Federal Court of Appeal | Cour d'appel fédérale

Date: 20140919

Docket: A-302-13

Citation: 2014 FCA 206

CORAM: **PELLETIER J.A.**
STRATAS J.A.
WEBB J.A.

BETWEEN:

WILLIAM A. JOHNSON

Appellant

and

THE INDEPENDENT CHAIRPERSON,
WARKWORTH INSTITUTION
DISCIPLINARY COURT

Respondent

Heard at Toronto, Ontario, on September 9, 2014.

Judgment delivered at Ottawa, Ontario, on September 19, 2014.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: STRATASJ.A.
WEBB J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

[1] Mr. Johnson appeals from the decision of the Federal Court, reported as 2013 FC 905, dismissing his application for judicial review of the decision of the Independent Chairperson appointed pursuant to the *Corrections and Conditional Release Regulations* SOR/92-620. The

Independent Chairperson found Mr. Johnson guilty of a disciplinary offence, namely disobeying a justifiable order of a staff member.

[2] The facts are not complicated. Mr. Johnson was advised that he was wanted at the Visitors and Correspondence (V&C) Center of the Warkworth Institution where a process server was waiting to serve him with documents in a civil matter. According to Mr. Johnson, he attended at the V&C Center but was advised that because he did not have a pass, he would be subject to discipline if he did not leave the area immediately. He returned to his original location where he was advised, not once but twice, that he was wanted at the V&C Center. Mr. Johnson declined to attend as requested and suggested that the request be forcibly inserted into one of the body cavities defined by section 46 of the *Corrections and Conditional Release Act*, S.C. 1992 c. 20 (the Act).

[3] Mr. Johnson was charged with a disciplinary offence with respect to the two occasions in which he was instructed (to use a neutral word) to attend at the V&C Center and failed to do so. The Independent Chairperson found that Mr. Johnson was guilty of the offence but reduced the charge from a major offence to a minor offence and fined him $20 and suspended payment for a period of time.

[4] Mr. Johnson applied to have the Independent Chairperson's decision judicially reviewed. He argued 3 grounds of review:

a that he had not been ordered to the V&C Center because the charge sheet indicated that he had merely been "directed" there;

b that the order or direction was an interference with his right as a litigant to avoid service; and

c that the Independent Chairperson could not have found him guilty beyond a reasonable doubt, as required by subsection 43(3) of the Corrections and Conditional Release Act because of the ambiguity raised by the use of the word "directed" in the charge sheet.

[5] The Federal Court Judge rejected Mr. Johnson's argument based on the distinction between the use of the words "directed" and "ordered". He found that the words were synonyms, particularly in the context of the daily administration of a correctional institution. The Federal Court Judge also found that there was no right to avoid service of legal process so that ordering Mr. Johnson to attend at the V&C Center could not be a violation of that right. As for the third ground of review, the Federal Court Judge found that Mr. Johnson was asking the Court to reweigh the evidence and declined to do so.

[6] Mr. Johnson now appeals to this Court. He raises 4 grounds of appeal. He argues that the Federal Court Judge breached his duty of procedural fairness by incorrectly stating the issues in the application for judicial review. He reiterates his contention that the instruction he received to attend at the C&V Center did not amount to an order and that the word “directed” used in the charge sheet is ambiguous. He also argues that the instruction he received, even if an order was not justifiable because it amounted to an interference with his position as a litigant in adversarial proceedings. This, he says, exceeds the Correctional Services statutory mandate so that the instruction was *ultra vires*. Finally, Mr. Johnson argues that the Federal Court Judge failed to address his mind to the issue of reasonable doubt. Subsection 44(3) of the Act stipulates that the Independent Chairperson shall not find an inmate guilty of an offence unless he or she is satisfied of his guilt beyond a reasonable doubt.

[7] On an appeal from an application for judicial review, the appellate court essentially steps into the shoes of the reviewing court: *Telfer v. Canada (Revenue Agency)*, 2009 FCA 23, [2009] F.C.J. No. 71, at paragraphs 18-19.

[8] Mr. Johnson's concern with the use of the word "directed" in the charge sheet does not assist him.

[9] The use of that word raises two questions. The first is whether Mr. Johnson has been charged with an offence other than that set out paragraph 45(a) of the Act. The Federal Court Judge found that the words "ordered" and "directed" were largely synonymous in the corrections context, a conclusion which has not been challenged. While the better practice would be to use the words of the statute in the charge sheet, the use of a synonym is not fatal to the charge. So long as Mr. Johnson was reasonably informed of the allegations against him and the offence with which he was charged was identified by reference to a definite section of the Act, the formal requirements for a valid charge were met: see *R. v. Coté*, [1978] 1 S.C.R. 8 at paragraph 11.

[10] The second question raised by the use of the word "directed" is whether, on the facts, Mr. Johnson understood that, in the exercise of their lawful authority, the correctional authorities required him to attend at the V&C Center for a purpose connected with the administration of the institution. He obviously understood that he was to attend at the V&C Center as he initially attended there. There is no reason to believe that Mr. Johnson believed otherwise when he was subsequently directed to attend at the V&C Center a second and third time.

[11] Given that the institution had custody of Mr. Johnson and that he could not be served unless he was produced by corrections officials, the instruction to attend at the V&C Center was for a purpose connected with the administration of the institution in the sense that the institution cannot, as public institution, interfere with the administration of justice by declining to produce an individual for service other than in the most exceptional circumstances.

[12] As for Mr. Johnson's further argument on this point based on the doctrine of *ultra vires*, it does not assist him either since the correctional officer's order did not interfere with Mr. Johnson's right to conduct his litigation as he saw fit. The correctional officer's order was not unjustified because it impeded Mr. Johnson's ability to avoid service. Avoiding service is not a legitimate litigation strategy.

[13] Mr. Johnson also argued that the use of the word "directed" ought to have introduced an element of reasonable doubt into Independent Chairperson's mind. For the reasons set out above, this argument has no merit.

[14] The allegation that the Federal Court Judge committed an error of law in misstating the issues cannot be sustained. While he did not characterize the issues as Mr. Johnson did, he dealt with the legal issues raised by Mr. Johnson's application.

[15] I would therefore dismiss the appeal with costs. Given the amount of the fine imposed by the Independent Chairperson ($20), his suspension of payment for a period of time and his reduction of the violation from a major offence to a minor offence, it appears that the

Independent Chairperson may well have found that there were mitigating factors. Given these mitigating factors as well as the limited resources of federal inmates, I would limit the respondent's costs to his out of pocket disbursements.

"J.D. Denis Pelletier"

J.A.

"I agree
David Stratas J.A."

"I agree
Wyman W. Webb J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-302-13
STYLE OF CAUSE:	WILLIAM A. JOHNSON v. THE INDEPENDENT CHAIRPERSON, WARKWORTH INSTITUTION DISCIPLINARY COURT
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 9, 2014
REASONS FOR JUDGMENT BY:	PELLETIER J.A.
CONCURRED IN BY:	STRATAS J.A. WEBB J.A.
DATED:	SEPTEMBER 19, 2014

APPEARANCES:

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