Date: 20080820

Docket: T-1802-07

Citation: 2008 FC 960

Ottawa, Ontario, August 20, 2008

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

MARK MICHAEL KOCHEMS

Plaintiff

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA and the DEPARTMENT OF FISHERIES AND OCEANS

Defendants

REASONS FOR JUDGMENT AND JUDGMENT

[1] On October 11, 2007, Mr. Mark Michael Kochems (referred to as Mr. Kochems or the Plaintiff) commenced an action against the Defendants. The Statement of Claim was amended on October 15, 2007 and October 25, 2007. The Defendants filed a Statement of Defence on November 23, 2007 and Mr. Kochems filed a Reply on December 2007. In this motion in writing, filed pursuant to Rule 369 of the *Federal Courts Rules*, SOR/98-106, the Defendants request the following:

(a) an Order, pursuant to Rule 75 allowing the Defendants to amend their Statement of Defence to add the following paragraph:

> 23. Further or in the alternative, the Plaintiff's claim was commenced more than two years after the Plaintiff knew or ought to have known that he may have a claim against the Defendants and is therefore barred by the combined operation of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, section 32 and the *Limitations Act*, R.S.A. 2000, c. L-12

(b) an Order, pursuant to Rules 221(1)(a), 221(1)(f), 213(2) and 216(1), to strike the Statement of Claim and for summary judgment dismissing the claim.

I. Issues

[2] The issues raised by this motion are as follows:

1. Should this motion be dealt with in writing or by oral hearing?

2. Should the Defendants be permitted to amend their Statement of Defence to plead expiry of the applicable limitation period?

3. Should Mr. Kochems' action be struck or dismissed on the grounds that the action was commenced beyond the limitation period imposed by statute or otherwise discloses no reasonable cause of action?

II. Factual Background

[3] Mr. Kochems' claim relates to staffing actions that were carried out by the Department of Fisheries and Oceans (DFO) in the time period commencing August 2000.

[4] In August 2000, a staffing competition was commenced by DFO for District Manager positions in various locations. As the competition was run as an "open" competition, any person – regardless of their current employment – was eligible to apply. In 2001, Mr. Kochems was found to be qualified and he was apparently placed on an eligibility list, from which eligible candidates could be selected for a period of one year. Mr. Kochems was not selected and, on November 22, 2001, he was advised that the eligibility list had expired. It appears that he took no steps to challenge the procedures followed in the open competition.

[5] In June 2002, a new competition for the District Manager position was posted on the internet. This competition was "closed"; that is, it was open only to persons employed in the public service. As an employee of Parks Canada, Mr. Kochems was not considered to be a person employed in the public service.

[6] Mr. Kochems filed an appeal with the Public Service Commission Appeal Board (PSCAB) against the selection made in the 2002 closed competition. After an oral hearing (attended by Mr. Kochems), the PSCAB ruled, in a detailed written decision dated March 31, 2003, that:

> [A]s an employee of the Parks Canada Agency, Mr. Kochems was not eligible to be a candidate in these [closed] competitions, since he did not meet the definition of "employee" in the Public Service

> Employment Act, and a person had to be an "employee" under the PSEA in order to be eligible to be a candidate in the first place.

[7] Thus, the PSCAB concluded, Mr. Kochems had no right to appeal to the tribunal; it followed that the PSCAB "does not have the jurisdiction to decide his appeals on their merits".

[8] Of note, Mr. Kochems did not take the next step of seeking judicial review of the PSCAB decision by the Federal Court as he could have pursuant to s. 18 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. Rather, as described in his Statement of Claim, he unsuccessfully and at length pursued his dispute through informal means with, for example, his Member of Parliament and the President of the Treasury Board. At every turn, his requested relief (which was, apparently, a position as District Manager or the equivalent with DFO) was denied.

[9] As noted, Mr. Kochems commenced this action in October 11, 2007, pursuant to s. 17 of the *Federal Courts Act*.

III. Issue #1: Should this motion be dealt with in writing or by oral hearing?

[10] The Defendants brought this motion pursuant to Rule 369 which provides that a party may, in a notice of motion, request that the motion be decided on the basis of written representations. Mr. Kochems, in his written submissions in response to the motion, requested an oral hearing. However, Mr. Kochems provided no reasons why the motion should not be disposed of in writing, as required under Rule 369(2).

[11] In my view, both parties have taken the opportunity to present adequate submissions in writing on the issues in question. An oral hearing is unnecessary in the circumstances.

IV. Issue #2: Should the Defendants be permitted to amend their Statement of Defence to plead expiry of the applicable limitation period?

[12] In their motion, the Defendants seek to add a pleading that the Plaintiff's action is out of time to bring this action. Although the proposed addition adds a new ground to the defence, the facts supporting this specific ground are already included in the pleadings. These facts – most of which are contained in Mr. Kochems' Statement of Claim – disclose that Mr. Kochems has been aware that the eligibility list for the open competition expired without an appointment since 2001 and that DFO was excluding him from the closed competition since some time in 2002. The pleadings also describe the appeal of Mr. Kochems to the PSCAB and the decision of that tribunal on March 31, 2003. The proposed amendment does not change or even add to the factual basis of the claim.

[13] Mr. Kochems' reason for objecting to the addition of the limitation defence is simply that: "It has been well over six months (November 23, 2007) since the Statement of Defence was registered with the Federal Court". Mr. Kochems presents no principled reason for rejecting the request. While timeliness may be a relevant factor, in this case, it cannot be determinative. Nor does the timing of the proposed amendment unduly prejudice Mr. Kochems.

[14] The proposed amendment is a logical and obvious consequence of the pleaded facts. In my view, it should be allowed.

V. Issue #3: Should the pleadings in the Statement of Claim be struck or the action dismissed?

[15] The first question that needs to be addressed is whether this action should be dismissed because it is, in effect, an indirect attack on staffing decisions which attacks ought to have been pursued through judicial review. The answer to this question lies in an understanding of the pleadings of Mr. Kochems.

[16] As stated by Justice Décary in *Canada v. Roitman*, 2006 FCA 266, 2006 D.T.C. 6514, at para. 16:

> A statement of claim is not to be blindly read at its face meaning. The judge has to look beyond the words used, the facts alleged and the remedy sought and ensure himself that the statement of claim is not a disguised attempt to reach before the Federal Court a result otherwise unreachable in that Court. To paraphrase statements recently made by the Supreme Court of Canada in *Vaughan v. Canada*, [2005] 1 R.C.S. 146 at paragraph 11, and applied by this Court in *Prentice v. Canada (Royal Canadian Mountain Police)*, [2005] F.C.J. No. 1954, 2005 FCA 395, at paragraph 24, leave to appeal denied by the Supreme Court of Canada, [2006] S.C.C.A. No. 26, May 19, 2006, SCC 31295, a plaintiff is not allowed to frame his action, with a degree of artificiality, in the tort of negligence to circumvent the application of a statute.

[17] A review of the Statement of Claim demonstrates that Mr. Kochems' action arises from staffing actions of DFO. This is apparent from a number of paragraphs of his amended Statement of Claim. For example, at paragraph 30, Mr. Kochems states that he "contends that he was denied a career opportunity with the Department of Fisheries and Oceans". In paragraph 31, he states that he believes that actions taken during the process were "not transparent, respectful nor ethical in keeping with Treasury Board Policy, the Public Service Commission Staffing Guidelines, and other established public service protocols".

[18] Mr. Kochems also describes difficulties with the process and conclusion of the PSCAB. In paragraph 25, he states that he was "denied proper recourse through the Public Service Commission". In paragraph 19, he refers to "misleading and inaccurate obiter statements made during an Appeal Hearing, in which the Appeal Chair of Public Service Commission stated upfront that they had no jurisdiction to hear the Plaintiff's appeal.

[19] Further clarification of the true purpose of the Statement of Claim can be seen in the remedies sought. In addition to punitive damages, Mr. Kochems seeks only compensation in amounts equal to salary (past and future) and pension differentials between his current classification and that of a District Manager.

[20] Also instructive are the comments of Mr. Kochems in his response to this motion, where he states that:

> To this end, the Plaintiff was denied a career opportunity with the Department of Fisheries and Oceans (DFO), a large government organization. The full potential of what the Plaintiff could have achieved, as an employee for DFO, will never be realized. As a consequence, the Plaintiff suffered economic and social loss.

[21] Thus, having reviewed the amended Statement of Claim in this action and Mr. Kochems' response to this motion, I am satisfied that the sole basis of Mr. Kochems' claim is his dissatisfaction with the appointment process for a position within the public service. In sum, this action is no more than an indirect challenge of administrative decisions taken during the two staffing competitions. Mr. Kochems challenges the legality of the two appointment competitions and nothing more.

[22] In my view, the facts of this case are, in substance, identical to those before the Court of Appeal in *Grenier v. Canada*, 2005 FCA 348, [2006] 2 F.C.R. 287. In that case, Mr. Grenier, a prison inmate, attempted to bring an action in relation to a decision made by the institutional head to discipline Mr. Grenier. Mr. Grenier did not challenge the decision by way of judicial review. Some three years after the decision, Mr. Grenier brought an action in damages, claiming that the decision was unlawful. The Court of Appeal held that Mr. Grenier could not indirectly challenge the lawfulness of the decision by way of action for damages; he had to apply directly to have the decision nullified or invalidated by way of judicial review (*Grenier*, at para. 35). Mr. Grenier's action was dismissed.

[23] The same conclusion on similar facts was reached by Justice Layden-Stevenson in *Graham v. Her Majesty the Queen*, 2007 FC 210. There, as here, the Plaintiff had failed to pursue alternative remedies.

[24] In the case before this Court, as noted above, the entire substance of Mr. Kochems' claim stems from actions taken during the open competition and the closed competition held for staffing positions within DFO. Contrary to the assertion of Mr. Kochems in his response to this motion, he did not exhaust all other avenues of recourse. With respect to the open competition, there were steps he could have taken to object to the process; it appears that he took no formal action. For the closed competition, he pursued a complaint to and was heard by the PSCAB; he did not seek judicial review of that decision. Accordingly, Mr. Kochems' claim should be dismissed. As noted by Justice Létourneau in *Grenier*, above, at para. 33:

> It is especially important not to allow a section 17 proceeding as a mechanism for reviewing the lawfulness of a federal agency's

> decision when this indirect challenge to the decision is used to obviate the mandatory provisions of sub-section 18(3) of the Federal Courts Act.

[25] Since I am satisfied that the action should be dismissed for these reasons, there is no need to address the issue of whether the limitation period has been exceeded.

VI. **Conclusion**

[26] The Statement of Claim of Mr. Kochems will be struck and his action will be dismissed with costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The Defendants are permitted to amend their pleadings to include paragraph 23 as set out in these Reasons;

2. The Statement of Claim is struck; and,

3. The action is dismissed with costs to the Defendants.

"Judith A. Snider"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1802-07
STYLE OF CAUSE:	MARK MICHAEL KOCHEMS v. HER MAJESTY THE QUEEN IN RIGHT OF CANADA and the DEPARTMENT OF FISHERIES AND OCEANS

MOTION IN WRITING WITHOUT PERSONAL APPEARANCE OF PARTIES, CONSIDERED AT OTTAWA, ONTARIO

REASONS FOR JUDGMENT AND JUDGMENT:	SNIDER J.
DATE OF REASONS:	August 20, 2008

APPEARANCES:

Mark Michael Kochems	FOR THE PLAINTIFF (Self-Represented)
Doreen Mueller	FOR THE DEFENDANT(S)

SOLICITORS OF RECORD:

Mark Michael Kochems Calgary, Alberta	FOR THE PLAINTIFF
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE DEFENDANTS