Federal Court Cour fédérale

Date: 20220608

Docket: T-541-21

Citation: 2022 FC 850

Toronto, Ontario, June 8, 2022

PRESENT: The Honourable Madam Justice Furlanetto

BETWEEN:

GEORGE FRASER

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of an Offender Final Grievance Response [Decision] of the Assistant Commissioner [AC] of the Correctional Service of Canada [CSC], denying a final grievance by the Applicant under the *Corrections and Conditional Release Act*, SC 1992, c 20 [CCRA]. The Applicant grieved the refusal to permit a file correction to a Statement/Observation Report [SOR] that characterized a statement he made as being an attempt to manipulate health care staff.

[2] On this judicial review, the Applicant seeks to raise a new argument that the SOR should never have issued, as the statement was a non-reportable incident. While the Applicant contends that the Court has discretion to consider this argument, as it was not raised before the decision-maker, it cannot be argued now.

[3] Further, the Applicant has failed to demonstrate that the Decision made by the AC is unreasonable. The application for judicial review is accordingly dismissed.

I. Background

[4] The Applicant, George Fraser, is an inmate at Bath Institution [BI]. In late 2018, Mr. Fraser developed a finger condition called stenosing tenosynovitis. He received an initial steroid injection treatment for the condition with follow-up treatment to occur shortly thereafter. The follow-up did not occur. Mr. Fraser subsequently filed a complaint with the College of Physicians and Surgeons of Ontario against the doctor who gave him the initial treatment.

[5] On March 1, 2019, a nurse at BI made an SOR entry on Mr. Fraser's Case Management File [CMF] following a conversation with Mr. Fraser. The entry stated:

> Offender attempting to manipulate health care, offering to drop his complaint to College of Physicians against Dr. Baron, if Dr. Baron would provide the treatment that the offender wants today.

[6] In September 2019, Mr. Fraser submitted a Record Correction Request [RCR]. He sought to have the SOR corrected to read:

> Offender in total desperation to get pain relief for Stenosing Tenosynovitis / Trigger Finger offered to drop his complaint to College of Physicians against Dr. Baron, if Dr. Baron would

> provide the treatment that the offender desperately needs today for pain relief.

[7] Following consultation with the nurse who authored the SOR and the Manager, Assessment and Intervention, the RCR was denied on November 7, 2019 and a Memo to File was placed on the Applicant's CMF.

[8] On November 27, 2019, Mr. Fraser filed his initial grievance. He argued the statement in the SOR was misrepresentative and taken out of context because it failed to include any reference to the significant pain he was experiencing from his finger condition.

[9] On March 11, 2020, the initial grievance was denied. After an interview with the Applicant, the Warden of BI concluded that there was no requirement to provide detailed medical information in the SOR and that doing so could be a privacy risk, and would violate the "need to know" principle. He also noted that Mr. Fraser was informed that this information could not be added retroactively, and that he was free to provide a letter for his CMF setting out his explanation of events.

[10] On April 10, 2020, Mr. Fraser made a written request that his Case Management Team [CMT] review, modify or add a clarification to the SOR to reflect that there was no attempt to manipulate health care, but rather "an intentional, deliberate and planned quid pro quo for medical treatment".

[11] On May 7, 2020, Mr. Fraser filed his final grievance. He again argued that there was a misrepresentation in the SOR and that his comment had been taken out of context. He also argued that he was refused a full review by his CMT, contrary to the initial grievance decision. The final grievance was denied on February 17, 2021.

[12] The Decision provided *inter alia* as follows:

> A review of your file at the National level determined that, on 2019-11-06, you submitted a formal request for file corrections. Subsequently, on 2019-11-07, a Memo to File was created in accordance with the above-referenced policy. You were provided with a copy of the Memo to File and informed of your right to appeal the denial through the grievance process.
>
> Given the above noted information, as well as the fact that the Memo to File references your request, its denial, and the reasons for its denial, it has been determined that your request for file corrections was adequately addressed in accordance with paragraph 15 of Annex B of CD 701. Further the Memo to File documents that consultation occurred with both the Nurse who had issued the Statement/Observation Report on 2019-03-01 and with the Manager, Assessment and interventions, on 2019-11-07. As reasonable efforts were taken in order to address your concerns with the report, in accordance with paragraph 15 of Annex B of CD 701, this portion of your grievance is denied.
>
> Regarding your concerns that your Case Management Team refused to conduct a review, it has been determined that you submitted a request for a Case Management File Review on 2020-04-10. Upon review of your file, it is noted that you met with your Institutional Parole Officer on 2020-05-05 to discuss this request. You were informed that your opinion was noted and would be incorporated into any further reports. Ultimately, it was decided that your Case Management Team supported the decision to deny your request for file corrections as per the previous Memo to File (2019-11-07), as no new information was brought forward. The decision to uphold the denial was made in consultation with the Manager, Assessments and Interventions. Due to the above information, this portion of the grievance requires no further action.

II. Issues and Standard of Review

[13] The following issues are raised by this application: 1) can the issue of whether the incident is reportable be considered by the Court as a new issue if it was not raised before the decision-maker; and 2) was the Decision unreasonable because it did not consider whether the incident was reportable.

[14] The standard of review for a CSC grievance decision is reasonableness: *Henry v Canada (Attorney General)*, 2021 FC 31 [*Henry*] at para 19; *Creelman v Canada (Attorney General)*, 2020 FC 936 at paras 20-22. None of the situations that rebut the presumption of reasonableness for administrative decisions are present: *Canada (Minister of Citizenship and Immigration v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 9-10, 16-17.

[15] A reasonable decision is "based on an internally coherent and rational chain of analysis" that is "justified in relation to the facts and law that constrain the decision maker": *Vavilov* at paras 85-86; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at paras 2, 31.

[16] When determining whether a decision is reasonable, the Court's focus is on "the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome": *Vavilov* at para 83. Reasons must be responsive to the submissions made by the parties and "meaningfully grapple with key issues or central arguments raised": *Vavilov* at paras 127-128; *Mason v Canada (Citizenship and Immigration)*, 2021 FCA 156 at para 34. A decision is reasonable if, when read as a whole and taking into account the administrative setting,

it bears the hallmarks of justification, transparency, and intelligibility: *Vavilov* at paras 85, 91-95, 99-100.

III. Analysis

[17] The Applicant argues that the thrust of his complaint in his grievance was that his actions did not warrant reporting under Commissioner's Directive [CD] 568-1 - *Recording and Reporting of Security Incidents* [CD 568-1]. He states that writing up his comment as a threat to the safety of the institution was chilling and abusive, and cannot be reasonable.

[18] The Respondent asserts that the AC reasonably dealt with the issues raised during the grievance process. It contends that the Applicant's argument that the incident was not reportable under CD 568-1 is a new issue that was not raised during the grievance process.

[19] CD 568-1 sets out CSC's procedure for recording and reporting security incidents. Paragraph 12 requires CSC staff to document witnessed incidents or observations in an SOR. The Annexes of CD 568-1 set out the type of incidents and observations to be reported. CD 568-2 -*Recording and Sharing of Security Information and Intelligence*, referenced within CD-568-1, indicates at paragraph 6(a) that an SOR will normally be used when staff "observe activities, behaviours or receive information that they consider to be significant or out of the ordinary".

[20] In each of his grievance submissions, the Applicant sought a correction to the SOR. He argued that the statement made in the SOR was misrepresentative and taken out of context and

that it should be amended to reflect that he was desperate to get pain relief for Stenosing Tenosynovitis/Trigger Finger. The Applicant admitted in oral argument that he did not argue that his statement was not a reportable incident.

[21] As stated in *Oleynik v Canada (Attorney General)*, 2020 FCA 5 at paragraph 71:

> As a general rule, a court will not consider an issue on judicial review where the issue could have been but was not raised before the administrative decision-maker: *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras. 21-26; *Canada (Attorney General) v. Valcom Consulting Group Inc*., 2019 FCA 1 at para. 36. The reason for the rule include the risk of prejudice to the responding party, and the potential to deny the reviewing court an adequate evidentiary record: *Albert Teachers*' at para 24-26.

[22] I see no basis to deviate from this general rule on this application. The Applicant's reference to paragraphs 78-79 of *Canada (Attorney General) v Best Buy Canada*, 2021 FCA 161 is of no assistance and the Applicant has not established its applicability to this case. The nurse's jurisdiction to report the incident was not challenged during the grievance process, was not raised in the Applicant's notice of application and cannot be raised as a new issue before me now.

[23] The Applicant argues, in the alternative, that the reportability of the incident is foundational and underlies the grievance. He argues that the fact that the AC did not grasp this issue and comment on it in their Decision makes the Decision unreasonable. The Applicant relies on *Henry* in support of this submission.

[24] However, I do not find *Henry* to be applicable. In *Henry*, the Applicant argued in his grievance submissions that his Parole Officer did not author the report that was at issue in that case in accordance with the relevant directive (CD 705-6, *Correctional Planning and Criminal Profile*). Thus, Justice Ahmed found that the issue of whether the directive was followed was something that the decision-maker should have grappled with.

[25] In this case, the core challenge in the grievance process was to the characterization of the facts reported about the incident rather than to the nature of the incident itself and whether the incident came within CD 568-1.

[26] In the decision from the initial grievance, the Warden indicates that he interviewed the Applicant. His decision references CD 568-1 and explains the manner of preparing a report under that directive. There is no indication that the Applicant raised any issue with the reportability of the incident under CD 568-1 at that time and there is no reference to this argument in the submissions made in the Applicant's final grievance.

[27] To the contrary, the initial grievance presentation claimed that the SOR was incomplete on its facts, misrepresentative, and lacked context and requested a file correction. Similarly, the submissions on the final grievance characterize the issue as the misrepresentation of facts and circumstances of the Applicant's "quid pro quo offer without further explanation of [the Applicant's] stenosing tenosynovitis" and the alleged failure of the CMT to consider the Applicant's April 10, 2020 request for file review.

[28] I agree with the Respondent that the AC engaged with and responded to all of the arguments raised in the Applicant's grievance. In my view, the AC was not obliged to justify why the statement was reported as this was not the focus of the grievance. The AC reviewed the procedural history and noted that the Institutional Head had already informed the Applicant of the obligations of staff to report any potential security incidents under CD 568-1 in its response to the initial grievance. The AC then went on to consider the arguments made on the final grievance, which were focussed on the requested correction to the statement within the SOR not on the existence of the SOR itself. In my view, there is no reviewable error in this approach. The Decision is transparent, intelligible and provides justification for its outcome.

[29] For these reasons, the application is dismissed.

IV. Costs

[30] The parties provided oral submissions as to costs at the hearing. The Applicant indicated that he was not seeking costs of the application, while the Respondent requested $1,120 in costs if successful.

[31] Rule 400 of the *Federal Courts Rules* provides the Court with full discretionary power over the amount and allocation of costs. In this case, as the Respondent is the successful party and I agree that they are entitled to some costs. However, considering the Rule 400(3) factors, including the small number of discrete issues raised, the simplicity of the submissions and hearing, and the fact that Mr. Fraser is incarcerated and would have more limited means, I will exercise my discretion to cap the award of costs at $300.

JUDGMENT IN T-541-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. Costs in the amount of $300 are awarded to the Respondent.

"Angela Furlanetto"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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