Date: 20080430

Docket: T-2131-06

Citation: 2008 FC 559

Ottawa, Ontario, April 30, 2008

Present: The Honourable Orville Frenette

BETWEEN:

GILLES OUELLETTE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision by the National Headquarters of Correctional Service Canada (CSC), dated October 30, 2006, refusing the applicant's grievance V30A00020878.

I. The facts

[2] The applicant has been in detention at the La Macaza Institution (the Institution) since April 2003. He filed a certain number of grievances, alleging that he was harassed by an employee

of the Institution, Sylvain Blais. Most of his grievances were dismissed. One grievance was upheld in part, grievance V30A00017399, contemplating the third level decision to the effect that Mr. Blais [TRANSLATION] "did not manage the situation in a professional manner," but that his action did not amount to [TRANSLATION] "a case of harassment according to the definition of the policy in effect." Another grievance, regarding the time period for registering the last complaint, was also upheld in part, recognizing that the time period was too long, but that this was the result of uncontrollable circumstances.

[3] On January 25, 2006, the applicant filed the grievance at issue at the first level, i.e. before the prison Warden, after he was transferred from his workspace to another building, where Mr. Blais did not work. In this building, the applicant alleges that he did not have access to running water, toilets, or to many departments such as the recreation and social area of the life group, the gym, the library, or the meeting room of Groupe Option-Vie. According to the applicant, this created an illegal segregation. The appellant argued in his first level complaint that the workplace transfer confirmed [TRANSLATION] "Mr. Blais' harassment of Mr. Ouellette. To achieve this, [Mr. Blais] obtained the unconditional support of his wife, the Deputy Warden Ms. Bergevin."

[4] The prison Warden dismissed this grievance, noting that Ms. Bergevin, as the Institution's Deputy Warden, [TRANSLATION] "made all of the necessary decisions inherent to this position." In light of the situation of conflict between the applicant and Mr. Blais, the management of the Institution was looking for [TRANSLATION] "a viable solution with the fewest repercussions possible." The Warden also noted that the applicant had not lost any salary.

[5] The applicant filed his grievance at the second level, namely before the head of the region, alleging that certain specific points had not been addressed at the first level. Specifically, the applicant submitted that he was not in a conflict situation with Mr. Blais, but in a situation where he was subjected to constant harassment from Mr. Blais, in league with his spouse, Ms. Bergevin.

[6] The applicant's grievance was dismissed at the second level. The head of the region observed that some of the allegations had already been raised in grievances V30A00017945 and V30A00017399. In regard to the allegation of suspension, the head of the region determined that the suspension required an interruption of wages, which was not the case in this matter. Finally, regarding the services which the applicant alleged he could not access, the head of the region observed:

> [TRANSLATION]
>
> You have access to the services offered to the other inmates every evening after 3:00 p.m. and you can continue to do your work in accordance with the new schedule that was given to you. Finally, we have been advised [by the Institution authorities] that in the event of a conflict between your work schedule and access to certain services, other measures could be considered.

[7] The applicant brought his grievance to the third level, before CSC, where he alleged that Mr. Blais, who had been harassing him for a long time, wanted him to be dismissed from his employment. He allegedly spoke about it to his spouse, Ms. Bergevin, so that she could meet with the applicant's immediate superior in an attempt to influence the superior to this end. Further, the applicant alleges that Ms. Bergevin wanted to change the applicant's work schedule, despite the

objections of his immediate superior, to ultimately change his place of work so that he "supported his wife no matter what." The applicant restated that he did not have access to running water or to the toilets and that he could not enjoy his free time in the afternoon like the other inmates because he could not access the building where several recreational activities were held. The applicant again alleged that he was being harassed by Mr. Blais, and that Ms. Bergevin was in a conflict of interest situation.

[8] The applicant added other allegations to the grievance in a new complaint form but, as these new allegations were never reviewed at the first level, they were referred to the first level.

[9] Following receipt of an administrative summary prepared by an analyst, CSC communicated its decision to dismiss the applicant's grievance on October 30, 2006, CSC noted that the allegations of Mr. Blais' harassment had already been addressed at the third level, in grievance V30A00017399.

[10] As for the new allegations, CSC noted that decisions such as the one at issue were to be made by the Institution Warden, and not by the spouse of the employee in question, and that the Warden had the authority under section 4 of the *Corrections and Conditional Release Regulations*, SOR/92-620, as well as under a Commissioner's Directive. CSC added:

> [TRANSLATION]
>
> While this building [where the applicant works] does not have water or toilets, you are not the only one in this situation. … You were less than 200 feet away from your cell block and all you had to do was close your office to go to your cell to access water and use the toilets.

> As for your allegations that you did not have access to the recreational, social and cultural activities of the Institution, the Institution Warden confirmed the opposite. You have access to all of these activities after 3:00 p.m., evenings and every weekend.
>
> Finally, the Institution Warden actively tried to find a solution to e solution to offset a potential conflict situation between you and a member of the staff.

[11] The applicant filed an application for judicial review before the Federal Court on November 30, 2006. Since these events, it was admitted that the employee Sylvain Blais is deceased. It was also established that since December 2007, the Institution has had a new Warden and that the applicant's privileges have been restored.

[12] My colleague, Mr. Justice Yvon Pinard, in an order dated November 7, 2007, allowed the applicant to serve and file a supplemental memorandum of fact and law, bearing strictly on the issue of procedural fairness in regard to Ms. Bergevin's involvement in the decisions relating to the attempt to resolve the conflict between the applicant and Mr. Blais.

[13] At the hearing on the merits, the applicant opined that I had to rehear the recording of the exchange before Pinard J. He was mistaken on this point, since Pinard J.'s order states that everything must reconsidered by the judge on the merits.

[14] Since Pinard J.'s order, the respondent informed the Court that part of the information regarding Ms. Bergevin's involvement in the decision that was the subject of the grievance before the third level was inaccurate.

[15] The respondent indicated that the initial decision had been made on or about January 18, 2006, by the Deputy Warden, Ms. Bergevin, who was then acting Warden of the Institution in the absence of the Warden.

[16] This revelation is completely inconsistent with the third level decision, which reads as follows:

> [TRANSLATION]
>
> … You refer to the spouse of the employee in question as being responsible for the decisions regarding your schedule as well as your place of work.
>
> On consulting the Warden of the Institution, I can assure you that it is the management of the Institution which makes the decisions and not the spouse of the employee in question.
>
> [Emphasis added.]

[17] Based on the foregoing, the respondent acknowledges that the third level grievance decision must be set aside.

II. The issue

[18] As the respondent recognized that the third level decision regarding Ms. Bergevin's involvement in the decision which was the subject of the applicant's grievance was based on inaccurate information, the only issue to decide in this application is whether the Court has the jurisdiction to award the remedies sought by the applicant.

III. The analysis

[19] In the application for judicial review, the following orders were sought:

[TRANSLATION]

(a) TO DECLARE INVALID OR TO SET ASIDE the decision made in grievance V30A00020878.
(b) TO ORDER that the federal board, commission or tribunal at issue, Correctional Service Canada, cease all restrictive measures imposed specifically on the applicant since the filing of this grievance V30A00020878.
(c) TO ELIMINATE from the applicant's prison record all reports directly or indirectly suggesting or implying that the applicant acted improperly in this matter.
(d) TO ORDER that serious sanctions be taken against the respondent to establish that no form of harassment by a member of CSC will ever be tolerated by this federal board, commission or tribunal.
(e) TO RECOGNIZE all or part of the abuse of authority, the harassment caused to the applicant by the actions of the members of Correctional Service Canada, *inter alia* more specifically by Sylvain Blais and his spouse Julie Bergevin.
(f) TO ENSURE that the two principal respondents, Sylvain Blais and his spouse Julie Bergevin, working with Correctional Service Canada, can no longer work together in the same Institution, in order to avoid any future conflict of interest in the decisions made by this Deputy Warden, Julie Bergevin, regarding the inappropriate conduct of her spouse, Sylvain Blais.
(g) TO ORDER, if the Court sees fit, that this application for judicial review be heard as though it were an action for compensatory damages by the applicant against the respondent.

[20] Moreover, in his memorandum of fact and law dated March 20, 2007, the applicant sought additional orders. *Inter alia*, he asked the Court to specify to the authorities involved that in the future he have the same rights and privileges as all of the other residents of the Institution, to order that Ms. Bergevin and Mr. Blais write letters of apology to the applicant, that Ms. Bergevin and

Mr. Blais be suspended from their employment without pay, and that the applicant be awarded punitive and exemplary damages as well as compensation for postal and clerical expenses.

[21] I note that several other remedies sought in the memorandum are not found in the application for judicial review and therefore are not admissible before this Court.

IV. The conversion of an application for judicial review to a summary action

[22] The applicant submits that his application be amended so that it becomes a summary action in which he could claim $50,000 in punitive and exemplary damages, given the respondents' conduct. The respondent vehemently opposes this change, alleging that this is not an exceptional case justifying such recourse and that there is no evidence in the record justifying the damages claimed.

V. The law

[23] Subsections 18(4)(1) and (2) of the *Federal Courts Act* (R.S. 1985, c. F-7) state:

Hearings in summary way	Procédure sommaire d'audition
18.4 (1) Subject to subsection (2), an application or reference to the Federal Court under any of sections 18.1 to 18.3 shall be heard and determined without delay and in a summary way.	18.4 (1) Sous réserve du paragraphe (2), la Cour fédérale statue à bref délai et selon une procédure sommaire sur les demandes et les renvois qui lui sont présentés dans le cadre des articles 18.1 à 18.3.
Exception	Exception
(2) The Federal Court may, if it considers it appropriate, direct that an application for judicial review be treated and proceeded with as an action.	(2) Elle peut, si elle l'estime indiqué, ordonner qu'une demande de contrôle judiciare soit instruite comme s'il s'agissait d'une action.

[24] Clearly, as section 18 indicates, this is generally an exceptional procedure, particularly in this case where there is no tangible evidence to establish the alleged prejudice, above all the amount of damages claimed.

[25] I note the remarks of the Federal Court of Appeal in *Macinnis v. Canada (Attorney General)*, [1994] 2 F.C. 464, at paragraph 9: "It is, in general, only where facts of whatever nature cannot be satisfactorily established or weighed through affidavit evidence that consideration should be given to using subsection 18.4(2) of the Act." In this case, I cannot see any problem regarding the Institution or the assessment of facts through affidavits which would justify resorting to the above-mentioned subsection.

[26] It must be held that the applicant's application, on this point, is unfounded in fact and law and must therefore be dismissed.

VI. The other findings sought

[27] The Court's jurisdiction in judicial review applications is limited to the powers set out in subsection 18.1(3) of the *Federal Courts Act*. The Court has the power to determine whether the decision-maker erred in fact or in law, and, if such is the case, to set aside the decision and to refer the issue back to the federal board, commission or tribunal. In exceptional cases, the Court can give instructions as to the decision to render (*Rafuse v. Canada*, 2002 FCA 31, [2002] F.C.J. No. 91 (QL)), but this power is rarely exercised. This will be the case, for example, when the sole issue to be decided is a pure question of law which would dispose of the case, or in cases where the evidence on the record is so clearly conclusive that there is only one possible conclusion (*Simmonds v. Canada (Minister of National Revenue – M.N.R.)*, 2006 FC 130, [2006] F.C.J. No. 184 (QL), at paragraph 38). In my opinion, these factors do not exist in this case.

[28] The judicial review mechanism enables the Court to verify the legality of the impugned decision, not to substitute its opinion for that of the original decision-maker.

VII. Conclusion

[29] For all of these reasons, it is my opinion that beyond setting aside the impugned decision, the Court does not have the jurisdiction to allow all of the orders and all of the relief sought. The decision must therefore be set aside and the matter referred to the third level, composed of an analyst and a decision-maker who were not involved in the first decision.

JUDGMENT

THE COURT ORDERS that

(1) The decision dated October 30, 2006, in grievance V30A0020878 be set aside and the matter referred to the third level, composed of an analyst and a decision-maker who were not involved in the first decision;

(2) This reconsideration shall consider the fact that the central decision which is the subject of grievance V30A00020878 was made by Ms. Bergeron, namely the spouse of the employee contemplated in the conflict with the applicant;

(3) The applicant be authorized to file additional reasons before the decision-maker who will hear the grievance;

(4) The other findings of the application be dismissed; and

(5) Each party assume their costs.

"Orville Frenette"
Deputy Judge

Certified true translation

Kelley A. Harvey, BCL, LLB

FEDERAL COURT

SOLICITOR OF RECORD

DOCKET:	T-2131-06
STYLE OF CAUSE:	Gilles Ouellette v. AGC
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	April 23, 2008
REASONS FOR JUDGMENT AND JUDGMENT BY:	FRENETTE D.J.
DATE FOR REASONS:	April 30, 2008

APPEARANCES:

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SOLICITOR OF RECORD:

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