Federal Court  Cour fédérale

Date: 20160614

Docket: T-1352-15

Citation: 2016 FC 662

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, June 14, 2016

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

CHSHUKINA, YULIA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Yulia Shchukina [the applicant] has brought an application for judicial review of a decision rendered orally on June 30, 2015 by an independent chairperson of the disciplinary court, who found the applicant guilty of a disciplinary offence at Joliette Institution; she pleaded guilty to two other similar disciplinary offences on July 15, 2015, given the content of the

June 30 decision. It appears that this application for judicial review is made pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

[2] The matter is confusing, but it is possible to draw from it the facts needed to settle it.

I. Facts

[3] The applicant appeared three times for similar offences. On April 1, 2015 (docket 121653), April 4, 2015 (docket 121661), and May 23, 2015 (docket 121881), the applicant apparently did not stand in her cell for the counts at 21:00 and 11:50. Only those facts pertaining to the April 1 offence are relevant to this judicial review, because it would seem that after being found guilty on June 30 despite the tendered defence, the applicant's guilty pleas for the other two offences were accepted.

[4] The facts that led to the April 1 charge resulting in the June 30 guilty verdict are not in dispute. During the 11:50 count, the applicant was in bed instead of on her feet, as required. It was not until the duty officer knocked on her door that she woke with a start and quickly stood. An offence report was prepared.

II. The legal context

[5] The offence for which the applicant was charged three times is listed under paragraph 40(r) of the *Corrections and Conditional Release Act*, SC 1992, c 20 (the Act):

40 An inmate commits a disciplinary offence who	40 Est coupable d'une infraction disciplinaire le

	détenu qui :
…	. . .
(r) wilfully disobeys a written rule governing the conduct of inmates;	r) contrevient délibérément à une règle écrite régissant la conduite des détenus

[6] It is not disputed in this case that the Joliette Institution Handbook contains a written rule governing the conduct that the applicant must observe on pain of violating paragraph 40(r) of the Act. It is section 4—which governs life at the institution—that applies here. Paragraph 4.10 reads as follows:

> [TRANSLATION]
>
> 4.10 INSTITUTIONAL RULES
>
> Ignorance of these rules is not considered a valid excuse in the event that you break them. This document in its entirety is also a written order from the Warden.

Paragraph 4.10 also contains the rule to stand for the 11:50 and 21:00 counts:

> [TRANSLATION]
>
> 4. Unless otherwise indicated, all inmates must be in their rooms for formal counts. In addition, during the 11:50 and 21:00 counts, you must remain standing in your room until the primary workers have completed the count of the unit.
>
> 5. **Counts are held at:** 06:05, 11:50, 16:45, 21:00, 22:30 and 00:05.

[7] The Inmate Handbook was created by the institutional head to expand on *Commissioner's Directive 506-4* (the Directive), which was adopted under section 98 of the Act. The Directive deals with inmate counts and specifically provides that the institutional head must put in place specific procedures to complement the broader rules of the Directive.

[8] The aforementioned independent chairperson of the disciplinary court was appointed under the *Corrections and Conditional Release Regulations*, SOR/92-620 [the Regulations]. Section 24 provides for the appointment of independent chairpersons.

A. *The issues*

[9] The applicant raised a defence of lawful excuse to the charge brought against her. She claimed that she was in withdrawal from medication and that the resulting fatigue had made her drowsy. She allegedly stopped using the medication on March 6, 2015. The offence in question was allegedly committed on April 1.

[10] Essentially, the applicant asserts that her defence of "lawful excuse" was not accepted by the independent chairperson. As I understand it, the excuse she gave was her condition at the time of the offence, which supposedly negates the requisite intent (memorandum of fact and law, paragraph 25).

[11] Moreover, the applicant claims that the independent chairperson misapplied the principle of reasonable doubt. She submits that her testimony regarding withdrawal-induced fatigue was a sufficient basis for her defence of lawful excuse, such that no corroborative or expert evidence was required. According to her, the testimony of a nurse to the effect that she had not complained of fatigue was inconsequential. In her view, the independent chairperson misapprehended the meaning of reasonable doubt, since the defence raised must be disproved beyond a reasonable doubt. The applicant had no persuasive burden.

[12] The offence is worded as a wilful violation. Accordingly, the applicant argues that her guilt can be established only if it is proven that the violation was intentional. Noting that the evidence shows that she woke with a start and quickly stood, this supposedly shows the lack of intent to deliberately break the written rule.

[13] Lastly, the applicant argues that the independent chairperson's reasons were inadequate. The applicant submits that she should have explained why the explanations given and the legitimate defence invoked did not raise a reasonable doubt.

III. The decision for which judicial review is requested

[14] The decision rendered on June 30, 2015 is not a model of clarity. This is often the case when reasons for the decision are given orally after mere minutes of deliberation. Moreover, the matter was not very complex in terms of the facts.

[15] The independent chairperson noted that the applicant had quickly stood. She also noted that the withdrawal symptom experienced would have been nausea, not drowsiness. Indeed, the applicant had supposedly complained only of nausea and increased anxiety in the days preceding the alleged offence.

[16] After examining the "medical issue," the chairperson found that it raised no doubts. If anything, it strengthened the Correctional Service of Canada's case. The institutional nurse testified that he had checked and determined that drowsiness was not a symptom of such withdrawal; as a result, the independent chairperson stated: [TRANSLATION] "Correctional

Service of Canada has convinced me beyond a reasonable doubt, particularly given the nurse's testimony, OK" (transcript of June 30, 2015 hearing, p. 41). Page 42 says: [TRANSLATION] "In my mind, the fact that you didn't stand for the count is tantamount to deliberately breaking the rule."

[17] Ultimately, the applicant's claim that she had been drowsy because she went off her medication three weeks earlier was not accepted by the independent chairperson for the April 1 offence, the one at issue in her decision. The nurse called to testify confirmed everything, according to the chairperson. As drowsiness had been ruled out, the chairperson found that the offence, that is, failure to stand for the duration of the count, as required by the Inmate Handbook, had been established beyond a reasonable doubt.

IV. Standard of review

[18] As the applicant seeks judicial review of the independent chairperson's decision, the rules of administrative law apply. This is not about appealing a decision but rather about reviewing it using a standard of reasonableness, except for certain questions of law, including the four studied in *Dunsmuir v New Brunswick*, 2008 SCC 9, at paragraphs 55 to 61, [2008] 1 SCR 190.

[19] This Court has stated numerous times that questions of fact and questions of mixed fact and law are reviewable on a standard of reasonableness. Moreover, this Court has specifically stated in the context of prison law that "the assessment of an inmate's guilt in cases of disciplinary law in a prison setting is subject to a reasonableness standard" (*Boucher-Côté v*

Canada (Attorney General), 2014 FC 1065, at paragraph 16 (*Boucher-Côté*), and cases cited therein).

[20] This type of review is at the heart of the specialized jurisdiction of independent chairpersons, whose role is to determine whether a disciplinary offence was committed. In these matters, the person conducting the hearing will not find the inmate guilty unless "satisfied beyond a reasonable doubt" (subsection 43(3) of the Act).

[21] Consequently, this Court will have to accord deference to the impugned decision. Rather than replace the judgment of the independent chairperson, it seeks to determine whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. In addition, "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process" (*Dunsmuir*, at paragraph 47). This Court will not substitute its own findings but rather review the legality of the impugned decision to determine whether it is reasonable.

V. Analysis

[22] As it happens, the arguments raised in this matter are similar to those made in *Boucher-Côté*. In that case as well, it was argued that the legal tests to establish proof beyond a reasonable doubt had been misapplied. The independent chairperson was criticized for issuing a brief decision with inadequate reasons that, according to counsel, did not explain why the inmate's testimony had not raised a reasonable doubt. With respect, I fear that the attempt made in this case was no more successful.

[23] Essentially, the applicant's case rests on the proposition that she had a lawful excuse. The excuse given was that she was drowsy from being in withdrawal from medication. So if she was sleeping during the count on April 1, it was not intentional. The memorandum of fact and law states that [TRANSLATION] "the applicant raised a defence of lawful excuse related to her condition at the time of the alleged offence to demonstrate a lack of intent to the independent chairperson." This proposition is problematic.

[24] It cannot be disputed that the common law defences, justifications and excuses are available. The General part of the *Criminal Code*, R.S.C., 1985, c. C-46, makes specific provisions for this, and these apply in respect of proceedings for an offence under any Act of Parliament (subsection 8(3) of the *Criminal Code*). The alleged offence is set out in paragraph 40(r) of the Act. Common law defences can be invoked.

[25] However, conceptually, there is no basis for the proposed defence. While common law defences such as necessity (*Morgentaler v. The Queen*, [1976] 1 SCR 616; *Perka v The Queen*, [1984] 2 SCR 232 [*Perka*]), entrapment (*R. v Mack*, [1988] 2 SCR 903), and extreme self-induced intoxication (*R. v Daviault*, [1994] 3 SCR 63) are all disproportionate to some degree, it is far from clear what level of drowsiness is necessary to constitute an excuse. As the Supreme Court noted in *Perka*: "A 'justification' challenges the wrongfulness of an action which technically constitutes a crime. . . . For such actions people are often praised, as motivated by some great or noble object" (page 246). That is not the nature of the excuse. Thus, regarding the defence of necessity, the Court insisted on the lack of a viable or reasonable choice (page 250), the disproportionality of imposing a criminal sanction when the act was realistically unavoidable.

As for self-induced intoxication, it involves automatism or an absence of awareness akin to a state of insanity or automatism. In this case, nothing of the sort has been argued. In truth, the nature of the defence is unclear. There is a question as to whether it exists at common law. As formulated, it is difficult to ascertain its parameters. Putting aside the conceptual difficulty in establishing proper parameters, the fundamental problem facing the applicant is that the factual basis for a defence needs to be established. In this case, there needs to be a factual basis according to which withdrawal induces drowsiness, and this needs to be accepted by the decision-maker. However, the decision-maker did not accept this evidence. Instead, she accepted the nurse's evidence that drowsiness is not a withdrawal symptom.

[27] Therefore, the independent chairperson did not accept the applicant's evidence, which she was entitled to do. The applicant never complained of drowsiness after going off the medication; she complained only of nausea to the institutional physician and was treated for it. This indicates not only that drowsiness is a recent reason put forward by the applicant, but also that the applicant knew to complain of health problems. Moreover, the evidence submitted by the nurse, who was called to testify by both the institution and the applicant, can only be seen as contrary to that of the appellant. Therefore, the applicant's version that she had experienced withdrawal-induced drowsiness was recent and contradicted by the medical evidence before the chairperson. It is difficult to see how her conclusion that withdrawal-induced drowsiness had no factual basis would be unreasonable. The evidence in the record certainly supported such a conclusion.

[28] As there is insufficient evidence to support the alleged withdrawal-induced drowsiness, it follows that the applicant's "lawful excuse" that she was drowsy due to an external factor cannot be accepted, given the lack of a factual basis.

[29] The applicant also argued that the independent chairperson had misapplied the [TRANSLATION] "reasonable doubt tests." As I understand the arguments, based on *R. v W.(D.)*, [1991] 1 SCR 742 [*W.(D.)*], it is argued that the rejection of an accused's evidence cannot be held against the accused. A lawful excuse need not rest on anything other than the applicant's testimony, either. The independent chairperson has been criticized for deciding that the medical evidence worked against the applicant. This criticism is unfounded.

[30] In this case, the independent chairperson did not reverse the burden of proof, which the Court sought to avoid in *W.(D.)*. Thus, if an accused testifies in a criminal trial, jurors must be instructed not to base their decision solely on whether or not they believe the accused's evidence. Believing or disbelieving the accused's evidence does not put an end to deliberations. Jurors are told that even if they do not believe the accused, the Crown's evidence can still raise a reasonable doubt as to the accused's guilt, in which case they must acquit. Jurors must not find the accused guilty if, despite disbelieving the accused's evidence, they conclude that the whole of the evidence does not satisfy them beyond a reasonable doubt. The burden of proof is never reversed in a criminal trial.

[31] But that has nothing to do with the case at hand. Here, the independent chairperson did not accept the applicant's testimony, reasonably in my view, but there is no reason to believe that

she used this rejection as evidence against the applicant. Rather, she chose the nurse's evidence that drowsiness is not a symptom of withdrawal. The chairperson could also take into account the fact that in the three weeks after she went off her medication, the applicant complained of nausea to the point of being seen by a physician, but did not mention drowsiness. Contrary to what the applicant asserts, the chairperson never required corroboration; she simply preferred the evidence of another. There is nothing unreasonable about that. As Mr. Justice Lemieux said in a case cited by the applicant: "The Applicant is not required to produce medical evidence or documentary evidence, but in many cases it would be in the Applicant's interest to do so" (*Boissel v Canada (Attorney General)*, 2011 FC 560, at paragraph 12).

[32] The applicant submits that the fact that she woke with a start shows that she could not have intended not to stand for the count. If I understand correctly, she contends that this reaction alone warrants a finding of a lack of intent. Clearly, this contention was not accepted. The onus was on the applicant to show that this rather unusual proposition could not reasonably be rejected. She failed to discharge this burden. The rule is that inmates have to stand for the 11:50 count. Waking with a start has nothing to do with the requirement to stand. In fact, neither counsel for this judicial review nor counsel before the independent chairperson spoke of a connection between the applicant's sudden waking and the requirement to stand.

[33] For this judicial review, the onus was on the applicant to satisfy this Court that the decision is unreasonable because it does not fall within a range of possible, acceptable outcomes which are defensible. It is not the role of this Court to substitute its own opinion, especially since the independent chairperson heard the evidence. It is an invitation that this Court must decline.

[34] Lastly, the applicant claims that the reasons for the decision were inadequate, referring, as did the applicant in *Boucher-Côté,* to the decision in *Cyr v Canada (Attorney General),* 2011 FC 94.

[35] The state of the law has changed since then. In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* 2011 SCC 62, [2011] 3 SCR 708, [*Newfoundland and Labrador Nurses' Union*], the Court expressly rejected the notion that the "adequacy" of reasons is a stand-alone basis for quashing a decision (paragraph 14). Rather, reviewing courts are called upon to "look to the record for the purpose of assessing the reasonableness of the outcome." In *Newfoundland and Labrador Nurses' Union*, at paragraph 12, the Court quoted, with approval, this passage from an article by Professor Dyzenhaus:

> "Reasonable" means here that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise, etc, then it is also the case that its decision should be presumed to be correct even if its reasons are in some respects defective. [Emphasis added.]
>
> (David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy," in Michael Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 304)

Still in *Newfoundland and Labrador Nurses' Union*, at paragraph 18, the Court quoted a paragraph from the respondents' Factum, which I will quote here, as I find that it emphasizes that reasons are to be looked at in the context of the evidence and the parties' submissions:

> When reviewing a decision of an administrative body on the reasonableness standard, the guiding principle is deference. Reasons are not to be reviewed in a vacuum – the result is to be looked at in the context of the evidence, the parties' submissions and the process. Reasons do not have to be perfect. They do not have to be comprehensive. [para. 44]

[36] The decision under review is far from perfect, but perfection is not the required standard. In this case, the applicant apparently hoped for more extensive reasons as to why no reasonable doubt had been raised, especially since she had provided a "lawful excuse." She claims that she is unable to determine why her testimony was not accepted.

[37] This Court has read the record and the transcripts of the hearings before the independent chairperson, and has even listened to the recording of the arguments and decision. After reviewing the evidence and arguments and taking into account the process in these matters, I find that the reasons for the decision are intelligible. Focus was placed on the alleged withdrawal-induced drowsiness, which was used as a defence to the charge. Once this excuse was rejected, because the evidence did not support it, the independent chairperson was satisfied from the evidence that the offence charged was committed. Deference is owed. The reviewing court seeks to supplement before subverting.

[38] It is very clear that the independent chairperson was mindful of the two issues raised by the applicant: the existence of a lawful excuse and the lack of intent. Since the "medical evidence" did not support the contention that the drowsiness was withdrawal-induced, and since that was the only evidence aside from the applicant's contention, the said defence could reasonably be ruled out. As for the requisite intent, it was argued that the fact that the applicant

had quickly stood was proof that it was not her intention not to follow the rule as required by paragraph 40(r) of the Act. But what matters here is an intention to violate the substance of the rule. Inmates are required to stand for the duration of the count. The fact that the applicant stood, even quickly, does not satisfy that requirement.

[39] On the face of it, the applicant's behaviour violated the requirement to remain standing. As her defence of lawful excuse was rejected, and in the absence of another explanation, the independent chairperson was satisfied beyond a reasonable doubt that the disciplinary offence had been committed, with the intent required by law. The only defence raised in this regard was that the applicant had stood, which, logically, does not show a lack of intent to remain standing for the duration of the count. As I understood the arguments of counsel for the applicant before the independent chairperson, the requisite intent was lacking because the applicant did not want to violate the purpose of the rule and hence quickly stood. But that is not the alleged offence. The purpose of a rule is irrelevant; the applicant ought to have stood sooner and did not. It was open to the independent chairperson to conclude that, had the applicant's quickly rising to her feet been the only explanation, this did not raise a reasonable doubt as to her intention not to remain standing for the requisite amount of time.

[40] All that remained was to see whether the officer's evidence established that the applicant was not standing when the count commenced. In the record, there was no indication of the applicant's condition aside from the fact that she was asleep during the count and not standing, as required. The *actus reus* was established.

[41] Obviously, this Court cannot pass judgment on the wisdom of the rule. However, it may be noted that three warnings had previously been given to the applicant, who never indicated in response to these warnings that she was suffering from anything other than nausea (I am not in any way minimizing the severity of the nausea; in fact, the applicant received a medical prescription in this regard after the date of the offence). It was never said that the nausea had caused her to violate the rule.

[42] Therefore, the independent chairperson responded to the arguments she had heard minutes before in making her decision. The conclusion that she reached, when examined in light of the evidence, the parties' arguments and the process, is reasonable.

[43] As has been said many times before, administrative proceedings must not be transformed into civil or criminal proceedings before ordinary courts. That being said, decisions that are brief, terse and somewhat ambiguous should be avoided (*Ayotte v. Canada (Attorney General)*, 2003 FCA 429, 320 NR 339). Such decisions may not satisfy the test in *Newfoundland and Labrador Nurses' Union*. In this case, the decision is borderline reasonable, in light of the evidence and arguments underlying the decision, and the fact that there were not many submissions.

[44] The applicant does not seek costs, but the respondent does. The applicant suggested that costs fixed at $500 would already be heavy.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed with costs in favour of the respondent of $250.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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