Federal Court  Cour fédérale

Date: 20111212

Docket: T-1569-11

Citation: 2011 FC 1448

Ottawa, Ontario, December 12, 2011

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

MICHAEL AARON SPIDEL

Plaintiff

and

**HER MAJESTY THE QUEEN
AND HER SERVANTS BILL THOMPSON,
ANNE KELLY AND DON HEAD**

Defendants

REASONS FOR ORDER AND ORDER

[1] Mr. Spidel, at relevant times an inmate at Ferndale Institution, a minimum-security penitentiary, has taken action against Her Majesty and three of her servants in the employ of the Correctional Service of Canada. The alleged cause of action arises from a decision of the Warden to reject his nomination to run for election for the inmate committee, and his subsequent transfer out of Ferndale. He claims general, aggravated, punitive and *Charter* damages as a result thereof.

[2] Before me is a motion on behalf of the defendants to have the statement of claim struck in its entirety or, failing that, to dismiss the action as against the individuals named as defendants and to strike out the claim for aggravated and punitive damages.

[3] The motion is granted in part. The style of cause is struck in part and the action dismissed against the defendants Anne Kelly and Don Head. Otherwise, the motion is dismissed.

BACKGROUND

[4] Although Mr. Spidel had served from time to time on the inmate committee at Ferndale, the Warden, Bill Thompson, refused to allow him to run for office in December 2009. This led to a second and third level grievance and from there to this Court by way of judicial review. The Attorney General acting as Respondent moved to have the judicial review dismissed on the grounds of mootness, as in the interim Mr. Spidel had been transferred to another institution and could not therefore serve on the inmate committee in any event.

[5] Madam Justice Mactavish was not impressed. Although the matter was moot, she decided to hear it anyway. Her reasons in *Spidel v Canada (Attorney General)*, 2011 FC 999, [2011] FCJ No 1228 (QL), are highly critical. Following Mr. Spidel's transfer from Ferndale, a minimum-security institution, to Mission Institution, a medium-security institution, he brought an application for *habeas corpus* in the Supreme Court of British Columbia. Before the matter could be determined, Corrections Canada agreed to return him to a minimum-security institution, and a

consent order was issued. The record filed in the Supreme Court of British Columbia was lengthy and included various affidavits, which were also filed in this Court.

[6] Madam Justice Mactavish stated at paragraphs 17 and 19:

> [17] I do not intend to review each of the affidavits in detail. Suffice it to say that the picture painted by the evidence adduced by Mr. Spidel is troubling. While I understand that other evidence was put before the British Columbia Supreme Court by the respondent to justify the decision to reclassify and transfer Mr. Spidel, the affidavits before me suggest that the Warden of Ferndale Institution had become very irritated by Mr. Spidel as a result of grievances that he had brought, and that a variety of retaliatory measures were taken by the Warden against Mr. Spidel, including the abolition of a mental health program in order to justify the firing of Mr. Spidel.
> …
> [19] Two affidavits were provided by the psychologist who authored the document relied upon by CSC to justify the transfer. He deposes that he had been told that "management wanted Mr. Spidel gone and they wanted an assessment report … that would assist in accomplishing this end". While the psychologist says that he did not provide such a report at that time, he later drafted the note that provided the justification for moving Mr. Spidel. The psychologist swears that he was misled with respect to the alleged behaviour of Mr. Spidel, and that he did not take any steps to confirm what he had been told by CSC management before writing the note in question.

[7] Thereafter, in his statement of claim, Mr. Spidel asserts that his *Charter* rights, particularly freedom of assembly, were violated and that as well he suffered domestic hardship, humiliation, shame, dishonour, embarrassment, degradation and injury to his self-respect and esteem. The basis for the prohibition from running for office was allegedly maliciously false and misleading and intended to and did cause correctional setbacks, loss of reputation, mental suffering and other damage.

[8] Contrary to what Mr. Spidel asserts in the statement of claim, Madam Justice Mactavish reached her decision without having to consider the *Charter*.

[9] The basis of the motion is that pursuant to Rule 221 of the *Federal Courts Rules*, the statement of claim should be struck as disclosing no reasonable cause of action. The test is whether it is plain and obvious that no reasonable cause of action is disclosed (*Hunt v Carey Canada Inc*, [1990] 2 SCR 959, [1990] SCJ No 93 (QL)). The facts alleged in the statement of claim are assumed to be true (*Operation Dismantle Inc v the Queen*, [1985] 1 SCR 441, [1985] SCJ No 22 (QL)). In my opinion, if substantiated, there is a real possibility a cause of action exists, which extends to special damages.

[10] In addition, it is submitted that insufficient material facts were asserted to establish the *Charter* breaches alleged by the plaintiff.

[11] The leading case on *Charter* damages is *Vancouver (City) v Ward*, 2010 SCC 27, [2010] 2 SCR 28. It must be pointed out that Mr. Ward, unlike Mr. Spidel, was only asserting *Charter* damages under s 24(1) thereof which provides:

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.	**24.** (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

[12] At paragraph 20, Chief Justice McLachlin speaking for the Court said:

> The general considerations governing what constitutes an appropriate and just remedy under s 24(1) were set out by Iacobucci and Arbour JJ. in *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 SCR 3. Briefly, an appropriate and just remedy will: (1) meaningfully vindicate the rights and freedoms of the claimants; (2) employ means that are legitimate within the framework of our constitutional democracy; (3) be a judicial remedy which vindicates the right while invoking the function and powers of a court; and (4) be fair to the party against whom the order is made: *Doucet-Boudreau*, at paras 55-58.

[13] She added at paragraph 22 that in *Ward* what was being sought was not private law damages, but the distinct remedy of constitutional damages. Such an action lies against the state and not individual actors. However, she continued "[a]ctions against individual actors should be pursued in accordance with existing causes of action."

[14] The allegations against Anne Kelly and Don Head are simply that in their positions of authority they appointed the decision-makers at the second and third grievance level. If there is any cause of action against them at all, which I doubt, it would have to be constitutional in nature and lies only against the state, as set out in *Ward*, above. The same does not hold true for the Warden, Bill Thompson. The alleged cause of action arises from his decision not to let Mr. Spidel run for office, not from the grievance procedure.

[15] It is far too early to determine how this matter will develop, and at what stage, if any, Mr. Spidel may have to elect between private law damages and *Charter* damages.

[16] If there is a chance that the plaintiff might succeed, then he should not be "driven from the judgment seat," as per *Hunt*, above.

[17] If the remaining defendants think that the pleadings are somewhat vague then they are entitled to seek particulars.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. The motion to strike is granted in part:

2. The statement of claim is struck, without leave to amend, and the action dismissed as against the defendants, Anne Kelly and Don Head.

3. The style of cause is amended accordingly to read:

MICHAEL AARON SPIDEL

Plaintiff

and

HER MAJESTY THE QUEEN AND
HER SERVANT BILL THOMPSON

Defendants

4. Otherwise, the motion is dismissed.

5. The remaining defendants shall have 30 days herefrom to file their statement of defence.

6. Costs in the cause.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1569-11

STYLE OF CAUSE: SPIDEL v HMQ ET AL

MOTION IN WRITING CONSIDERED AT VANCOUVER, BRITISH COLUMBIA, PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

REASONS FOR ORDER AND ORDER: HARRINGTON J.

DATED: DECEMBER 12, 2011

WRITTEN REPRESENTATIONS BY:

Michael Aaron Spidel	FOR THE PLAINTIFF (Self-represented)
Amanda Sanghera	FOR THE DEFENDANTS

SOLICITORS OF RECORD:

n/a	FOR THE PLAINTIFF (Self-represented)
Myles J. Kirvan Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE DEFENDANTS