Federal Court Cour fédérale

Date: 20100224

Docket: T-1116-09

Citation: 2010 FC 171

Ottawa, Ontario, February 24, 2010

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

ANTHONY COWDREY

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application for judicial review of a decision by an independent chairperson (the Chairperson), dated November 6, 2008, in which the applicant was found guilty of creating or participating in an activity that is likely to jeopardize the security of the penitentiary, contrary to paragraph 40(m)(i) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (the Act).

[2] The applicant requests:

1. an order quashing the decision of the Chairperson;

2. an order in the nature of *mandamus* compelling Correctional Services Canada (CSC) to delete, correct or amend all information related to the conviction from all documents authored for the applicant by CSC and provide written notice to all agencies or organizations that may have received such information, including the National Parole Board; and

3. costs.

Background

[3] The applicant was an inmate at Fenbrook Institution in Ontario during 2008 serving a four year sentence. On July 23, 2008, the applicant was alleged to have participated in the removal of a bed from a cell and placing it on an upper tier. The respondent alleges that it was done to protest the institution's new policy of putting two inmates into a single cell. Two CSC officers claimed to have witnessed the applicant's participation and included the applicant's name in observation reports. The applicant denies any involvement.

[4] Two days later, the applicant was charged with an institutional offence pursuant to paragraph 40(m)(ii) of the Act, "creates or participates in any other activity that is likely to jeopardize the security of the penitentiary".

[5] The matter was to be heard at institutional court on July 31, 2008, but was adjourned a total of eight times; twice at the request of the applicant, four times at the request of CSC and twice

because the applicant was unavailable. The applicant was given notices prior to each scheduled hearing which stated in part, "I would once again wish to offer you the opportunity to contact Counsel. Duty Counsel will also be available between 1230 and 1300 Hours on the Scheduled Date for All Major Court Hearings." Each hearing was scheduled for 1300.

[6] On November 6, 2008, the Chairperson elected to proceed despite another request for an adjournment by the applicant and heard the evidence from one CSC officer. The applicant had still not consulted with a lawyer and duty counsel was not available that day. He pleaded not guilty but did not present a defence, indicating that he still wished to consult a lawyer. He was found guilty of the offence charged and was fined $20. The applicant challenges the decision to proceed and the Chairperson's ultimate decision in this judicial review.

[7] On October 9, 2008, the applicant was placed in dry cell for suspected possession of narcotics. On October 22, 2008, a security level review was completed for the applicant and was locked in the offender management system (OMS) on November 5, 2008. On March 2, 2009, the applicant was transferred to maximum security Millhaven Institution. On July 2, 2009, the applicant was released to Keele Community Centre, where he currently resides.

Issues

[8] The issues are as follows:

1. What is the appropriate standard of review?

2. Did the 15 week delay render the process unfair or contrary to law?

3. Did the Chairperson's decision to proceed in the absence of legal counsel for the applicant constitute a breach of procedural fairness?

4. Was the Chairperson's decision reasonable?

Applicant's Written Submissions

[9] The applicant submits that the 15 week delay between the time of the charge and the decision was unfair and contrary to the *Corrections and Conditional Release Regulations*, SOR/92-620 (the Regulations), section 28 of which requires a disciplinary hearing to take place "as soon as practicable". Though the applicant made two requests for adjournment, the last of which would have had his matter proceed on September 25, 2008. The further six week delay resulted in difficulties with the only testifying officer's memory.

[10] The applicant submits that it was unfair of the Chairperson to proceed without the applicant having access to counsel. The seriousness of the conviction and the complexity of the issues militated in favour of either proceeding on a day when duty counsel would have been available. The applicant made repeated requests for representation. The conviction was serious because not only was there a fine, but the applicant was required to enter into a behavioral contract and was relocated to a unit of restricted movement. Duty counsel was available October 23, 2008, the last day the CSC had requested an adjournment, and would have been available again on November 20, 2008. The applicant could not afford private counsel.

[11] Finally, the applicant submits that the evidence presented was insufficient to find the applicant guilty beyond a reasonable doubt. The decision was unreasonable. The only witnessing officer to give evidence could not remember specific events. The applicant's claim that he was doing laundry and was merely walking by the scene, was not refuted and raises a sufficient doubt. Nor was there any evidence to establish an essential element of the charge; jeopardy to the security of the penitentiary.

Respondent's Submissions

[12] The respondent submits that the requirement that disciplinary matters be heard as soon as practicable was not contravened. It was not unreasonable for the Chairperson to proceed with the hearing on November 6, 2008, particularly when the witnessing officer was present. Similarly, it was not unreasonable for the Chairperson to refuse the applicant's third request for an adjournment on that day, particularly when the alleged offence took place in July, some 15 weeks earlier.

[13] The respondent defends the decision of the Chairperson to proceed without the applicant having consulted a lawyer. The right to counsel is not absolute. Procedural fairness and the Commissioner's directive mandate that inmates up on disciplinary charges be given a reasonable opportunity to retain counsel. Nor did the complexity of the matter at hand require counsel. It was a single charge without any complex factual or evidentiary issues. The only sanction imposed was a $20 fine. There was no prospect of solitary confinement or loss of early release eligibility. The charge was at most only a minor factor in the applicant's subsequent transfer. Moreover, the

applicant was given reasonable opportunities to contact counsel and could have proceeded on July 31, 2008 when duty counsel was present. In cross-examination, the applicant stated that he attempted to contact his lawyer, but did not give any reasons as to why the lawyer did not attend at the hearing.

[14] The respondent submits that the Court should exercise judicial restraint in prison administrative decisions. The decision of the Chairperson was certainly reasonable. Two officers witnessed the applicant's participation and one officer testified that the activity was likely to jeopardize the security of the penitentiary. The applicant did not provide any evidence to the contrary.

Analysis and Decision

[15] **Issue 1**

What is the appropriate standard of review?

The ultimate decision of the Chairperson regarding the applicant's guilt is one of mixed fact and law involving the assessment of evidence in light of the relevant statutory provisions. According to *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, [2008] S.C.J. No. 9 (QL) at paragraph 53, the standard of reasonableness will apply.

[16] The present case primarily involves issues of procedural fairness to which the standard of correctness invariably applies (see *Bowden v. Canada (Attorney General)*, 2008 FC 580, [2008] F.C.J. No. 764 (QL) at paragraph 9).

[17] Administrative tribunals have discretionary control over their procedures, often including the power to grant adjournments. The overarching duty to maintain a fair process is paramount and unassailable. Thus, to the extent that a discretionary decision to grant or refuse an adjournment is alleged to have resulted in a breach of the duty of fairness, no deference is due

[18] I wish to first deal with Issue 3.

[19] **Issue 3**

Did the Chairperson's decision to proceed in the absence of legal counsel for the applicant constitute a breach of procedural fairness?

The respondent correctly asserts that there is no absolute right to counsel in administrative proceedings such as the disciplinary proceedings in the present case. The respondent seems to recognize that person such as the applicant have a right to counsel as duty counsel is usually available to an inmate in the one-half hour period before the hearing.

[20] In the present case, duty counsel was not available prior to the haring on November 6, 2008. The applicant requested counsel on a number of occasions at the hearings. The applicant also

requested an adjournment in order to speak to counsel. The Chairperson refused the requests. The transcript reads in part as follows (applicant's record, page 27):

> MR. COWDREY: I'd like to have a lawyer here.
>
> JUDGE: Well, we'll have to proceed, we don't have a lawyer.
>
> MR. COWDREY: I can't adjourn it.
> JUDGE: No.
>
> MR. COWDREY: And why is that?
>
> JUDGE: 'Cause it's been adjourned enough.
>
> MR. COWDREY: I've only adjourned it twice.
>
> JUDGE: This has been adjourned enough, this is . . .
>
> MR. COWDREY: Not on my . . .
>
> JUDGE: . . . I don't care. This took place in July . . .
>
> MR. COWDREY: Not on my part.
>
> JUDGE: . . . and I want this over with today.

And at page 28 of the tribunal record:

> MR. COWDREY: Why is it taking so long to deal with it then?
>
> JUDGE: It's been adjourned different times by both you and the institution, and it's here today, the officer's here today. I'm hearing it today.

It would appear that the denial of an adjournment was based on the fact the matter had been adjourned before and the need to complete the hearing.

[21] In *Smith v. Fort Saskatchewan Correction Centre*, 2002 ABQB 1044 (Can. LII.), Mr. Justice Clarkson, when speaking about when an inmate should be given the right to counsel stated at paragraph 36:

> The policy upon which the board purported to act is quite close to the common law test previously identified. The policy directs the chairperson of the board to consider seriousness, complexity and capacity. The policy also requires the Chairperson of the board to consider the need for reasonable speed of adjudication and the need for fairness. In my view, the contest is between expediency and fairness, that contest is decided by consideration of the factors of seriousness, complexity and capacity.

There, although a policy was relied upon, the policy requirements were similar to the common law.

[22] Applying these factors to the facts of this case, I find that in the circumstances, the duty of fairness required the Chairperson to have heeded the applicant's repeated requests.

<u>Seriousness</u>

[23] The charge faced by the applicant in this case was serious. The potential punishment if found guilty is contained in subsection 44(1) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20:

44.(1) An inmate who is found guilty of a disciplinary offence is liable, in accordance with the regulations made under paragraphs 96(i) and (j), to one or more of the following:	44.(1) Le détenu déclaré coupable d'une infraction disciplinaire est, conformément aux règlements pris en vertu des alinéas 96i) et j), passible d'une ou de plusieurs des peines suivantes :

(a) a warning or reprimand;	a) avertissement ou réprimande;
(b) a loss of privileges;	b) perte de privilèges;
(c) an order to make restitution;	c) ordre de restitution;
(d) a fine;	d) amende;
(e) performance of extra duties; and	e) travaux supplémentaires;
(f) in the case of a serious disciplinary offence, segregation from other inmates for a maximum of thirty days.	f) isolement pour un maximum de trente jours, dans le cas d'une infraction disciplinaire grave.

[24] The applicant was fined $20 which is equivalent to more than three days of pay for him. The existence of a conviction on the charge would also be a factor in his security classification being increased. The conviction can also be used by CSC if the applicant is returned to federal custody. As well, information about the conviction can be provided to provincial police upon their request. In my view, the charge was a serious charge.

Complexity

[25] At first glance, the charge may not seem to be complex but on a closer study, it is more complex. It deals with whether the applicant's alleged conduct was likely to jeopardize the security of the penitentiary. The cross-examination of correctional officers may well have been fruitful. It also dealt with the applicant having to present his defence to the charge.

Capacity of the Applicant to Represent Himself

[26] A review of the transcript makes it obvious that the applicant had no capacity to represent himself. He did not understand the process and asked to obtain counsel. He did not present a defence. He did not understand how to conduct a cross-examination.

[27] Taking these factors into account, I am of the view that the Chairperson made a reviewable error in not adjourning the matter so that the applicant could have obtained counsel. This was a breach of the principles of natural justice. The Chairperson's decision must be set aside and the matter referred back to a different chairperson for redetermination if that is practical with the passage of time.

[28] It follows from this finding that all information relating to the conviction and the events giving rise to the conviction should be deleted, corrected or amended in any documents provided to other parties or in any documents authored for the application for Correction Services Canada. This would include the National Parole Board.

[29] Because of my finding on Issue 3, I need not deal with the other issues.

[30] The applicant shall have his costs of the application.

JUDGMENT

[31] **IT IS ORDERED that:**

1. The application for judicial review is allowed and the decision of the Chairperson is set aside and the matter is referred to a different chairperson for redetermination. The respondent may elect not to have the matter redetermined.

2. All information relating to the conviction and the events giving rise to the conviction should be deleted, corrected or amended in any documents provided to other parties or in any documents authored for the application for Correctional Services Canada. This would include the National Parole Board.

3. The applicant shall have his costs of the application.

"John A. O'Keefe"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1116-09
STYLE OF CAUSE:	ANTHONY COWDREY
	- and -
	THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	January 20, 2010
REASONS FOR JUDGMENT AND JUDGMENT OF:	O'KEEFE J.
DATED:	February 24, 2010

APPEARANCES:

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Rina M. Li	FOR THE RESPONDENT

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