Federal Court of Appeal Cour d'appel fédérale

Date: 20191107

Docket: A-43-19
A-131-19

Citation: 2019 FCA 279

[ENGLISH TRANSLATION]

CORAM: **BOIVIN J.A.**
DE MONTIGNY J.A.
GLEASON J.A.

BETWEEN:

RICHARD TIMM

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Montréal, Quebec, on November 5, 2019.

Judgment delivered at Montréal, Quebec, on November 7, 2019.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: BOIVIN J.A.
GLEASON J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] The appellant has been serving a life sentence (without eligibility for parole for 25 years) in a federal institution since 1995. After having filed a grievance pursuant to the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 for acts committed against him in 2012 by officers at the La Macaza Institution, he also brought an action for damages against Her Majesty the Queen on August 26, 2013 on the same grounds. He essentially alleges that his correctional officer and

another inmate’s Aboriginal liaison officer caused him harm through statements they made about him. In his view, these statements constitute harassment and discrimination.

[2] In his action, the appellant had three subpoenas served on Correctional Service of Canada employees who were involved in handling his grievance. He did so on the ground that their testimony was necessary in order to properly understand the grievance procedure and the decision rendered on his grievance at the third level. The Federal Court granted the respondent’s motion to quash the subpoenas (2019 FC 36) and the appeal from that decision is the subject of docket A-43-19.

[3] The Federal Court also dismissed the appellant’s action less than two months later (2019 FC 238), and docket A-131-19 is the appeal from that decision.

[4] After having carefully read both files and having heard the arguments of both parties, I have come to the conclusion that there is no reason to intervene and that both appeals should be dismissed.

[5] With respect to the first matter, I believe that the Federal Court properly allowed the respondent’s motion to quash in that the testimony of the three individuals concerned could not have been anything other than hearsay, these individuals having testified that they had no personal knowledge of the events underlying the appellant’s action in damages, that they had never met the inmates in question and that they had never set foot in the institution where they are incarcerated. Furthermore, the proposed testimony could not have been of any relevance in

determining whether the alleged actions and statements of certain members of the Correctional Service constitute a civil fault giving rise to liability on the part of the respondent. The appellant has not satisfied me that the trial judge committed a palpable and overriding error as regards the production of evidence, which is a question of mixed law and fact with respect to which this Court must show deference.

[6] It is true that, in its reasons, the Federal Court dealt with the deliberative secrecy of administrative tribunals. Its statements in that regard, as the parties rightly noted, were ill-advised because that issue had been the subject of neither argument nor representations by the parties. Consequently, the Federal Court should not have ruled on it. Moreover, the paragraphs devoted to the issue are clearly *obiter* and were not necessary for deciding the issue that was before the Federal Court. For these reasons, I do not consider it appropriate to express any opinion on their validity.

[7] Moreover, the appellant did not demonstrate that the Federal Court erred in dismissing his action for damages. After having observed that the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 refers to the private law of the province in which the alleged actions took place, the Court identified the relevant standards of conduct in light of the facts and the applicable standards in a prison environment. It concluded that the evidence did not reveal any act of discrimination toward the appellant on the part of the two agents of the state. On the other hand, the Court stated that in its opinion the same two agents had committed a fault in discouraging a fellow inmate from calling upon Mr. Timm for assistance in seeking a remedy and had thereby impeded the exercise of the right of a person to assert his or her rights without

reprisal. Since the evidence did not show that this fault had any consequences at all, that the appellant suffered any harm from it or that there existed a causal link between the alleged harm and the fault, the Court nevertheless dismissed the action.

[8] The appellant argued before us that the Federal Court had erred in failing to consider the actual repercussions of a fault committed in a prison environment and in finding, on the basis of a misinterpretation of the decision rendered at the final level of the grievance procedure, that there was no harassment. Despite the conviction with which the appellant's counsel argued the case, I cannot accept his arguments.

[9] First, it seems clear to me upon reading the substantial judgment rendered by the Federal Court judge that he was well aware of the context in which the actions by the correctional officer and Aboriginal liaison officer occurred. The judge moreover took pains to examine Mr. Timm's claim that the words of the two officers could be extremely damaging to him in a prison context; he nevertheless dismissed the claim for lack of evidence. The appellant did not convince me that the judge committed a palpable and overriding error in his assessment of the facts.

[10] Nor did the judge commit a palpable and overriding error in his interpretation of the third-level grievance decision. It was perfectly open to him to consider that the grievance had been allowed not because harassment had been established but, rather, because the process followed at the first level had not permitted Mr. Timm to present his arguments. Furthermore, I note that this is precisely the conclusion arrived at in a third-level decision on a subsequent grievance (see para. 20 of the defendant's written submissions in Federal Court, appeal

No. A-43-19, pp. 94–95). In any event, the Federal Court was not bound by that decision; as the judge noted in paragraph 69 of his reasons, the grievance decision cannot be *res judicata* in the context of an action for damages insofar as the concept of harassment in the Correctional Service of Canada guidelines is not necessarily the same as that which prevails in civil law and the grievance process is not intended to compensate the complainant. Lastly, I would note that the Federal Court ultimately dismissed the appellant's action on the ground that he had not proven the harm he alleged; as a result, any error that the judge may have committed with respect to the issue of fault would be without consequences.

[11] For all of the above reasons, I am therefore of the opinion that both appeals should be dismissed, with costs.

"Yves de Montigny"
J.A.

"I agree.
Richard Boivin J.A."

"I agree.
Mary J.L. Gleason J.A."

Certified true translation
Erich Klein

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKETS:	A-43-19 A-131-19
STYLE OF CAUSE:	RICHARD TIMM v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	NOVEMBER 5, 2019
REASONS FOR JUDGMENT BY:	DE MONTIGNY J.A.
CONCURRED IN BY:	BOIVIN J.A. GLEASON J.A.
DATED:	NOVEMBER 7, 2019

APPEARANCES:

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