Federal Court

Cour fédérale

Date: 20120209

Docket: T-2118-10

Citation: 2012 FC 189

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, February 9, 2012

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

EDWARD BRUCE GENDRON

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision dated December 8, 2010, by Marie-Claude Landry, the chairperson of the disciplinary court (chairperson), that the applicant is guilty of refusing to provide a urine sample pursuant to subsection 49(1) of the *Corrections and Conditional Release Act*, SC 1992, c 20 (Act).

[2] The applicant is alleging a breach of procedural fairness because the evidence was not communicated to him. He also claims that the chairperson made an unreasonable finding because no witness was heard to establish reasonable grounds to believe that he committed an offence leading to the request for him to provide a urine sample.

[3] After reviewing the file and hearing the submissions by counsel for the two parties, the Court finds that this application for judicial review must be dismissed.

Facts

[4] The applicant is an inmate in the Cowansville Penitentiary. On August 31, 2010, Officer Marie-Michèle Blouin, accompanied by Officer Lamy Deslauriers, saw the applicant leaving another inmate's cell, where there was a strong odour of an illegal substance.

[5] On September 1, 2010, Correctional Officer Marc Ferland asked to meet with the applicant in order to obtain a urine sample in accordance with paragraph 54(*a*) of the Act. The Notification to provide a urine sample indicates that Officer Ferland provided the applicant with a copy of it. The Notification also specifies that the applicant refused to provide a sample. The reason for this refusal, as noted in the Notification, reads as follows: [TRANSLATION] "You know that I am a pot and hash user. That I buy and use it regularly. The subject wishes to resolve the issue in disciplinary court with counsel".

[6] That same day, the institutional head at the time, Nicolas Guérard, again asked the applicant to provide a urine sample, explaining the consequences of his refusal. Officer Guérard gave the

applicant the opportunity to make representations on his case, but he refused again without ever denying being found in another inmate's cell where illegal substances had been consumed. Officer Guérard also noted on his observation report that the applicant refused to take a copy of the Notification to provide a urine sample.

[7] On September 7, 2010, the applicant was charged with a serious offence for refusing to provide a urine sample in accordance with paragraph 40(*l*) of the Act. However, there was an error in the Notice of charge; while the date and time of the offence were correct, the date in the box marked "sent to inmate" was June 7, 2010, that is, three months before the alleged offence was committed.

[8] The same error was committed in the offence report given to the other inmate, who was then, for that reason, acquitted of the offence with which he was charged. The chairperson, however, refused to give the applicant the same treatment on the basis that she made a mistake in the other inmate's case and was not obligated to repeat it.

Impugned decision

[9] The hearing took place over three days, September 28, 2010, October 27, 2010, and December 8, 2010. First, the chairperson rejected the applicant's preliminary objection that was based on the date error in the Notice of charge on the ground that it was simply a clerical error that could be corrected.

[10] Subsequently, after hearing Officer Ferland's testimony on October 27, 2010, the chairperson determined that she had no other choice but to find the applicant guilty of the offence set out in paragraph 40(*l*) of the Act because the applicant admitted that he is a drug user and clearly showed his intent to not provide a urine sample.

Issues

[11] Counsel for the applicant essentially raised the following two issues:

a. Does convicting the applicant of a disciplinary offence breach the principles of natural justice and procedural fairness insofar as there is no evidence that the Notice of charge was given to the applicant and the Notice of charge contained no reasonable grounds for the urine sample request?

b. Did the chairperson of the disciplinary court err by convicting the applicant without evidence of reasonable grounds for the urine sample request?

Analysis

[12] It is now settled law that procedural fairness issues must be examined on the standard of correctness (see, for example, *Ha v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 49, [2004] 3 FCR 195; *Canadian Union of Public Employees (CUPE) v Ontario (Minister of Labour)*, 2003 SCC 29 at paragraphs 100-104, [2003] 1 SCR 539; *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at paragraph 111, [2006] 3 FCR 392). However, questions of mixed fact and law are assessed on the standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190). Consequently, the Court must show deference with respect to the

second issue and intervene only if the chairperson's finding does not fall within the range of "possible, acceptable outcomes which are defensible in respect of the facts and law".

> (a) Does convicting the applicant of a disciplinary offence breach the principles of natural justice and procedural fairness insofar as there is no evidence that the Notice of charge was given to the applicant and the Notice of charge contained no reasonable grounds for the urine sample request?

[13] Under section 25 of the *Corrections and Conditional Release Regulations,* SOR/92-620, the Correctional Service must produce a Notice of charge containing a description of the "conduct that is the subject of the charge, including the time, date and place of the alleged disciplinary offence, and contain a summary of the evidence to be presented in support of the charge at the hearing", and the date, time and place of the hearing. The staff member must also issue the Notice of charge to the applicant "as soon as practicable".

[14] The applicant claimed that the Notice of charge was never issued to him and that no evidence was provided to the effect that it was issued to him. Moreover, he maintained that the Notice of charge did not describe the source of the reasonable grounds to believe that he "[took] an intoxicant into [his] body", contrary to paragraph 40(*k*) of the Act. The reasonable ground was apparently in the Notification to provide a urine sample and in the observation report by Officer Marie-Michèle Blouin, two documents that were apparently not issued to the applicant. At first glance, these arguments cannot prevail.

[15] We should start with some principles governing penitentiary discipline properly summarized by Justice Denault:

> 1. A hearing conducted by an independent chairperson of the disciplinary court of an institution is an administrative proceeding and is neither judicial nor quasi-judicial in character.
>
> 2. Except to the extent there are statutory provisions or regulations having the force of law to the contrary, there is no requirement to conform to any particular procedure or to abide by the rules of evidence generally applicable to judicial or quasi-judicial tribunals or adversary proceedings.
>
> 3. There is an overall duty to act fairly by ensuring that the inquiry is carried out in a fair manner and with due regard to natural justice. The duty to act fairly in a disciplinary court hearing requires that the person be aware of what the allegations are, the evidence and the nature of the evidence against him and be afforded a reasonable opportunity to respond to the evidence and to give his version of the matter.
>
> 4. The hearing is not to be conducted as an adversary proceeding but as an inquisitorial one and there is no duty on the person responsible for conducting the hearing to explore every conceivable defence, although there is a duty to conduct a full and fair inquiry or, in other words, examine both sides of the question.
>
> 5. It is not up to this Court to review the evidence as a court might do in a case of a judicial tribunal or a review of a decision of a quasi-judicial tribunal, but merely to consider whether there has in fact been a breach of the general duty to act fairly.
>
> 6. The judicial discretion in relation with disciplinary matters must be exercised sparingly and a remedy ought to be granted "only in cases of serious injustice" (Martineau No 2, p. 360).
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> *Hendrickson v Disciplinary Court of Kent Institution (Independent Chairperson),* (1990) 32 FTR 296 at paragraphs 298-299, cited with approval by *Forrest v Canada (Attorney General)*, 2002 FCT 539 at paragraph 16, 219 FTR 539.

[16] In this case, I see no breach of the principles of procedural fairness. First, it is apparent in the Notice of charge that the applicant refused to sign it, but still received a copy of it. Second, the applicant never alleged that he did not receive the Notice of charge during his disciplinary hearing. He claimed, rather, that he should be given the same treatment as the other inmate who was the subject of a similar offence report and who was acquitted because of the date error that also occurred in his report.

[17] I also note that the chairperson gave the Correctional Service the opportunity to prove the date on which the report was communicated to the applicant, if so desired by his counsel, during the hearing on December 8, 2010. However, after the hearing was suspended, counsel for the applicant did not ask for this evidence and even seemed to admit that the Correctional Service evidence had been established on this point.

[18] Moreover, it is well established that a breach of procedural fairness must be alleged at the first possible opportunity. Counsel for the applicant maintained that he was never given the opportunity to raise this issue because the chairperson had convicted the applicant immediately. I am not persuaded of this. He could have, when the hearing resumed, insisted that that evidence be provided, since the chairperson had given him the opportunity to do so. His silence is now working against him.

[19] In any event, no harm was demonstrated or even alleged. The applicant did not argue that he was unaware of the charge against him, or that he had been unable to submit his version of the facts. Indeed, he never denied refusing to provide a urine sample, or even regularly consuming drugs.

Under these circumstances, the chairperson was completely justified in convicting him for the offence with which he was charged.

[20] Finally, the following comments can be made about the fact that the offence report did not contain reasonable grounds for why Mr. Gendron was asked to provide a urine sample. First, Officer Ferland mentioned in his responses to the written examination on his affidavit that he offered to give the applicant the observation report written by Marie-Michèle Blouin describing her reasonable grounds to believe that he had committed an offence, but that Mr. Gendron refused to take a copy of it. Moreover, the chairperson was not bound by the strict rules of evidence that are essential to judicial or quasi-judicial procedures, as seen above. Thus, she was not obligated to require officers who have reasonable grounds to provide testimonial evidence to that effect, especially since she gave the opportunity, during the hearing on October 27, 2010, to counsel for the applicant to call the two officers with those reasonable grounds to testify. That offer went unanswered. The applicant cannot complain about this now. The chairperson had no reason to doubt the good faith and credibility of the statements contained in the Notice of charge and the observation reports. Finally, the applicant knew full well why he was asked to provide a urine sample, and there could be no ambiguity in his mind on this point.

[21] In short, I am of the opinion that the applicant did not demonstrate that the rules of procedural fairness were not respected or that he was harmed in any way.

b) Did the chairperson of the disciplinary court err by convicting the applicant without evidence of reasonable grounds for the urine sample request?

[22] The applicant relies on paragraph 54(*a*) of the Act to submit that the chairperson erred by convicting him without having evidence before her that the request for a urine sample was based on reasonable grounds, and while Officer Ferland had no personal knowledge of the reasons required. The provision reads as follows:

Urinalysis	Analyses d’urine
54. Subject to section 56 and subsection 57(1), a staff member may demand that an inmate submit to urinalysis	**54.** L’agent peut obliger un détenu à lui fournir un échantillon d’urine dans l’un ou l’autre des cas suivants :
(*a*) where the staff member believes on reasonable grounds that the inmate has committed or is committing the disciplinary offence referred to in paragraph 40(*k*) and that a urine sample is necessary to provide evidence of the offence, and the staff member obtains the prior authorization of the institutional head;	*a*) il a obtenu l’autorisation du directeur et a des motifs raisonnables de croire que le détenu commet ou a commis l’infraction visée à l’alinéa 40*k*) et qu’un échantillon d’urine est nécessaire afin d’en prouver la perpétration;

[23] This claim cannot be accepted. First, Officer Ferland was entitled to rely on the observation report by Officer Marie-Michèle Blouin for reasonable grounds to believe that the applicant had committed an offence. The Act does not provide that he must personally have knowledge of the events on which the reasonable grounds were based to believe that an inmate is committing or committed an offence. The observation report written by the institutional head at the relevant time, Mr. Guérard, also specifies that he met with the applicant, at the request of Officer Ferland, further to the applicant’s first refusal to submit to a urine test. At that time, he explained to the applicant that [TRANSLATION] “in the absence of representations on his part and after reading the information

available to me in this case, we have reasonable grounds to believe that he used . . . ." Despite repeated requests, the applicant made no representations and refused all of the requests made of him to provide a urine sample. It therefore seems that both Officer Ferland and Officer Guérard had reasonable grounds to believe that the applicant had committed an offence on the basis of the observation report written by Officer Blouin.

[24] With respect to the fact that the reasons required were not proved during the disciplinary hearing, the applicant has only himself to blame. Once again, Officer Ferland testified (in his responses to the written examination on his affidavit) that the applicant refused to take a copy of the Notification to provide a urine sample and the observation report by Marie-Michèle Blouin. However, counsel for the applicant stated that he would request a copy of the observation report by Ms. Blouin during the hearing on October 27. However, no request in this respect appears to have been made and no allegation regarding the non-issuance of this report was raised when the hearing resumed on December 8, 2010. Finally, and this is undoubtedly the most important point, the applicant never tried to explain to Officer Ferland, Officer Guérard or the chairperson why he had refused to provide a urine sample. The decision by the chairperson therefore arose from the evidence in the file and the lack of any evidence to the contrary. In fact, the chairperson could not have made any other finding, especially given that the applicant explicitly and voluntarily stated that he is a regular user of illegal substances.

[25] For all of the above reasons, the application for judicial review must therefore be dismissed, with costs.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed, with costs.

"Yves de Montigny"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

DOCKET:	T-2118-10
STYLE OF CAUSE:	EDWARD BRUCE GENDRON and AGC
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	February 7, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	de MONTIGNY J.
DATED:	February 9, 2012

APPEARANCES:

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