

Federal Court



Cour fédérale

Date: 20101108

Docket: T-90-09

Citation: 2010 FC 1110

BETWEEN:

ALLAN ARTHUR CRAWSHAW

Applicant

And

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER

HENEGHAN J.

INTRODUCTION

[1] By Order dated June 10, 2010, this application for judicial review was allowed, with Reasons to follow. These are the Reasons.

[2] Mr. Allan Arthur Crawshaw (the “Applicant”) sought judicial review to quash the Third Level Grievance decision (the “decision”) made by Mr. Marc-Arthur Hyppolite, Senior Deputy Commissioner (the “Senior Deputy Commissioner”), of the Correctional Service of Canada (the “CSC”), on December 5, 2008. This application is taken pursuant to the *Federal Courts Act*, R.S.C.

1985, c. F-7, the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (the “Act”), and the *Corrections and Conditional Release Regulations*, SOR/92-620 (the “Regulations”).

BACKGROUND

[3] The Applicant is incarcerated in the federally operated Mission Institution, located in Mission, British Columbia. He was transferred there from Ferndale Institution, also situated in Mission, in February 2008. Shortly after the transfer, on or about February 29, 2008, he was told by an Admissions and Discharge Officer (the “A & D Officer”) that his computer could not be returned to him because it contained an unauthorized program, that is Microsoft Trips and Maps 2004. This software had been purchased on August 9, 2004 from Future Shop by CSC. The software was paid for by the Applicant, through his inmate trust account. The records of that trust account were in the possession of CSC.

[4] The software program was recorded on his Inmate Personal Property Record from William Head Institution and also from Ferndale Institution. The records show that this software program entered his cell on September 21, 2004. The Inmate Personal Property Record is a CSC record intended to record all authorized inmate property that is in the cell or in storage. The Inmate Personal Property Record describes all software and computer peripherals that were in the Applicant’s possession. There was no reference to a GPS module with USB cable in the Inmate Personal Property Record.

[5] On March 3, 2008, the Applicant filed an Offender Complaint Presentation with respect to the seizure of his computer. He alleged that he had no unauthorized programs and informed the institution about prior difficulties with a previous seizure of his computer which led to a grievance and ultimately, to litigation by the Applicant in cause number T-964-04. In his complaint, the Applicant alleged numerous violations of the Act, the Regulations, and the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11. As well, he requested the return of his computer.

[6] The Offender Complaint Response was received on March 27, 2008. This complaint, reference #V80A00022469 was investigated by Mr. Mark Thibault, Chief IT Client Services, Mission Institution. Mr. Thibault also authorized the seizure which was the subject of the Applicant's complaint in March 2008.

[7] The Applicant's request for the return of his computer was denied on the grounds that Microsoft Trips and Maps 2004 was a program providing "phone book" type data and as such, was prohibited under the Commissioner's Directive 566-12 ("CD 566-12"), Annex C, paragraph 14(f). The response also indicated that the Applicant was responsible for the removal of the program by an approved repair facility, at his own expense.

[8] The Applicant filed his First Level Grievance on April 16, 2008. He said that the Microsoft Trips and Maps was not a "phone book" type program and not prohibited under CD 566-12. He also claimed that this program had been authorized by CSC for some years. He said it was similar to

other authorized educational software that he owned which were also authorized. He claimed that the program had been purchased through the proper CSC processes, using his inmate trust fund. In his grievance, he alleged that Mr. Thibault had improperly seized his computer in an earlier incident under a similar allegation. He requested the return of his computer and the software. He also requested an interview with the warden.

[9] The Memorandum regarding “Second Level Grievance – Allan Crawshaw” was issued by Assistant Deputy Commissioner Heather Bergen on July 30, 2008. The Second Level Grievance held that the review did not disclose any documentation to verify the Applicant’s legal ownership of Microsoft Trips and Maps 2004 and in the event that the Applicant provided proof of ownership, then Mission Institution would consider returning his computer to him unless additional security conditions were identified. If no documentation were provided, then the Applicant was required to pay for the removal of the software.

[10] On August 12, 2008, the Applicant sent a request to the A & D Officer for the return of his computer, as a result of his Second Level Grievance. This request was denied as the A & D Officer could not confirm that the Applicant was allowed to have the computer with the “unauthorized” software on it.

[11] The summary provided to the warden of Mission Institution says that the software is not “phone book” type software. The summary also said that the software itself was not a concern; rather there is a version of the software that comes with a GPS receiver and a USB cable, and

another version that does not. The Regional Headquarters IT Security Manager noted that it was necessary to determine which version was in the Applicant's possession. The IT Security Manager also said that the software does not contravene CD 566-12, Annex C, paragraph 14(f). However, the Regional Headquarters Security Jr. Project Officer was not satisfied that the Inmate Personal Property Record was proof of legal ownership.

[12] On August 20, 2008, the Applicant filed his Third Level Grievance. He repeated his previous complaints. In reply to the second level response, he noted all of the internal CSC documents and other documents in the possession of CSC that supported his ownership of the software and its prior authorization.

[13] On August 29, 2008, the Applicant received his computer and effects. However, the Applicant noted that his printer had been physically damaged and that CSC did not return the power cords to power his computer or monitor. As well, the printer cable and computer headset were missing. In response to his request for the return of these items, he received a direction from the A & D Officer to ask Ferndale Institution for these items, as they had not arrived at Mission Institution.

[14] On September 14, 2008, the Applicant filed an addendum to his Third Level Grievance, addressing the missing parts and damage to his printer. The Grievance Coordinator acknowledged receipt of this addendum on September 15, 2008 and forwarded it for consideration as part of the Third Level Grievance.

[15] On September 23, 2008, the Applicant purchased, through CSC, new power cords at a cost of \$33.58. He requested the purchase of a new printer and printer cable, on December 16, 2008. The printer cost \$163.00.

[16] The Offender Grievance Response (Third Level), was issued by the Senior Deputy Commissioner on December 5, 2008. The grievance was denied. The response says that while his computer was seized, it was returned when the Applicant provided proof of ownership. The Senior Deputy Commissioner decided that this part of the grievance required no further action. He also noted that the seizure of the computer was based on the fact that Microsoft Trips and Maps 2004 was initially found to be unauthorized software as it was classified as “phone book” software.

[17] The response stated that there are different versions of this software and that the Applicant had not proven, before August 13, 2008, that his version was not prohibited. The response also said that the computer was seized because of reasonable security concerns.

[18] As well, the response did not address the concerns raised in the Applicant’s addendum, with respect to the failure to return his power cords and his headphones. The Senior Deputy Commissioner said that these issues were not being addressed since the Applicant had submitted two new separate complaints before submitting the third-level addendum. As these complaints were being addressed at the second level, the Offender Complaint and Grievance Manual authorizes the

grievance review authority to reject a grievance that has been responded to in another complaint or grievance.

[19] In this application, the Applicant seeks the following relief:

- (1) An Order of Certiorari to quash the decision of the Senior Deputy Commissioner, and remit it back to the CSC for reconsideration;
- (2) An Order of Mandamus restraining the CSC from the continued practice of confiscating his computer equipment and requiring the CSC to conduct an investigation into the theft and damage to his computer;
- (3) Punitive and exemplary damages;
- (4) Costs of this application; and
- (5) Such further remedies as this Court considers appropriate.

SUBMISSIONS

i) Applicant's Submissions

[20] In his written submissions, the Applicant argues that a penalty was imposed upon him without the benefit of a trial, in breach of natural justice and procedural fairness. He argues that he was punished by the removal of his computer, without ever having been tried for any offence.

[21] In his oral submissions, the Applicant advanced the notion that there was a contract between him and the CSC wherein the Applicant is permitted to have a computer in exchange for following certain rules and regulations in addition to those found in the Act.

[22] Next, the Applicant submits that the Third Level Grievance decision was not reasonable. He says that it was not reasonable to find that a program which was purchased and authorized by CSC is an “unauthorized” program. He argues that the fact that Mr. Thibault, after denying the return of the Applicant’s computer, was allowed to respond to the initial complaint is a breach of procedural fairness.

[23] The Applicant also submits that it was unreasonable to require him to prove ownership before he could retrieve his personal property. He says that CSC had all the necessary documentation to prove ownership.

[24] The Applicant points out that the warden’s response to the First Level Grievance indicates that there was no effort made to conduct an independent investigation. The Applicant claims that the warden merely repeated the unfounded allegations of Mr. Thibault. The Applicant considers this to be continued harassment by Mr. Thibault and says that he filed his Second Level Grievance in an attempt to force CSC to follow the law regarding inmate personal property.

[25] Although the Applicant was partially successful at the Second Level Grievance, he says that the Corrections staff were still referring to the software as “unauthorized” and refusing to return his computer.

[26] When he did receive the computer, essential components were missing. There were no power cords for the computer or monitor, and the cable connecting the computer to the printer was missing. His computer headset was also missing. The printer had been damaged while in the possession of CSC. Although the Applicant had technically received his computer, it was incapable of operating. As the computer did not work without the missing parts, the Applicant says that there was no actual resolution to the original grievance.

ii) Respondent’s Submissions

[27] The Attorney General of Canada (the “Respondent”) represents CSC in this application.

[28] The Respondent submits that the decision involves questions of discretion, policy and mixed fact and law. As such, it is subject to review upon the standard of reasonableness.

[29] The Respondent argues that the Court can only review the Third Level Grievance decision, referring to the decision in *Johnson v. Attorney General of Canada* (2008), 337 F.T.R. 306 (F.C.).

[30] The Respondent argues that the process in this case was fair. The Applicant was not subject to a disciplinary or criminal sanctions, rather, he was the subject of an administrative process. The

applicable CSC policy contemplates seizure of computer equipment where it is believed to contain unauthorized programs.

[31] The Applicant was dissatisfied with the seizure of his computer. When a complaint did not result in the computer being returned, the Applicant availed himself to the grievance process. At each stage the Applicant was provided with the opportunity to make detailed submissions, and was provided with reasons for the decision. Due to partial success at the Second Level grievance, the Applicant had his computer returned to him.

[32] The Applicant was not entitled to an oral hearing. The content of the duty of fairness is contextual, see *Canada (Attorney General) v. Flynn*, [2008] 3 F.C.R. 18 (F.C.A.). In *Gallant v. Canada (Deputy Commissioner, Correctional Service)*, [1989] 3 F.C. 329 (F.C.A.), it was held that the content of the duty of fairness in the context of involuntary transfers does not require oral hearings. It cannot be that the content of the duty of fairness is more onerous in the context of this case.

[33] With regard to the reasonableness of the Senior Deputy Commissioner's decision, the Respondent notes that the third level decision-maker made three key findings. First, that the request for the return of the computer required no further action; second, that further investigation of and sanctions against staff in connection with the seizure of the computer were not warranted; and third, the new complaints with respect to the computer cables, power cord and headset should be dealt with in the other two grievances commenced by the Applicant.

[34] The Respondent submits that these three findings are reasonable, having regard to the evidence. With respect to the first finding, that the request for the return of the computer required no further action, the Respondent says this is clearly reasonable since the computer has been returned.

[35] The Respondent submits that the second finding, that is that further investigation or discipline of staff in connection with the seizure of the computer was not warranted, is based on reasonable considerations, including policy. He argues that the seizure of computers containing unauthorized software is expressly contemplated in the relevant policy and the Applicant consented to these policy conditions in order to possess a computer. The relevant policies expressly prohibit “phone book” software. The computer was seized initially upon the belief that it contained phone book software. When subsequent investigation determined that the version of the software was not prohibited, the computer was returned.

[36] The Respondent submits that the conclusion of the Senior Deputy Commissioner on the investigation and sanction fell within the range of defensible and acceptable outcomes, and was accordingly, reasonable.

[37] Finally, the Respondent argues that the new complaints with respect to the computer cables, power cord and headset, should be dealt with in the other two grievances the Applicant had commenced. The Applicant’s complaints with respect to these items were submitted before the

addendum to his Third Level Grievance. It was reasonable, according to the Respondent, to allow these matters to be determined at the second level.

DISCUSSION AND DISPOSITION

[38] The first issue to be addressed is the applicable standard of review. In light of the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, decisions of administrative tribunals are reviewable upon one of two standards, that is correctness or reasonableness. The identification of the applicable standard of review depends upon the nature of the question at issue.

[39] Insofar as the Applicant establishes a breach of the requirements of natural justice and procedural fairness, that issue is reviewable on the standard of correctness. Insofar as the disposition of this application for judicial review depends upon the merits of the decision at issue, the standard of reasonableness will apply. In this regard, I refer to the decision in *Johnson* at paras. 102-103 as follows:

[102] Mr. Johnson's 1st level grievance was initiated because he was not provided with a copy of the Post Search Report detailing the seizure of his typewriter on February 22, 2006 as required under paragraph 18 of Commissioner's Directive 566-9. The ensuing grievances were filed because of delay and poor administration by the respondent. Mr. Johnson advised the Court during the hearing that he received the Post Search Report about a month after he filed the second level grievance. His third level grievance relates almost entirely to his complaints about Ms. McGee's performance of her duties.

[103] In an application for judicial review arising from the CSC grievance process, it is not the Court's role to sanction CSC employees for administrative failures but to determine whether there have been reviewable errors in the final level decisions or breaches of procedural fairness. I can, however, note deficiencies or systemic problems. Here, the respondent failed to provide the applicant with a Post Search Report in a timely manner as required by policy and delayed in responding to his request for the said report. But these errors were addressed in the grievance process and I find no reviewable error or denial of natural justice that would justify the Court's intervention.

[40] I agree with the Respondent that there were three major components to the decision.

However, the decision is to be considered as a whole and not in terms of the individual elements which contributed to it.

[41] In the Third Level Grievance response, the Senior Deputy Commissioner said that the Applicant's computer was returned, therefore no further action was required. In my opinion, having regard to the evidence in the record, this conclusion was unreasonable.

[42] The Applicant received the major components of his computer, but he was not given all of the necessary parts that were required to make it work. It was not possible to use the computer without the power cords to the computer and the monitor. Upon these facts alone, in my opinion, the suggestion that the computer was "returned" is unreasonable. Such conclusion fails to consider the nature of the personal property that was seized.

[43] As well, other items were missing that would have prevented the Applicant from using the computer in the manner for which he had been previously authorized, that is the Applicant's headphones.

[44] The failure to return the power cords means that the Applicant did not have a functioning computer. While I am not prepared to say that the Senior Deputy Commissioner was obliged to address the manner in which the power cords and headphones went missing, his failure to address the fact of the missing components undermines his conclusion that the computer had been "returned" to the Applicant.

[45] The Senior Deputy Commissioner notes in his decision that the Applicant's allegation in the addendum to his Third Level Grievance, concerning the alleged theft of his power cords and headphones, was the subject of separate grievances, contemporarily at the second level. While it may have been reasonable for the Senior Deputy Commissioner to defer to the second level decision-maker insofar as the allegation of theft is concerned, the conclusion that the computer was returned remains unreasonable.

[46] The third major element in the Third Level Grievance response was the refusal of the Applicant's request for an investigation and sanctions against CSC staff. In my opinion, this issue is independent of the complaint that gave rise to the application for judicial review, that is the determination by the Senior Deputy Commissioner that the Applicant's computer had been returned to him. There is no scope within the grievance process for an inmate to demand that staff be

investigated and sanctioned. These are discretionary administrative decisions that lie beyond the scope of this application for judicial review.

[47] I turn now to the issue of procedural fairness. As noted above, this issue is reviewable on the standard of correctness.

[48] The Record shows that the Applicant's computer was seized by the same CSC staff member, Mr. Thibault, that responded to the Applicant's Offender Complaint Presentation regarding the return of his computer. The Applicant also alleges that it was Mr. Thibault who seized his computer in 2004 for having the same computer program. The Applicant brought an application for judicial review for that previous seizure as well, which the parties settled in the Applicant's favour.

[49] The fact that the person who seized the computer was later involved in the determination about the appropriateness of that seizure, is problematic. This fact suggests that this employee was both the investigator and the decision-maker. At face value, this gives rise to a reasonable apprehension of bias.

[50] The test for finding a reasonable apprehension of bias was set out by the Supreme Court of Canada in *Committee for Justice & Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 (S.C.C.):

30 This Court in fixing on the test of reasonable apprehension of bias, as in *Ghirardosi v. Minister of Highways for British Columbia*,

and again in *Blanchette v. C.I.S. Ltd.*, (where Pigeon J. said at p. 842-43, that "a reasonable apprehension that the judge might not act in an entirely impartial manner is ground for disqualification") was merely restating what Rand J. said in *Szilard v. Szasz*, at pp. 6-7 in speaking of the "probability or reasoned suspicion of biased appraisal and judgment, unintended though it be". This test is grounded in a firm concern that there be no lack of public confidence in the impartiality of adjudicative agencies...

[51] In the circumstances of this case, I find that the legal test for a reasonable apprehension of bias has been established.

[52] On the facts of this case, it was inappropriate that Mr. Thibault both seized the Applicant's computer and acted as the decision-maker in responding to his Offender Complaint Presentation. Since the subsequent decisions ultimately relied on Mr. Thibault's analysis, including the decision of the Senior Deputy Commissioner, I am satisfied that these actions give rise to a reasonable apprehension of bias in the complaint and grievance process as it was applied to the Applicant in this case.

[53] In addition to the unreasonable finding of the Senior Deputy Commissioner, the Applicant's rights to procedural fairness have been breached.

[54] In the result, the decision of the Senior Deputy Commissioner is quashed and of no further effect. Although the Applicant sought the remedy of *mandamus*, the relief is denied.

[55] The Applicant seeks punitive and exemplary damages. However, damages cannot be awarded on an application for judicial review, see *Hinton v. Canada (Minister of Citizenship and Immigration)*, [2009] 1 F.C.R. 476 (F.C.A.).

“E. Heneghan”

Judge

Winnipeg, Manitoba
November 8, 2010

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-90-09

STYLE OF CAUSE: ALLAN ARTHUR CRAWSHAW v.
ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: Vancouver, BC

DATE OF HEARING: December 10, 2009

REASONS FOR ORDER: HENEGHAN J.

DATED: November 8, 2010

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