Federal Court  Cour fédérale

Date: 20170418

Docket: T-236-16

Citation: 2017 FC 370

Ottawa, Ontario, April 18, 2017

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

WILLIAM A. JOHNSON

Applicant

and

**THE COMMISSIONER OF CORRECTIONS,
AS REPRESENTED BY LARRY MOTIUK,
ASSISTANT COMMISSIONER, POLICY**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Mr. William Johnson, who was self-represented on this application, is a federally incarcerated inmate at the Warkworth Institution [WI]. He is residing in Unit 5 (also referred to as the Eighty Man Unit [EMU]).

[2] In December 2013, Mr. Johnson submitted a complaint relating to tobacco use in Unit 5. Specifically Mr. Johnson complained that despite the smoke-free status of WI, inmates found smoking have not been disciplined. He argued that this situation is particularly prejudicial in his case as he suffers from allergies. He submits that exposure to second-hand smoke is negatively impacting his health and safety.

[3] Mr. Johnson pursued the complaint through the Correctional Service of Canada [CSC] Offender Complaint and Grievance Process [the 2013 Grievance]. In August 2015 the Assistant Commissioner, Policy [Commissioner] of the CSC rejected the 2013 Grievance concluding that the issues raised had been addressed in a prior grievance at the National level [the 2010 Grievance]. The 2010 Grievance is before this Court in file T-149-13.

[4] Mr. Johnson brings the application for judicial review seeking a number of declarations and is asking that the decision be set aside and returned for redetermination by the Commissioner. In effect he argues that he had a legitimate expectation that the issues raised in the 2013 Grievance would be addressed. He submits that the Commissioner erred in concluding the issues had already been addressed in the 2010 Grievance. The respondent submits that the decision was reasonable and further submits that this judicial review application is an abuse of process.

[5] Having reviewed the record, including the written submissions of the parties and having heard the parties' oral arguments by video-conference I am not persuaded that the Commissioner

erred or that the determination reached was unreasonable. My reasons for dismissing this application follow.

II. Background

A. *General*

[6] Mr. Johnson alleges that he suffers from a medical condition and that smoke adversely affects his breathing. He states that although federal inmates were permitted to smoke in federal correctional facilities prior to 2009, he resided in a designated smoke-free unit, Unit 5, at WI. He submits that the no smoking rules were strictly enforced within Unit 5 prior to 2009.

[7] Mr. Johnson states that in 2009, CSC introduced a smoking ban in all federal correctional facilities [the Smoking Ban]. As all institutions became fully smoke-free upon implementation of the Smoking Ban, Unit 5 was no longer treated as unique. Mr. Johnson alleges that the result of the Smoking Ban has been the development of a "black market" for use of tobacco products at the WI including in Unit 5, contrary to CSC policy, use that has adversely impacted his health.

B. *The 2010 Grievance and related proceeding, T-149-13*

[8] In 2010, Mr. Johnson initiated a complaint/grievance alleging smoke from Aboriginal ceremonies in or around Unit 5 was impacting upon his health. The complaint was denied at the initial level and continued through the grievance process. At the second level in the complaint/grievance process Mr. Johnson alleged CSC policies allowing Aboriginal ceremonies

were discriminatory. He also alleged that CSC workers were not enforcing the smoking ban in Unit 5, but instead were protecting inmate smokers.

[9] In advancing the 2010 Grievance to the third level Mr. Johnson referred to his medical condition, argued that the Smoking Ban had increased second-hand smoke in Unit 5 and clarified that his primary issue related to second-hand smoke – his allegation that policies allowing Aboriginal ceremonies were discriminatory, were secondary in his complaint. He maintained his allegations that CSC staff members were protecting inmate smokers. The grievance was upheld as it related to procedural defects in the complaint process that Mr. Johnson had identified but was denied in respect of the issues relating to second-hand smoke from Aboriginal ceremonies, discrimination, and the alleged improper conduct of CSC staff.

[10] In January, 2013, Mr. Johnson sought judicial review of the negative decision (T-149-13). In pursuing the application Mr. Johnson filed new information and exhibits. By way of Order dated July 9, 2015, the Case Management Judge converted the application to an action to "…ensure the real issues in dispute are before the Court and to avoid a multiplicity of proceedings". Mr. Johnson subsequently served and filed a statement of claim and the action in T-149-13 is proceeding.

C. *The 2013 Grievance*

[11] In December 2013 Mr. Johnson initiated the 2013 Grievance that underlies this application for judicial review. In pursuing the 2013 Grievance to the third level he identified the following issues: (1) the Smoking Ban was ill conceived in that it resulted in less protection for

inmates with medical conditions exacerbated by second-hand smoke; (2) the Smoking Ban failed to provide for real security measures similar to those established to detect drugs and there has been a refusal to provide for the necessary measures; and (3) he relied on the *Canadian Charter of Rights and Freedoms* and paragraph 3(a) of the *Corrections and Conditional Release Act*, SC 1992, c 20, to argue that the CSC must provide a safe living environment.

[12] In satisfaction of the 2013 Grievance, Mr. Johnson requested that: (1) Unit 5 rules be restored requiring signed agreements with inmates, which would lead to removal to a different living unit if found smoking or creating second-hand smoke; (2) that the Commissioner's Directives be modified to provide for tobacco detection devices; (3) that the Commissioner's Directives be modified to protect inmates with medical conditions that would be exacerbated by second-hand smoke from Aboriginal smudging ceremonies; and (4) that occupants of units housing inmates with medical conditions exacerbated by second-hand smoke be subject to urinalysis spot checks.

[13] In responding to the 2013 Grievance, the Commissioner noted the issues raised by Mr. Johnson and highlighted the matters addressed in the 2010 Grievance. The Commissioner reproduced an extract from Annex C, paragraph 5 of Guideline 081-1, *Offender Complaint and Grievance Process*, [Guideline 081-1] which states:

> A complaint/grievance may be rejected when:
>
> […]
>
> **5. The issue is being, or has been, addressed in a separate complaint/grievance**. If, during the analysis of a complaint/grievance at any given level, it is established that the issue is being, or has been, addressed in a separate complaint/grievance, the complaint/grievance may be rejected.

> However, if a submission is going to be rejected on this basis, it must be clear that the issue was the same and was addressed in the separate complaint/grievance. The response should also clearly outline the reason(s) for rejecting the complaint/grievance as well as the reference number(s) of the submission that already addressed the issue.

[14] Relying on Guideline 081-1, the Commissioner then concluded that Mr. Johnson's concerns regarding second hand-smoke had been previously addressed in the 2010 Grievance. The 2013 Grievance was rejected.

III. Preliminary Issues

[15] At the outset of the hearing Mr. Johnson raised two preliminary issues: (1) the respondent's record was filed outside the time period provided for in the *Federal Courts Rules*, SOR/98-106 and he was unaware of any Order of the Court authorizing the late filing; and (2) the respondent's record contained documents that were not before the Commissioner, and therefore were improperly before the Court on judicial review.

[16] A review of the Court's file in this application confirms that Prothonotary Kevin Alto authorized, by way of oral direction, the service and filing of the respondent's record on or before June 23, 2016. The respondent's record was served and filed in compliance with Prothonotary Alto's direction.

[17] Turning to Mr. Johnson's objection to documentation in the respondent's record, he flags the following documentation as not having been before the Commissioner: (1) the Certified Tribunal Record [CTR] relating to the 2011 Grievance; (2) Mr. Johnson's affidavit and exhibits

filed in T-149-13; (3) the order of the Case Management Judge converting the application to an action in T-149-13; (4) Mr. Johnson's Statement of Claim in T-149-13; (5) correspondence from the respondent dated March 16, 2016 seeking to have this matter stayed on the basis that it is duplicative of the proceeding in T-149-13; and (6) the Court's online docket index in T-149-13.

[18] The respondent submits that this is background information taken from the records of the Court and the Court has the authority to take judicial notice of and consider its own records to avoid an abuse of its process. In this respect the respondent submits that the Court could, on its motion, access Court file T-149-13 and the inclusion and consideration of the material is not inappropriate.

[19] A review of the CTR in this matter reveals that portions of the 2010 Grievance, including the final level decision rendered in response to the 2010 Grievance were before the Commissioner in relation to the 2013 Grievance. The CTR also reflects that the analysts involved in the preparation and review of the 2013 Grievance for consideration by the Commissioner were aware of and had sought a copy of Mr. Johnson's application for judicial review of the 2010 Grievance decision.

[20] It is well-established in the jurisprudence that, subject to specific exceptions none of which apply here, a Court reviewing a decision is to do so based on the record that was before the decision-maker. In considering the merits of this judicial review application I have therefore not considered any material that does not form part of the CTR.

[21] However a review of the decision is not the only issue raised on this application. The respondent raised a preliminary objection, arguing that Mr. Johnson's application is an abuse of process and it can properly rely on the documentation and information contained in the Court's file in the T-149-13 proceeding to demonstrate this. I agree, it is well-established that the Court possesses the inherent discretion to prevent misuse of its procedure, and can stop proceedings that have become unfair or oppressive (*Behn v Moulton Contracting Ltd*, 2013 SCC 26 at paras 39-40; *Coombs v Canada (Minister of National Revenue – MNR)*, 2015 FC 869 at para 28). The Court will consider those portions of the respondent's record that did not form part of the record before the Commissioner for the limited purpose of considering submissions relating to abuse of process and costs. The Court has not considered those portions of the record for the purpose of addressing the merits of this judicial review application.

[22] In coming to this conclusion I note that Mr. Johnson was aware that documentation filed in T-149-13 had been placed before the Court. He has had the opportunity to address that evidence and has taken advantage of that opportunity. He suffers no prejudice through its use for the limited purpose set out above.

[23] The respondent's abuse of process argument is addressed below.

IV. Issues

[24] The parties raise the following issues:

A. Did the Commissioner reasonably conclude that the issues raised in the 2013 Grievance had already been addressed in a separate grievance?

B. Does this judicial review application constitute an abuse of process?

V. Standard of Review

[25] Mr. Johnson submits that his legitimate expectations flowing from what is now section 2 of *Commissioner's Directive 081 - Offender Complaints and Grievances (2014-01-13),* [Commissioner's Directive 081] have been violated. Section 2 of Commissioner's Directive 081 states:

> 2. Decision makers at all levels will ensure that grievors are provided with complete, documented, comprehensible and timely responses to all issues that are related to the subject of the initial complaint or grievance.

[26] Mr. Johnson submits that the Commissioner's failure to individually address each issue raised in his third level grievance submissions engages an issue of procedural fairness to be reviewed against a standard of correctness. I disagree.

[27] The issue raised in this application relate to the Commissioner's interpretation of Annex C paragraph 5 of Guideline 081-1 and the application of that Guideline to the facts as disclosed in Mr. Johnson's 2013 Grievance. The Commissioner's interpretation of the CSC Guidelines and the determination of questions of mixed fact and law are decisions to which significant deference is owed by a reviewing Court (*Gallant v Canada (Attorney General),* 2011 FC 537 at paras 14-15 citing *Bonamy v Canada (Attorney General),* 2010 FC 153; *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47 – 49 [*Dunsmuir*]). The decision will be reviewed against a standard of reasonableness.

VI. Analysis

A. *Did the Commissioner reasonably conclude that the issues raised in the 2013 Grievance had already been addressed in a separate grievance?*

[28] Mr. Johnson relies on Section 2 of Commissioner's Directive 081 to argue that the Commissioner had an obligation to address each of the issues raised in the 2013 Grievance and the failure to do so amounts to a reviewable error warranting the intervention of this Court. He argued that the core issues in the two grievances are distinct; the 2010 Grievance addressed second-hand smoke from Aboriginal ceremonies whereas the 2013 Grievance addressed detection tools and enforcement. Having considered Mr. Johnson's argument, I am not persuaded.

[29] In rendering the final level decision the Commissioner summarized the issues raised in the 2013 Grievance. Mr. Johnson has taken no issue with the accuracy or completeness of this summary. The Commissioner then proceeded to summarize and rely upon the first level response that Mr. Johnson received. That response confirmed the Smoking Ban in federal correctional institutions, that the CSC policy provides tools to address breaches of the policy and that the policy is enforced equally in the WI. The first level response further noted the absence of evidence to substantiate the allegation that CSC staff was ignoring or actively protecting those found violating the policy.

[30] The Commissioner's decision then summarized the issues addressed in the 2010 Grievance. This included second-hand smoke from Aboriginal ceremonies and the substantive

issues relating to Mr. Johnson's exposure to second-hand smoke. The decision then proceeded to address Mr. Johnson's complaint regarding the lack of enforcement and detection tools stating "…[p]olicy provides tools and measures to address any inmate who may be caught smoking. The [first level] complaint response sufficiently addressed your concerns and you have not provided any subsequent evidence to substantiate your allegations. Furthermore your concerns regarding second hand smoke have previously been addressed at the National level".

[31] The above statement indicates that the Commissioner did more than simply conclude the issues raised had previously been addressed at the National level. The Commissioner reached this conclusion only after adopting the response provided at the first level and addressing what Mr. Johnson argues is the unique aspect of the 2013 Grievance, detection tools and enforcement mechanisms. While Mr. Johnson may disagree with the Commissioner's conclusions in this regard and may have preferred the Commissioner engage in a more detailed or lengthy response, neither of these concerns render the Commissioner's decision unreasonable. There was no obligation on the Commissioner to directly and expressly address each and every argument or concern raised as Mr. Johnson has argued (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16).

[32] The Commissioner then proceeded to conclude that while Mr. Johnson in the 2013 Grievance had framed issues in a different manner than the 2010 Grievance, the substantive issue remained - second hand smoke in Unit Five at the WI. The Commissioner reasonably concluded that this issue had been addressed in the 2010 Grievance and was now before this Court in T-149-13. In light of the record, I am satisfied that it was reasonably open to the Commissioner to

reject the 2013 Grievance relying on Guideline 081-1. The decision is justified, transparent and intelligible and falls within the range of possible, acceptable outcomes defensible in respect of the facts and law (*Dunsmuir* at para 47).

B. *Does the application constitute an abuse of process?*

[33] In light of my conclusion that the Commissioner's decision was reasonable, the abuse of process issue need not be addressed. However, the respondent has sought "substantial indemnity costs" on the application, arguing that Mr. Johnson is no stranger to the Court and that he has an obligation to conduct his litigation in an efficient manner that avoids the waste of judicial resources. In this case the respondent submits the issues raised are duplicative of those currently being litigated in T-149-13. In oral submissions the respondent indicated that costs in the amount of $2,500.00 would be appropriate.

[34] In support of its position the respondent advised the Court that it raised its concerns with the duplicative nature of this application in writing in the course of case management proceedings in T-149-13 and further noted that the Case Management Judge converted the application in T-149-13 to an action to, in part, avoid a multiplicity of proceedings. Mr Johnson was not receptive to the respondent's request that this matter not proceed.

[35] Mr. Johnson disputes the suggestion that the application is an abuse of process submitting that he believes he was entitled to a response to each of the issues raised, that the decision failed to directly address the question of tobacco detection methods. He also advised that Court that he is not currently working and lacks the financial resources to pay a significant costs award.

[36] Costs are inherently a matter falling within the discretion of the Court. While I have found that the Commissioner reasonably concluded that the issues raised in Mr. Johnson's 2013 Grievance were addressed in the 2010 Grievance, Mr. Johnson effectively advanced his arguments and I am satisfied that he has pursued the application on the basis of a good faith belief that the Commissioner erred in relation to the 2013 Grievance. I am also mindful of Mr. Johnson's financial circumstances and note his submissions to the effect that he is currently unemployed and is not in a position to pay costs in the amount the respondent seeks. In the circumstances, I am of the view the costs in the amount of $250.00 would be appropriate.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. Costs are awarded to the respondent in the amount of $250.00.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-236-16
STYLE OF CAUSE:	WILLIAM A. JOHNSON v THE COMMISSIONER OF CORRECTIONS, AS REPRESENTED BY LARRY MOTIUK, ASSISTANT COMMISSIONER, POLICY
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	OCTOBER 5, 2016
JUDGMENT AND REASONS:	GLEESON J.
DATED:	APRIL 18, 2017

APPEARANCES:

William Johnson	FOR THE APPLICANT (ON HIS OWN BEHALF)
Ayesha Laldin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT