Federal Court  Cour fédérale

Date: 20170921

Docket: T-2299-14

Citation: 2017 FC 848

Ottawa, Ontario, September 21, 2017

PRESENT: Madam Prothonotary Mireille Tabib

BETWEEN:

FRANK KIM

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

JUDGMENT AND REASONS

I. Overview

[1] Frank Kim is an inmate serving an indeterminate sentence, having been declared a dangerous offender in October 2000.

[2] He began serving his sentence at the medium security Mountain Institution in British Colombia. In late September and early October 2002, copies of two fax communications sent to

Mr. Kim by lawyers were placed on his Case Management file. Two months later, in late November 2002, a copy of a written complaint addressed by Mr. Kim to the Office of the Correctional Investigator was shared by Mr. Kim's Institutional Parole Officer (IPO) with other staff members and placed on his CM file. Mr. Kim discovered these facts in May 2011, after requesting and receiving a complete copy of his CM file.

[3] Mr. Kim considers that these documents are privileged and that they were improperly shared and placed on his CM file. In 2011, he filed a complaint with Correctional Service Canada (CSC), requesting both that the CSC's "practice" of copying privileged information be stopped and monetary compensation. The CSC readily agreed that the documents were of a "privileged nature" and should not have been placed on the CM file. Apologies were made, but monetary compensation was refused. The CSC noted that there were no indications of other similar occurrences.

[4] Mr. Kim pursued the matter through three levels of grievances. In the process, the CSC initiated and completed a Privacy Risk Assessment. Mr. Kim also filed a complaint with the Office of the Privacy Commissioner of Canada about the matter. The results were, throughout, substantially the same.

[5] In this action, Mr. Kim seeks an award of general damages in the amount of $30,000 and punitive damages in the amount of $20,000 as compensation for these events. For the reasons below, I find that no liability attaches to the defendant as a result of the communication of the

documents at issue, and that in any event, Mr. Kim has not established that he has suffered compensable damages from the conduct of CSC's employees.

II. Breach of Privacy

[6] In the fall of 2002, Mr. Kim was appealing his conviction before the British Columbia Court of Appeal, representing himself without the assistance of counsel. The Attorney General was represented in the appeal by Scott Bell, and the BC Court of Appeal had appointed Robert W. Gourlay to act as *amicus curiae*.

[7] Mr. Kim had some 25 to 30 boxes of materials from his trial which he claimed he needed to keep in his cell in order to prepare his appeal. Issues arose between Mr. Kim and the authorities at Mountain Institution as to whether Mr. Kim should be allowed to store all this material in his cell. The penitentiary authorities felt he could and should be limited to the content of one metal foot locker; Mr. Kim felt he needed and had the right to the content of two metal foot lockers. During that period, Mr. Kim raised this issue and sought relief directly from the Court of Appeal, through the grievance process and eventually, to the Office of the Correctional Investigator, the Ombudsman for federal offenders. All of the correspondence at issue in this action relates, at least in part, to this issue. The details of the correspondence are as follows:

[8] On September 24, 2002, Robert Gourlay sent an 8-page fax to Mr. Kim at Mountain, care of Monica Stolte, as IPO for Mr. Kim. The message on the fax cover sheet indicates that it is being re-sent, contains two cover sheets and is transmitting a memorandum which Mr. Gourlay

intended to submit to the BC Court of Appeal and a draft Consent Order to facilitate Mr. Kim's access to the court file. A copy of that fax was placed on Mr. Kim's CM file by Ms. Stolte.

[9] On October 1, 2002, Scott Bell sent a 4-page fax to Mr. Kim, also care of Ms. Stolte as IPO. The fax cover sheet indicates that it is transmitting a summary of the various outstanding matters involving Mr. Kim for a hearing before the BC Court of Appeal the following day. Page 1 of the summary bears a date stamp of the Court of Appeal Registry in Vancouver, dated October 1, 2002. The fax cover sheet has the following hand-written note from Ms. Stolte: "rec'd Oct 2/02 at 8:45 am – fax machine was not printing properly on Oct 1/02 – M. Stolte". Ms. Stolte also placed a copy of the fax on Mr. Kim's CM file.

[10] When asked in 2011 why she had placed this correspondence on file, Ms. Stolte had no recollection of having done so, but surmised that she might have done so at Mr. Kim's request because of on-going issues. Her testimony at trial was to the same effect. The notations on the cover pages of both faxes bear out the possibility that transmission difficulties were experienced and that may explain why it was felt necessary to retain a record. Mr. Kim himself had no specific recollection of these events to offer at trial.

[11] Mr. Kim's complaints concerning the storage of his legal materials were still unresolved in November 2002. Sometime in November, he gave to Ms. Stolte a 2-page complaint dated November 21, 2002, to be faxed to the Correctional Investigator requesting assistance in resolving these issues. The last page of the document indicates:

> "CC: Court of Appeal Registry – Fax # (604) 660-1951
>
> Scott Bell, Crown counsel – Fax # (604) 660-1142"

[12] In addition to faxing the complaint, Ms. Stolte made copies of it and sent or delivered one to each of the Warden, Alex Lubimiv, and to the Unit Manager responsible for the living unit in which Mr. Kim was housed, John Romaine. In an accompanying handwritten note to the Warden, Ms. Stolte acknowledged that she made the copies without Mr. Kim's knowledge, and that she would not normally do so "but this issue is different, as the C.I. will no doubt want some explanations, so we need to know what Kim said".

[13] The complaint, together with Ms. Stolte's note, was placed on Mr. Kim's CM file, although why or by whom has not been ascertained. Ms. Stolte, when asked in 2011, denied placing this document on file, and she maintained that denial in her testimony at trial.

[14] Ms. Stolte acknowledged having provided a copy of the complaint to the Warden's office and to the Unit Manager, but maintained throughout that she did so only to facilitate the preparation of the response she anticipated would be required. Indeed, while a copy of Mr. Kim's complaint does not appear to have been provided by the Correctional Investigator to the Warden, a summary of the complaint was communicated to the Warden and to the Unit Manager in the course of the investigation of the complaint, as was the usual practice. I also note that Mr. Kim presented a second level grievance on November 25, 2002 with respect to the same issue (V80A0004365, included as part of Exhibit JR-3 to the affidavit of John Romaine), referring to his letter to the Correctional Investigator and noting that "an unsigned copy of the letter is attached at the end of this grievance".

[15] The documents remained in Mr. Kim's CM file until 2012. Mr. Kim submits that he only became aware of their presence on his file in late May 2011, after receiving a copy of his file pursuant to an access to information request. Their presence on file is not otherwise referred to, remarked upon or noted in any documentation. There is no indication that the documents were digitized or that the information they contain was reproduced or referred to in the Offender Management System. The OMS is an electronic database of reports and forms created and maintained in respect of inmates' security classification and sentence management, such as correctional plans, criminal profile reports, internal psychological reports, assessment for decisions and other staff-generated reports.

[16] It should be noted that Mr. Kim's CM file is a paper record, which, as of 2011, consisted of over 27 volumes containing thousands of pages. CSC staff wishing to consult any of its volumes were expected to record their name, along with the reason and date of consultation on the volume's cover page. Ms. Stolte's testimony at trial was to the effect that given the increasing availability of information in the OMS, especially since the mid-2000's, access to and reliance on an inmate's physical CM file was infrequent. The evidence shows that in the period between October 2002 and June 2011, excluding those processing Access to Information or Privacy Act requests, fewer than six individuals accessed the then existing volumes of Mr. Kim's CM file and could have come across the communications.

[17] On the other hand, all three of the documents were otherwise made public: the document sent to Mr. Kim by Scott Bell appears to have come from the BC Court of Appeal Registry, and Mr. Kim's complaint to the Correctional Investigator was intended to be copied to the BC Court

of Appeal Registry. Mr. Kim attached an unsigned copy of it to an internal grievance and later filed it as an exhibit in Federal Court file T-442-03. The correspondence from Mr. Gourlay was filed by Mr. Kim as an exhibit in two Federal Court applications, T-971-02 and T-442-03.

[18] Still, when Mr. Kim became aware that the communications had been placed on his CM file and that his complaint to the Correctional Investigator had been copied by Ms. Stolte to the Warden and the Unit Manager, Mr. Kim filed a grievance, considering that his privacy rights had been breached.

[19] In order to appreciate the genesis of Mr. Kim's complaint and CSC's prompt acknowledgement of its validity, it helps to understand CSC's practices and policies regarding inmate correspondence. Policies regarding correspondence are set out in Commissioner's Directive No. 085 "Correspondence and Telephone Communications". The Directive generally provides that letters to and from inmates are to be opened and inspected but may not be read by staff, except where safety and security concerns arise. The Directive provides additional strictures for correspondence designated as "privileged correspondence". This correspondence is generally to be delivered to inmates unopened, unless, in addition to the existence of security concerns, the institutional authorities have reasonable grounds to believe that the communication is not in fact privileged. Further, paragraph 12 of the Directive provides that "The person intercepting the privileged correspondence should treat the information contained therein as confidential". The definition of what is "privileged correspondence" at paragraph 11 of the Directive is expansive and does not follow the contours of legal privilege. It includes correspondence between an inmate and the person listed in Annex "A" of the Directive. This

Annex includes legal counsel, but also judges and registrars of courts, various government officials, the commissioners of various government agencies, and ombudspersons, including the Correctional Investigator.

[20] The correspondence at issue in this action, by virtue of being sent by legal counsel (Mr. Gourlay and Mr. Bell) and to the Correctional Investigator, would therefore automatically have fallen under the definition of "privileged correspondence" and, had it been sent or received in sealed envelopes, treated as presumptively privileged.

[21] The correspondence here was sent and received by fax, which is not a mode of correspondence expressly covered by the Directive. Inmates do not have direct access to fax machines, and must rely on their IPO to send and receive faxes. Faxes are thus inherently less protected than sealed envelopes, as they must be open to be sent and received by IPOs and must be read, at a minimum, to ascertain the person to whom they are to be sent. Nevertheless, Ms. Stolte readily acknowledged at trial that fax correspondence of inmates should be treated, as far as practicable, in accordance with the Directive. It appears that this understanding was prevalent, though not unanimously shared, throughout CSC. Mary Danel, who was Deputy Warden at Mountain at the time, deposed that she may not have considered the correspondence to the Correctional Investigator to be confidential, in part because Mr. Kim chose to give a copy to his IPO for faxing rather than using the mailbox available to him in his living unit to send confidential documents.

[22] I should add that section 94 of the *Correction and Conditional Release Regulations*, SOR/92-620, similarly provides that communications between inmates and members of the public cannot be "opened, read, listened to or otherwise intercepted by a staff member or a mechanical device" unless there are reasonable grounds to believe that it contains evidence of a criminal offence or of an act that would jeopardize the security of the penitentiary or the safety of a person. In the case of presumptively privileged communications, section 94 also requires the authorities to have reasonable grounds to believe that privilege does not apply.

[23] It is clear that Ms. Stolte's actions, in copying and communicating Mr. Kim's letter to the Correctional Investigator to other CSC personnel without Mr. Kim's knowledge and permission, constitutes an unauthorized interception of the communication. Unless Mr. Kim requested or consented to it, the placing of copies of the fax communications from Messrs. Gourlay and Bell on the CM file could also be construed as unauthorized interceptions of communications. Even assuming that, in choosing to send and receive his correspondence by fax, Mr. Kim implicitly consented to his correspondence being read by his IPO, the fact that the correspondence was presumptively privileged by virtue of the identity of their senders and recipients imposed on the penitentiary's staff further duties of confidentiality under the Directive and the Regulations. These duties were breached when the correspondence was copied to others and placed on the CM file.

[24] However, the simple breach by a servant of the Crown of a duty imposed by statute, regulation or directive does not automatically constitute and actionable wrong, or give rise to a cause of action for damages. An independent tort of statutory breach is not recognized in

Canadian law. The Supreme Court, in *Canada v Saskatchewan Wheat Pool*, [1983] 1 SCR 205, allowed that the formulation of a duty by a statute may, in some cases, provide a useful indication of the standard of reasonable conduct expected by society, the breach of which can point to negligence, but that in the end, the civil consequences of a breach of a statute or regulation are subsumed in the law of negligence. Mr. Kim has not argued, nor can it reasonably be suggested, that Ms. Stolte's conduct, or that of any other CSC staff who may have handled the correspondence, amounts to negligence.

[25] It cannot be over-emphasized that the correspondence at issue only ever attracted the designation of "privileged" through the regulatory regime created by the Regulations and the Directive, which require penitentiary authorities to treat as presumptively privileged any and all communications between an inmate and certain categories of persons. Considered independently of the Regulations and Directive, it is clear that the communications were never subject to privilege, and were never even intended or expected by Mr. Kim to be kept confidential.

[26] Mr. Kim was not in a solicitor and client relationship with either Mr. Gourlay or Mr. Bell. The former was appointed as *amicus curiae*, and not as counsel for Mr. Kim. The latter was Crown counsel on Mr. Kim's appeal. The correspondence therefore could not have attracted solicitor-client privilege. The correspondence itself was not of a confidential nature. Mr. Gourlay's fax sought Mr. Kim's comments on documents he proposed to put before the Court. Mr. Bell's fax transmitted a summary of outstanding motions drawn from the Court records.

[27] While inmates' letters to the Correctional Investigator are, pursuant to s. 184 of the *Corrections and Conditional Releases Act* SC 1992, c 20 (the "CCRA"), to be delivered unopened, Mr. Kim waived the protection of that provision by sending his correspondence by fax. He further negated any expectation of confidentiality or privacy by expressly requesting, by the "C.C." notation at the end of the letter, that a copy be faxed to the BC Court of Appeal Registry and to Mr. Bell.

[28] In the circumstances, employees of the CSC did not owe Mr. Kim a private duty to ensure that his correspondence be treated with a particular degree of confidentiality. The internal dissemination of the complaint among those who would, in any event, be consulted in the course of the Correctional Investigator's inquiry, and the placement of the communications on the internal CM file did not constitute negligence.

[29] In any event, no damage could possibly have been caused by the manner in which CSC handled the correspondence: Mr. Kim had no reasonable expectation of confidentiality in the documents; moreover, he himself chose to disseminate the complaint internally within CSC by attaching a copy of it to a second level grievance and to publicly disclose both that letter and Mr. Gourlay's letter by filing them in Court. Mr. Kim's own handling of the correspondence at issue also negates his contention that dissemination of the complaint caused the penitentiary authorities to be biased against him. His claim for reimbursement of the $400 he has paid over the years as fees for fax transmissions that were not treated with the required confidentiality has no foundation. Mr. Kim himself did not keep the correspondence at issue as confidential, and he has not established that any other fax transmission has been mishandled in the past.

[30] Mr. Kim says he suffered damage from the mishandling of the communications because he now constantly worries about what and how much of his "privileged correspondence" CSC staff has intercepted or read without authorization. He states that this has caused him stress and worry, and has inhibited his ability to seek or obtain psychological treatment.

[31] Mr. Kim's submissions on psychological damages are without merit. Mere psychological upset, worry and anxiety that do not rise to the level of personal injury do not amount to damages and are not compensable at law (*Mustapha v Culligan of Canada Ltd.*, [2008] 2 SCR 114). Mr. Kim has led no evidence that his mental state amounts to a psychiatric or psychological injury. Even if he had, damages for psychological injury can only be claimed where they are a reasonably foreseeable consequence of the alleged breach of duty in a person of ordinary fortitude (*Mustapha*, above). Mr. Kim has found no other instance where, in the course of his 16-plus years of incarceration, any other of his documents or correspondence might have been treated otherwise than in conformity with the existing Regulations and Directives. A comprehensive Privacy Risk Assessment was conducted by the CSC following Mr. Kim's complaint. It revealed no other similar occurrences. Any worries or fear Mr. Kim may have that truly private or privileged information concerning him might be disseminated or misused is not rationally supported by the facts. That one might suffer psychological harm amounting to compensable injury from such worries is far-fetched and would not have been reasonably foreseeable.

[32] Mr. Kim's action is also framed as a recourse for breach of privacy. Breach of the *Privacy Act* RSC 1985 c P-21 is not a recognized independent cause of action, and this Court has

confirmed that there are no civil remedies available for unauthorized disclosure of personal information in breach of the *Privacy Act* (*Murdoch v Canada (RCMP)*, 2005 FC 420. See also the discussion in *Gauthier v Canada (Minister of Consumer and Corporate Affairs)*, [1992] FCJ No 1040). To the extent the conduct of the CSC staff was to constitute a breach of the *Privacy Act*, any cause of action would, as for any other general breach of statutory duty, still be subsumed in the law of negligence. As mentioned above, the absence of compensable damages is fatal to Mr. Kim's action based on negligence.

[33] In any event, I am not satisfied that the conduct of the CSC amounted to a breach of the *Privacy Act*. Sections 7 and 8 of the *Privacy Act* limit the use and disclosure, by a government institution, of personal information under its control. The only document that may have contained or may arguably have constituted "personal information", as defined in the *Privacy Act*, is Mr. Kim's letter to the Correctional Investigator. The correspondence sent to Mr. Kim by Messrs. Gourlay and Scott does not constitute and does not contain personal information of Mr. Kim.

[34] The Privacy Commissioner considered that the letter to the Correctional Investigator was protected under the *Privacy Act* for two reasons: that it contained Mr. Kim's Finger Print Services (FPS) number, an identifying number assigned to him and defined as personal information pursuant to s. 3(c) of the *Privacy Act*, and that it was "correspondence sent to a government institution by the individual that is implicitly or explicitly of a private or confidential nature", as defined in s. 3(f) of the *Privacy Act*. However, while the correspondence was indeed sent to a government institution, it was also explicitly copied to Mr. Bell, acting as Crown

counsel adverse to Mr. Kim's interest, and to the BC Court of Appeal Registry, and expected to be filed publicly. The correspondence itself was therefore not implicitly or explicitly of a private or confidential nature, and did not constitute protected personal information. Its disclosure by Ms. Stolte to the Warden and the Unit Manager cannot have been in breach of the *Privacy Act*.

[35] Only the FPS number set out in the complaint might have constituted personal information of Mr. Kim subject to the protection of the *Privacy Act*. However, this number appears on all of the institutional records related to Mr. Kim, and was already well known and accessible to all CSC staff. The internal communication of the letter did not result in the disclosure of any protected information that was not already known to the recipients, and was therefore not in breach of the *Privacy Act*.

[36] Finally, Mr. Kim pleaded that the conduct of the CSC staff in relation to his correspondence constitutes misfeasance in public office. The tort of misfeasance in public office is an intentional tort that has two main elements: first, that a public officer engage in deliberate and unlawful conduct in his or her capacity as public officer, and second, that the public officer must have been aware that his or her conduct was both unlawful and that it was likely to harm the plaintiff (*Odhavji Estate v Woodhouse*, 2003 SCC 69). As mentioned, the conduct of Ms. Stolte, even if one assumes that she was aware at the time that it breached the Regulations, did not cause any harm to Mr. Kim, and cannot have been thought to be likely to cause him any harm. Again, no valid cause of action has been made out by Mr. Kim.

III. Failure to correct record

[37] At the trial, Mr. Kim asserted that his Statement of Claim also pleads a cause of action for damages arising from the CSC's reliance on, or failure to correct, false or misleading information placed on his institutional record.

[38] Mr. Kim's Statement of Claim contains over 100 paragraphs, but only paragraphs 47 to 49 might be said to relate to this cause of action. These paragraphs essentially recite that in early 2009, Mr. Kim wrote letters to Alex Lubimiv in his capacity as Assistant Deputy Commissioner of Institutional Operations, Pacific Region, to argue against his reclassification as maximum security and his consequent involuntary transfer to the Eastern region, but that Mr. Lubimiv "misapprehended the Plaintiff's submissions, and failed to materially assist the Plaintiff from being transferred to a New Brunswick maximum security prison (…)". These particular allegations against Mr. Lubimiv are however part of the broader allegations of the Statement of Claim to the effect that, because of the improper sharing and distribution of Mr. Kim's complaint to the Correctional Investigator, Mr. Lubimiv's findings and rulings in matters involving M. Kim were "tainted with bias towards the Plaintiff".

[39] It is only in his Reply that Mr. Kim provides details of his allegations that incorrect information was used to determine his security rating and that this information was eventually corrected. The Reply asserts, at paragraphs 78 to 80, that "the Defendant's false reporting" violated her duty to act fairly and constituted a breach of her duty to take all reasonable steps to ensure that any information about an offender that it uses is as accurate, up to date and as

complete as possible under s. 24 (1) of the *CCRA*. The reply concludes that "this issue related to the false reporting is a separate cause of action from the Plaintiff's Privacy Act complaint".

[40] A new or alternative cause of action cannot be raised in a reply. New causes of action must be raised by way of amendments to the Statement of Claim (*Niemann v Canada (Public Service Commission)*, (1989) 29 FTR 156). That said, mechanical rules of pleadings should not defeat meritorious claims where the facts are otherwise pleaded, where the other party is not taken by surprise or prejudiced and where all facts necessary to the fair determination of the matter are before the Court. In such cases, late amendments can even be permitted (*Faulding (Canada) Inc. v Pharmacia S.p.A.*, 2001 FCT 12; *Eli Lilly & Co. v Apotex Inc.*, (2000) 8 CPR (4th) 52; *Martel Building Ltd. V Canada*, [1998] 4 FC 300, reversed but not on this point 2000 SCC 60; *Francoeur v Canada*, [1992] 2 FC 333). Despite the inadequacy of the pleadings, in view of Mr. Kim's insistence and being satisfied that the Defendant will not suffer prejudice, I am satisfied that this cause of action is sufficiently pleaded, and I have considered its merits in light of the evidence before me. I find that Mr. Kim has failed to prove the elements of a cause of action based on failure to correct or reliance on incorrect information.

[41] At the heart of Mr. Kim's complaint are two stabbing incidents in which Mr. Kim was involved in 2007 and 2008. The information on Mr. Kim's OMS file correctly noted that the charges brought against him in relation to both incidents were dismissed, but the contextual information reported on the file still identified him as the aggressor in both instances. Being identified as an aggressor in two stabbing incidents played a material part in Mr. Kim's

reclassification as maximum security and his subsequent involuntary transfer to Eastern Canada in 2009.

[42] Mr. Kim has throughout protested his identification as the aggressor in the OMS. He asserted that the Independent Chairperson who heard and dismissed the first charge had identified him as the victim in the incident, and that evidence that was available in respect of the second incident showed that he was not in fact involved. Mr. Kim filed several grievances in relation to the security reclassification and in relation to other decisions subsequently made in reliance on this allegedly incorrect information. The outcome of these grievances, including on judicial review of one of them (*Kim v Canada (Attorney General)*, 2012 FC 870) has invariably been a finding that it is reasonable for the Warden, and the Assistant Commissioner at the third level grievance review, to rely on the facts and description of incidents set out in an offender's OMS file in making security classification determinations, even where the independent disciplinary tribunal may have dismissed the charges.

[43] The remedy, where an inmate is of the view that the information presented in his OMS file is incorrect, is to make a request for correction pursuant to s. 24(2) of the *CCRA*. Commissioner's Directive 701, as it existed at the relevant time, directed that requests for corrections be made by the inmate in writing to his current IPO. The process for correcting information entered in the OMS and upon which decisions may be based is thus separate and distinct from the process for grieving decisions that have been made on the basis of that information. One cannot, through grieving a decision, seek and obtain a correction of the information upon which the decision was made. The Federal Court in *Kim v Canada*, above, a

judicial review of one of Mr. Kim's grievances based on reliance on incorrect information, confirmed that the processes are separate and independent and that this is reasonable:

> 45 The Assistant Commissioner dismissed the part of the applicant's grievance that addressed the accuracy of the information in his file records because it had not been raised at the first grievance level directly with the officer responsible, IPO Mark Hare. The Assistant Commissioner concluded that he could not bypass the normal grievance procedures. This was a reasonable conclusion, in my view, and a complete answer to the applicant's complaint. I think it useful, however, to comment further on the applicant's submissions should the controversy arise again.
>
> 46 At the hearing, the applicant confirmed that he was aware that he could have brought a grievance against IPO Hare regarding the correctness of the information in his file. He contends, however, that he had raised the issue from the outset in his grievances against the Warden's decisions and that it is unfair to require him to initiate a separate grievance procedure. The difficulty with that position is that the grievance procedure requires that requests to correct information in the offender's file be directed to the official responsible for entering the information and maintaining the file. In this case, that was IPO Hare and not the Warden.

[44] The decision in *Kim v Canada*, at paras 12 and 13, indicates that Mr. Kim made a request for correction to his IPO in April 2010, but that "no further action appears to have been taken on this request". No additional evidence was led at trial in respect of this request for correction. We do not know whether it failed, was withdrawn or was not pursued, or of the reasons for this outcome. The only evidence presented at trial in respect of any request for corrections are the results of requests for corrections made by Mr. Kim in the period from May to June 2013 and in April 2014. The requests themselves, including the evidence and arguments considered by Mr. Kim's IPO in granting some of them, were not put in evidence.

[45] Section 24(1) of the *CCRA* imposes on the CSC the duty to "take all reasonable steps to ensure that information about an offender that it uses is as accurate, up to date and as complete as possible". However, it does not provide for a specific right of action or recourse in damages for breach of that duty. Accordingly, the Defendant's liability, if any, is again subsumed in the law of negligence and can only arise, pursuant to section 3 of the *Crown Liability and Proceedings Act*, RSC c C-50, in respect of a tort committed by one of its servants.

[46] Assuming, but without determining, that failing to correct or knowingly relying on false information in an offender's file could give rise to a recognizable cause of action in tort against an employee of the Crown, that cause of action would at a minimum require that the employee of the CSC identified as responsible for correcting the information or acting upon it knows, or at least has reason to believe that the information is incorrect. Merely showing that information in an offender's file was determined to be incorrect and was amended does not establish that the employees who came across or relied on the information in the past knew or had any reason to believe it to be incorrect.

[47] There is no evidence on the record before me to show the reasons why the information initially placed on Mr. Kim's record in relation to the stabbing incidents was incorrect. There is no evidence of the facts, documents or arguments on the basis of which the information was later corrected. Mr. Kim filed many grievances over the years, arguing that evidence exists to support his contention that the information recorded in his OMS file is erroneous. However, none of the testimony or documents adduced at trial establishes that such evidence existed at the time, was in

the possession of the CSC, or was even the evidence upon which Mr. Kim's IPO relied in agreeing to correct the record in 2013.

[48] Indeed, when asked at trial why, if it was so obvious that incorrect information appeared in his OMS file, he chose not to seek or pursue the recognised process for seeking corrections in 2008 or 2009, Mr. Kim offered as an explanation that he did not have all the necessary information at the time. Mr. Kim did not however identify what information he was missing. He could not explain how and when he eventually secured the allegedly missing information. More importantly, Mr. Kim did not show why one might conclude that this information was known to the persons who initially entered the incorrect information on his file, to the persons who might have had a duty to correct the file, or to the persons who relied on the file in making various decisions.

[49] There is accordingly no basis on which the Court could possibly conclude that incorrect information was placed or allowed to remain on Mr. Kim's OMS file knowingly, or as a result of the fault, neglect or breach of duty of any employee of the Defendant, or that any employee of the Defendant relied on that information knowing, or having reason to know, that it was incorrect.

[50] This conclusion equally applies to the allegations directed specifically against Mr. Lubimiv, to the effect that he showed bias against Mr. Kim and failed to provide assistance by refusing to recognize that decisions as to Mr. Kim's security classification and involuntary transfer were based on incorrect information. It was not for Mr. Lubimiv, as Assistant Deputy

Commissioner, to entertain or act upon a request for correction, whether formulated in a letter or as part of a second level grievance of a reclassification decision. As mentioned, the Court specifically held in *Kim v Canada* that it is reasonable, in determining grievances of reclassification decisions, for officials such as Mr. Lubimiv to rely on information as it appears in the OMS. In any event, Mr. Lubimiv's evidence at trial was to the effect that at the time he dealt with Mr. Kim's requests and grievances, the information he had independently obtained in respect of the first stabbing incident was consistent with Mr. Kim being the aggressor. Mr. Kim did not challenge Mr. Lubimiv's recollections in cross-examination.

[51] Finally, Mr. Kim argues that Mr. Lubimiv's bad faith was apparent in that he continued to insist, in his testimony at trial, that Mr. Kim was the aggressor in both stabbing incidents, despite the fact that corrections have now been made. The Court notes, however, that Mr. Lubimiv retired from CSC in January 2012, before the corrections were made to Mr. Kim's OMS file. In cross-examining Mr. Lubimiv at trial, Mr. Kim did not put to Mr. Lubimiv the corrections that had been made to the OMS subsequent to his retirement, or the evidence on the basis of which the corrections had been made. I can find no bad faith on Mr. Lubimiv's part in having relied on the OMS information in 2009 and 2010, or in continuing to do so at trial, as he had no reason to think it is or was inaccurate.

[52] In conclusion, Mr. Kim has failed to establish any cause of action against the Defendant, and his action is accordingly dismissed, with costs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The action is dismissed, with costs in favour of the Defendant.

"Mireille Tabib"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

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