Plaintiff wrote to Associate Judge Coughlan concerning the fact that the registry rejected the filing of her reply to the motion to strike and affidavit of service. She further notified the Court that she had tested positive for COVID-19 and was in quarantine. On that basis she could not sign or scan her documents, but wished to nevertheless proceed with the hearing as planned as she was able to work from home and wished to avoid another delay. On February 14, 2022, the Court directed that the documents be accepted for filing.

[49] The hearing proceeded on February 17, 2022, as planned. The Plaintiff did not have a representative accompany her. During the hearing, Associate Judge Coughlan asked the Plaintiff a number of questions. At one point, Associate Judge Coughlan noted that the Plaintiff had availed herself of the right to grieve, and in response the Plaintiff indicated that she had but that it was a sham and stated that there were several arguments on that point that she was trying to find in her materials. Associate Judge Coughlan informed her “alright take your time Ms. Davis, I do not want to put you off your argument”. The Plaintiff then commenced her submissions on that point, continued for approximately two minutes, before stating, “I am sorry, I have been thrown off here”. At which point, Associate Judge Coughlan stated, “How about Ms. Davis we take the morning break right now, so that you can re-tool and come back – how much time would you like to have”. The Plaintiff responded “10 minutes is good”, and Associate Judge Coughlan adjourned the hearing accordingly.

[50] Upon resuming, the Plaintiff continued her submissions on that point and gave no indication that the adjournment was insufficient. The Plaintiff then provided submissions for

approximately an additional forty minutes, was responsive to questions, referred to case law, and made arguments in support of her position. She did not request an additional adjournment or break, and did not appear to experience difficulties when advancing her arguments.

[51] Following a reply on the part of the Defendant that lasted approximately 10 minutes, Associate Judge Coughlan stated that “Ms. Davis, we do not normally grant sur-reply but if there is something you would like to say please feel free, briefly”. The Plaintiff then provided a very brief response.

[52] The Plaintiff pleads that Associate Judge Coughlan erred by offering her a break but not an adjournment to another day in order to permit her to adequately prepare her submissions. The Plaintiff submits that she ought to have offered such an adjournment without the Plaintiff having to ask for it. She pleads that she was surprised by the questions and when Associate Judge Coughlan “abruptly interrupted”, she could not think or speak clearly.

[53] The Defendant submits that the Plaintiff had ample notice of the issues in play, had filed extensive written materials, was not hesitant to communicate concerns to the Court in advance, and Associate Judge Coughlan’s questions related to materials in the motion records and issues that the Plaintiff had raised – as such, there was no surprise. The Defendant pleads that the Plaintiff is raising the issue of interruption *ex post facto,* and fails to explain why she did not communicate it in advance of or during the hearing or indicate that due to her disability she has difficulty when being interrupted.

[54] In reply, on the topic of why she did not raise the issue of interruptions during the hearing, the Plaintiff pleads that the nature of a brain injury means that people may not be able to communicate what happened until after the incident.

[55] Having watched the entire recorded video of the hearing before Associate Judge Coughlan, to the outsider, the Plaintiff did not appear to be experiencing difficulties presenting her submissions, save for the one instance mentioned above where she stated she had been "thrown off" and a 10-minute adjournment was granted. Rather, the Plaintiff was coherent, responsive, articulate and advocated her position admirably for a self-represented individual. Based on what was communicated to Associate Judge Coughlan prior to and during the hearing, Associate Judge Coughlan could not have reasonably been expected to ascertain that the Plaintiff preferred to be asked questions only after making her submissions or that, upon being asked a question, the Plaintiff would have wished to adjourn the hearing until another day. In addition, I find that the questions posed by Associate Judge Coughlan were not unexpected or unusual given the contents of the motion records, and the manner in which she posed them was not in any way out of the ordinary for a member of the judiciary.

[56] As to the Plaintiff's submission that she didn't indicate during the hearing that she had difficulty with being interrupted because people with brain injuries are unable to do so until after the incident, I note three things. First, the issue of being interrupted would have been known to her prior to the hearing and thus it was within her control to disclose it to Associate Judge Coughlan in advance of the hearing or during the hearing once she witnessed counsel for the Defendant being questioned during her submissions. Second, during the hearing of the motion to

strike, the Plaintiff was in fact able to indicate that she was “thrown off” by one of the questions, and was accordingly offered a break. Third, the hearing of the motion to strike took place on February 17, 2022, and the Order was rendered on March 16, 2022. The Plaintiff was not precluded from raising the issue after the hearing by writing to the Court.

[57] The Plaintiff submits that Associate Judge Coughlan erred by not providing her with appropriate accommodation in terms of a representative. While she acknowledges that Associate Judge Coughlan did permit her to be accompanied by a representative should she wish, that was, in the Plaintiff’s submission, insufficient. Upon being questioned on this during the hearing of the present appeal, it came to light that it was the Plaintiff’s expectation that a representative would be paid for by the Court, be familiar with the processes of the Federal Court, and assist her in preparing her pleadings. Upon further questioning, the Plaintiff answered that her expectation was that such a representative would be able to provide legal advice and identify missing issues, using the example of an employment lawyer.

[58] The Defendant submits that at no point did the Plaintiff inform Associate Judge Coughlan that the accommodation offered by the Court was not sufficient. It is a cooperative process where the Plaintiff is expected to help the Court understand her needs, and the Defendant is not sure what more the Court could have done in this situation. One cannot fault Associate Judge Coughlan for what she did not know. The Defendant pleads that the Plaintiff has unrealistic expectations in terms of the assistance she expected to receive.

[59] While I have sympathy for the Plaintiff in terms of her brain injury and chronic fatigue syndrome, it was ultimately for her to indicate to the Court that the accommodation provided was not sufficient given her disability. This accommodation was granted over two weeks prior to the hearing of the motion to strike. Any issues therewith were not raised either before or during the hearing on the motion to strike.

[60] In the normal course, pursuant to Rule 119, a party who appears in this Court must either be self-represented or represented by a lawyer. As explained to the Plaintiff during the hearing of this appeal, the fact that Associate Judge Coughlan permitted her to be accompanied by a representative to assist her as necessary was a special dispensation that is not often granted. I agree with the Defendant that the Plaintiff does have unrealistic expectations in terms of what ought to have been provided to her. Associate Judge Coughlan did not commit a reviewable error by failing to ascertain that the Plaintiff viewed the accommodation as insufficient or by failing to arrange for a legal advisor free of charge for the Plaintiff.

[61] During reply submissions, the Plaintiff submitted that she ought to have had a representative appointed by the Court pursuant to Rule 115 of the Rules. She pleads that she is a "person under a legal disability" pursuant to Rule 115(1)(b). During the hearing, I explained the purpose for which Rule 115 is normally used. The Plaintiff acknowledged that she had more capacity generally than the type of individuals I had described, but submits that she does not have the capacity to get through the court system and her access to justice is being denied. As such, she requires a lawyer or a skilled representative to move through the process.

[62] Rule 115(1)(b) states:

Appointment of representatives	**Nomination de représentants**
115(1) The Court may appoint one or more persons to represent	**115(1)** La Cour peut désigner une ou plusieurs personnes pour représenter:
…	[…]
(b) a person under a legal disability against or by whom a proceeding is brought.	**b)** une personne n'ayant pas la capacité d'ester en justice contre laquelle une instance est introduite ou qui en prend l'initiative.

[63] Rule 121 requires, unless otherwise ordered by the Court, that a party under a legal disability be represented by a lawyer. It states:

Parties under legal disability or acting in representative capacity	**Partie n'ayant pas la capacité d'ester en justice ou agissant en qualité de représentant**
121 Unless the Court in special circumstances orders otherwise, a party who is under a legal disability or who acts or seeks to act in a representative capacity, including in a representative proceeding or a class proceeding, shall be represented by a solicitor.	**121** La partie qui n'a pas la capacité d'ester en justice ou qui agit ou demande à agir en qualité de représentant, notamment dans une instance par représentation ou dans un recours collectif, se fait représenter par un avocat à moins que la Cour, en raison de circonstances particulières, n'en ordonne autrement.

[64] I am not certain that the Plaintiff is fully aware of the implications of Rules 115(1)(b) and 121. Should she, based on evidence before the Court, be found to be "under legal disability" as

the term is used in Rule 121, the action would be stayed pending the appointment of a lawyer. The legal fees would not be paid by the Court.

[65] A legal disability as set out under Rules 115 and 121 refers to a party to a proceeding who lacks the capacity to represent themselves, or, in French, “une personne n’ayant pas la capacité d’ester en justice.” If one lacks the ability to appreciate the nature of the proceedings or provide meaningful information or instructions, one may be found to be under a legal disability (*Mawut v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 1155 at paras 7, 16 [*Mawut*]). Having a disability that affects one’s higher-order decision-making, impacts on the amount of time required to comprehend information, or necessitates assistance or guidance to ensure all important aspects of a situation are taken into account, is not sufficient to constitute a “legal disability” within the meaning of Rule 121 where the disability does not seriously impair one’s ability to react appropriately to one’s environment or associate with others (*Holland v Canada (Human Rights Commission)*, 2011 FC 1125 at paras 15-19; aff 2012 FCA 187).

[66] In *Guimond v Canada (TD)*, 1991 CanLII 13541 (FC), [1991] 3 FC 254 [*Guimond*], under a former version of Rule 115 (Rule 1700), the Court concluded that the key factors to consider with respect to the appointment of a representative is whether the person in question is capable of providing instructions and exercising judgment in relation to the claims at issue and their possible settlement, as a reasonable person would be expected to do (at 259).

[67] The focus is therefore on whether the person in question lacks the capacity to provide instructions to counsel and/or fails to understand the nature of the proceedings (*Canada*

(Minister of Citizenship and Immigration) v Seifert, 2003 FC 875 at paras 3, 6; *Guimond* at 259; *Mawut* at para 7). The issue of a "legal disability" within the meaning of Rule 121 is unrelated to the issue of whether a person has legal training or is familiar with court practice and procedure.

[68] The evidence currently before the Court, being the 2019 letter from a doctor confirming that the Plaintiff has been diagnosed with chronic fatigue syndrome and fibromyalgia syndrome, is insufficient for the Court to conclude that the Plaintiff is under a "legal disability" as contemplated in Rules 115 and 121. Moreover, Associate Judge Coughlan did not have the benefit of the 2019 letter in the motion record before her. Consequently, the Associate Judge did not err in failing to order that a lawyer be appointed to act on behalf of the Plaintiff.

[69] I turn now to the Plaintiff's status as a self-represented litigant. The Plaintiff identifies a number of areas where she considers that Associate Judge Coughlan ought to have assisted her or provided advice. She alleges the Associate Judge erred by not explaining the applicable procedure to her for challenging legislation or pleading a legislative error. She submits that the Associate Judge did not ensure that the Plaintiff understood the process, provide information enabling her to raise arguments, or provide any services to the Plaintiff as to how she may amend her pleadings. The Plaintiff pled during the hearing that the Associate Judge, as part of the case management process, ought to have provided her with information as to what should have gone into her Statement of Claim. The Plaintiff relies upon the *Statement of Principles on Self-represented Litigants and Accused Persons* 2006 [Statement of Principles].

[70] The Defendant submits that the Statement of Principles is advisory, and while it does permit judges to provide certain explanations and assistance, the requirement of impartiality remains. The Defendant pleads that the Plaintiff had ample opportunity to communicate that she was having difficulty with the process or required assistance. It is only once her claim has been struck that she claims the result would have been different had she received more guidance from the Court.

[71] I have not been convinced that Associate Judge Coughlan committed a palpable and overriding error by failing to provide advice or information to the Plaintiff. A failure to fully understand the implications of the Rules or to advance stronger arguments is not a ground of appeal. I agree with the Defendant that it was ultimately for the Plaintiff to put forward her case.

[72] In an adversarial system, it is the parties, not the judge, who bear the primary responsibility for defining the issues in dispute and for carrying that dispute through the judicial system (*Miglialo v Royal Bank of Canada*, 2018 FC 525 at para 30 [*Miglialo*]). While this Court generally shows a certain flexibility and openness when a party is self-represented and is mindful that such a litigant lacks the benefit of experience, being a self-represented litigant does not exempt a party from their obligation to discharge their burden (*Ballantyne v Canada*, 2014 FC 242 at para 11; *Barkley v Canada*, 2014 FC 39 at para 18). The fact that a litigant is self-represented does not give the litigant any additional rights or special dispensation due to their lack of knowledge or legal skill (*Brunet v Canada (Revenue Agency)*, 2011 FC 551 at para 10; *Cotirta v Missinnipi Airways*, 2012 FC 1262).

[73] While a certain level of explanation and information is permitted, as set out in the Statement of Principles, a judge is not permitted to become a party to the proceedings or stray from their duty of impartiality. A lack of representation can often justify making certain allowances, but does not usually justify applying a lower standard of compliance with the rules or orders of the Court given that it is the claimant's responsibility to put forward their case (*Miglialo* at para 30).

[74] I understand the Plaintiff's frustration, as litigation is not an easy process for anyone – let alone for a self-represented litigant. Associate Judge Coughlan was, however, under a duty to remain impartial. A number of the Plaintiff's expectations of the Associate Judge as expressed in her submissions appear to me to be dangerously close to, if not crossing the line between, providing assistance and becoming an advocate. By way of example, the Plaintiff submits that the Associate Judge "err[ed] in law, in respect to the statement of Principles on Self-Represented Litigants and Accused Persons, when the plaintiff was not given advice about asking a question of law concerning whether labour law applies to the unrepresented employee". During the hearing, the Plaintiff submitted that the Associate Judge ought to have provided her with information as to what should have been included in the Statement of Claim, including with respect to challenging provisions of the Act itself.

[75] Even if such assistance or advice is not crossing the line, the Federal Court of Appeal has confirmed that "a judge cannot be faulted because he does not anticipate or recommend a step a litigant might take" (*Erdmann v Canada*, 2002 FCA 240 at para 4).

[76] In light of the foregoing, I have not been convinced that Associate Judge Coughlan committed a palpable and overriding error by not assisting the Plaintiff further. In addition, much of the Plaintiff's argument before me may be summarized as follows: If I had been provided with legal advice and assistance by the Associate Judge, the outcome would have been different. As will be discussed further in the section below, I am not certain that is true.

[77] In summary, I have not been persuaded that Associate Judge Coughlan committed a reviewable error in the manner in which she accommodated the Plaintiff's disability and her status as a self-represented litigant, based on the information available to the Associate Judge at the time.

B. *The Court's Jurisdiction to Hear the Plaintiff's Claim*

[78] It bears repeating that the task before me is to assess, based on the issues raised by the parties, whether Associate Coughlan erred in finding the Court had no jurisdiction to hear the Plaintiff's claim based on the contents of the Statement of Claim and the record before her. During the hearing, the Plaintiff was reminded of the standard of review and that her submissions should be guided accordingly.

[79] The Plaintiff pleads that the Associate Judge erred by striking her Statement of Claim on the basis of section 236 of the Act. The Plaintiff made lengthy submissions, in writing and orally, concerning the grievance process, the alleged "legislative error" of including unrepresented employees in the Act, and the distinction between employment law and labour law. The Plaintiff submits that the grievance process does not in fact lawfully apply to her, but if it does, she falls

into one of the exceptions on the basis that the process was inadequate, flawed, biased, corrupt and misleading. The Plaintiff further states that she "has every right to challenge any section of an Act on validity and constitutionality".

[80] The difficulty for the Plaintiff is that a significant portion of what she now submits, and in particular the validity of the Act with respect to unrepresented employees, is not mentioned in her Statement of Claim. When I enquired during the hearing about this, she responded that the Statement of Claim stated that she was an unrepresented employee and this is sufficient to raise this issue.

[81] I find there to be a marked disconnect between the contents of the Statement of Claim and the focus of the Plaintiff's arguments before both Associate Judge Coughlan and myself. During the hearing of the motion to strike, Associate Judge Coughlan informed the Plaintiff that the Statement of Claim did not raise a number of the issues being pled on the motion. The Associate Judge then informed the Plaintiff that she, as the decision maker, was obliged to deal with what was contained in the Statement of Claim.

[82] In line with the Plaintiff's request, I did not interrupt her during her submissions. Once completed, however, I sought to refocus the Plaintiff's submissions to address alleged errors by the Associate Judge as they relate to the contents of the Statement of Claim. Despite having considered all the Plaintiff's written and oral submissions on appeal, along with those before Associate Judge Coughlan, I am not persuaded that the Associate Judge committed a reviewable error given the contents of the Statement of Claim.

[83] The Plaintiff's claim, as set out in the Statement of Claim, stems from alleged events that took place at, or are related, to her workplace. It includes allegations of harassment, discrimination, a unilateral change in the contract of employment, animosity, a failure to accommodate her disability, and disguised demotion and dismissal.

[84] Associate Judge Coughlan found that the Plaintiff's workplace concerns were of a nature that permitted the Plaintiff to avail herself of the grievance process, which she in fact did. I am not persuaded that the Associate Judge committed any palpable or overriding error in her appreciation of the nature of the Plaintiff's claim or the application of the applicable law, being section 236 of the Act, and jurisprudence to the relevant facts.

[85] While the Plaintiff submits there is a legislative error with respect to the unrepresented employee and thus section 236 of the Act does not serve to bar her claim, I am not persuaded that Associate Judge Coughlan erred by finding otherwise. Associate Judge Coughlan relied on the jurisprudence of this Court and the Ontario Court of Appeal to find that, in the present case, section 236 of the Act ousts the jurisdiction of the Court (*Bron v Canada* 2010 ONCA 71 [*Bron*]; *Public Service Alliance of Canada v Canada* 2020 FC 481; *Murphy v Canada*, 2022 FC 146). It is well established that section 236 of the Act is an explicit ouster of the Court's jurisdiction (*Bron* at para 4; *Wojdan v Canada (Attorney General)*, 2021 FC 1341 at para 21 [*Wojdan*]; *Hudson v Canada*, 2022 FC 694 at para 73 [*Hudson*]; *Murphy v Canada (Attorney General)*, 2023 FC 57 at para 70 [*Murphy (appeal)*]; *Murphy* at para 24; *Adelberg v Canada*, 2023 FC 252 at para 13 [*Adelberg*]). Furthermore, the statutory grievance scheme in the Act applies to both

unionized and non-unionized employees (*Adelberg* at para 11; *Wojdan* at para 17; *Hudson* at paras 43, 47).

[86] The Plaintiff submits that the Associate Judge made a palpable and overriding error by finding that her Statement of Claim is not an exception to section 236 of the Act. She pleads that the grievance process was inadequate, flawed, corrupt, a sham, deprives her of her ultimate remedy, and is only subject to judicial review which would deprive her of the opportunity to call witnesses and cross-examine the Defendant's witnesses. Furthermore, she submits that the Associate Judge did not establish what would constitute an exception.

[87] In response, the Defendant submits that the Associate Judge understood and considered the issue of a possible exception to section 236 of the Act because the Order at paragraph 18 references the "limited exceptions which are not applicable in this case" and paragraphs 20-21 considered whether there was a gap in the scheme and found such considerations were not at play in the case at hand. The Defendant pleads that the Associate Judge noted that it was the Plaintiff's position that the grievance process was a sham and corrupt, and thus turned her mind to this argument.

[88] The onus is on the Plaintiff to establish why, in her particular circumstances, the grievance process is not available such that the Court has jurisdiction (*Murphy (Appeal)* at paras 80-82; *Hudson* at para 93; *Lebrasseur v Canada*, 2007 FCA 330, at para 19). In her response to the Defendant's motion to strike before the Associate Judge, the Plaintiff pled that the Court ought to use its residual discretion "as the systemic negligence and harassment constitutes

‘extraordinary circumstance’ as in *Greenwood v Canada 2020*”. She further pled that, as per *Bron*, the grievance process could not provide an appropriate remedy and in any event as an unrepresented employee she does not have access to the grievance process. She further pled, relying on the dissent in *Vaughan v Canada*, 2005 SCC 11 at paragraph 64, that the outcome of the grievance process, being a judicial review, is inadequate when compared to the process of adjudication.

[89] Based on the record before me, I am not persuaded that Associate Judge Coughlan erred in concluding that the limited exceptions do not apply. I have carefully considered the allegations by the Plaintiff as they relate to her experience with the grievance process, along with the exceptions that she has pled. The Plaintiff has in fact availed herself of the grievance process, a point highlighted by the Associate Judge. The Associate Judge did not commit a palpable or overriding error by failing to conclude that the grievance process is corrupt, that exceptional circumstances exist, or that there is a real deprivation of the ultimate remedy.

[90] The Plaintiff submits that she “has every right to challenge any section of an Act on validity and constitutionality”, that her “rights were infringed when she could not fully and fairly present her case”, and that the Associate Judge “erred when she did not allow the plaintiff to challenge the validity and constitutionality of Part 2 of the [Act] in regard to an unrepresented employee”.

[91] The difficulty for the Plaintiff is that this is not what she in fact did. She did not bring a constitutional challenge nor plead that issue in her Statement of Claim. Associate Judge

Coughlan cannot be faulted for not factoring this issue into her analysis of the Statement of Claim given that it only appeared in response to the Defendant's motion to strike.

[92] In addition, when considering a statement of claim, a judge must look beyond the words used, the facts alleged, and the remedy sought, so as to ensure themselves that the proceedings are "not a disguised attempt to reach before the Federal Court a result otherwise unreachable in that Court." (*Canada v Roitman*, 2006 FCA 266 at para 16 [*Roitman*]). A litigant is not permitted to frame their proceedings with a degree of artificiality to circumvent the application of a statute (*Vaughan v Canada*, 2005 SCC 11 at para 11; *Roitman* at para 16). In the face of a motion to strike, the Plaintiff has questioned the validity and constitutionality of the part of the Act that would operate to bar her claim. I am not persuaded that the Associate Judge committed a palpable or overriding error by not permitting her to challenge the validity and constitutionality of Part 2 of the Act in the context of the Defendant's motion to strike.

[93] Ultimately, Associate Judge Coughlan concluded that the Court lacked jurisdiction to hear the Plaintiff's claim, and that the limited exceptions were not applicable to the present case. Accordingly, she struck the Plaintiff's Statement of Claim without leave to amend. While I have sympathy for the challenges the Plaintiff has faced and the emotional toll this workplace dispute has taken on her, the Plaintiff has failed to convince me that Associate Judge Coughlan committed a reviewable error in concluding that the Court lacked jurisdiction to hear the Plaintiff's claim.

V. Conclusion

[94] For the foregoing reasons, this motion to appeal the Order of Associate Judge Coughlan dated March 16, 2022, is dismissed.

[95] The Defendant seeks costs. Considering the facts of the matter, and my discretion pursuant to Rule 400 of the Rules, costs in the amount of $500.00 shall be awarded to the Defendant.

ORDER in T-1387-21

THIS COURT ORDERS that:

1. The motion to appeal the Order of Associate Judge Coughlan dated March 16, 2022, is dismissed.

2. Costs in the amount of $500.00 are awarded to the Defendant.

"Vanessa Rochester"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1387-21
STYLE OF CAUSE:	DREENA DAVIS v ROYAL CANADIAN MOUNTED POLICE

MOTION IN WRITING CONSIDERED IN OTTAWA, ONTARIO PURSUANT TO RULE 369 OF *THE FEDERAL COURTS RULES*

JUDGMENT AND REASONS:	ROCHESTER J.
DATED:	FEBRUARY 28, 2023

APPEARANCES:

Dreena Davis	FOR THE PLAINTIFF (SELF-REPRESENTED)
Amanda Neudorf	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Attorney General of Canada Saskatoon, Saskatchewan	FOR THE DEFENDANT