Federal Court  Cour fédérale

Date: 20171127

Docket: T-2230-16

Citation: 2017 FC 1069

Ottawa, Ontario, November 27, 2017

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

ABUBAKAR SHARIF

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision made by the Independent Chairperson of the Warkworth Institution Disciplinary Court on December 6, 2016, convicting the Applicant of a disciplinary offence contrary to paragraph 40(h) of the *Corrections and Conditional Release Act*, SC 1992, c 20 [*CCRA*], and sentencing him to a $30 fine.

I. Background

[2] The Applicant, Abubakar Sharif, is an inmate at Warkworth Institution in Ontario. On September 25, 2016, he was involved in an altercation with Correctional Officer Ethridge in the dining hall at Warkworth Institution. This altercation became physical, resulting in the Applicant being charged with a disciplinary offence contrary to paragraph 40(h) of the *CCRA*, which provides that: "An inmate commits a disciplinary offence who… fights with, assaults or threatens to assault another person."

[3] At the time of the altercation on September 25, 2016, the Applicant was suffering from a knee injury and required the use of crutches to walk. Because of his injury, the Applicant went to the front of the food line to pick up his meal. The Applicant claims he had been permitted by staff to go directly to the front of the line on a daily basis due to his injury. On this day though, Officer Ethridge instructed the Applicant to return to the back of the line. The Applicant told Officer Ethridge he was not able to stand in line because of his injury and that he had been accommodated in the past. Officer Ethridge instructed the kitchen staff not to pass out any more meals until the Applicant complied. The Applicant refused to do so. The Applicant then took a food tray from another inmate, which prompted Officer Ethridge and a second officer to approach the Applicant who moved and held the tray away from them. According to Officer Ethridge, the Applicant bumped him with his chest several times. Officer Ethridge then seized the tray from the Applicant's hands, and the Applicant fell to the floor. At this point, there was a disturbance among the other inmates in the dining hall, with some inmates referring to Officer Ethridge as a "goof."

[4] At the hearing before the Independent Chairperson, the Applicant's legal counsel argued that the Warkworth Institution had not proven beyond a reasonable doubt that the Applicant had assaulted Officer Ethridge. The Applicant acknowledged during the hearing that he had disobeyed instructions and had been trying to keep the food tray out of Officer Ethridge's reach. The Applicant referred to video footage of the altercation which he claimed showed that Officer Ethridge had initiated physical contact with him, causing him to fall. With respect to the alleged chest bump, the Applicant stated at the hearing that Officer Ethridge had bumped him with his chest, not vice-versa.

II. Decision

[5] The Chairperson's decision was delivered orally at the conclusion of the hearing on December 6, 2016, and consists entirely of the following:

> But the problem with that argument, counsel [that the Institution had not proven its case beyond a reasonable doubt that Mr. Sharif did in fact assault the Officer], is that Mr. Sharif has admitted that he was attempting to keep the tray out of the Officer's reach, which in my view, invites physical contact either by Mr. Sharif or by the Officer. This was obviously an explosive situation, which became even more so when Mr. Sharif fell. Whether accidentally or how that happened I could not tell from the video, but there is no doubt in my mind that Mr. Sharif was attempting to keep the tray from the Officer, and the Officer was attempting to get the tray, because in his view, it was not appropriate for him to have it. In these circumstances, I think the charge is made out.

[6] The Chairperson sentenced the Applicant to a $30 fine, with $10 imposed and $20 suspended for a period of 60 days.

III. Issues

[7] The Applicant frames the issues arising in this application for judicial review as follows:

1. What are the applicable standards of review?
2. Did the Chairperson err in law by convicting the Applicant of the disciplinary offence solely on the basis of the Applicant's disobedience, without finding that the Applicant actually assaulted Officer Ethridge?
3. Did the Chairperson err in law and violate procedural fairness by entirely failing to consider the Applicant's defences in his reasons and failing to address whether his evidence raised a reasonable doubt?

IV. Analysis

A. *Standards of Review*

[8] The Applicant submits that the second issue as stated above – namely, the question of whether the offence of "assault" can be made out by disobedience which "invites physical contact" without the application of physical force – raises a question of law with only one defensible answer and, therefore, is reviewable on the standard of correctness. I reject this submission because this issue neither raises a question of procedural fairness nor does it fall within the four types of questions identified by the Supreme Court in *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*], that attract review on a standard of correctness: namely, (i) "constitutional questions regarding the division of powers between Parliament and the provinces…as well as other constitutional issues" (para 58); (ii) true

questions of jurisdiction or *vires* "where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter" (para 59); (iii) "where the question at issue is one of general law 'that is both of central importance to the legal system as a whole and outside the [decision-maker]'s specialized area of expertise'" (para 60); and (iv) "Questions regarding the jurisdictional lines between two or more competing specialized tribunals" (para 61).

[9] The second issue as framed by the Applicant will be reviewed, therefore, on the reasonableness standard. It is well-established that an Independent Chairperson's assessment of whether an inmate is guilty of a disciplinary offence is reviewable on the reasonableness standard (see, e.g., *Alix v Canada (Attorney General)*, 2014 FC 1051 at para 18, 466 FTR 307). Under the reasonableness standard, the Court is tasked with reviewing a decision for "the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para 47). Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708 [*Newfoundland Nurses*].

[10] As for the third issue raised by the Applicant, this involves an allegation that the Chairperson violated procedural fairness. The standard of review for an allegation of procedural unfairness is correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79, [2014] 1 SCR

502; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, [2009] 1 SCR 339). Whether an administrative decision was fair is generally reviewable by a court. However, the analytical framework is not so much one of correctness or reasonableness but, instead, one of fairness. As noted by Jones & deVillars (*Principles of Administrative Law*, 6th ed. (Toronto: Carswell, 2014) at 266):

> The fairness of a proceeding is not measured by the standards of "correctness" or "reasonableness". It is measured by whether the proceedings have met the level of fairness required by law. Confusion has arisen because when the court considers whether a proceeding has been procedurally fair, the court…decides whether the proceedings were correctly held. There is no deference to the tribunal's way of proceeding. It was either fair or not.

[11] Under the correctness standard of review, the reviewing court shows no deference to the decision-maker's reasoning process and the court will substitute its own view and provide the correct answer if it disagrees with the decision-maker's determination (see: *Dunsmuir* at para 50). Moreover, the Court must determine whether the process followed in arriving at the decision under review achieved the level of fairness required by the circumstances of the matter (see: *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 115, [2002] 1 SCR 3).

[12] Before turning to the second issue raised by the Applicant, it is helpful to note the general principles which govern the penitentiary disciplinary process. These were summarized in *Hendrickson v Kent Institution Disciplinary Court (Independent Chairperson)* (1990), 32 FTR 296 at para 10, [1990] FCJ No 19, as follows:

> 1. A hearing conducted by an independent chairperson of the disciplinary court of an institution is an administrative

proceeding and is neither judicial nor quasi-judicial in character.

2. Except to the extent there are statutory provisions or regulations having the force of law to the contrary, there is no requirement to conform to any particular procedure or to abide by the rules of evidence generally applicable to judicial or quasi-judicial tribunals or adversary proceedings.

3. There is an overall duty to act fairly by ensuring that the inquiry is carried out in a fair manner and with due regard to natural justice. The duty to act fairly in a disciplinary court hearing requires that the person be aware of what the allegations are, the evidence and the nature of the evidence against him and be afforded a reasonable opportunity to respond to the evidence and to give his version of the matter.

4. The hearing is not to be conducted as an adversary proceeding but as an inquisitorial one and there is no duty on the person responsible for conducting the hearing to explore every conceivable defence, although there is a duty to conduct a full and fair inquiry or, in other words, examine both sides of the question.

5. It is not up to this Court to review the evidence as a court might do in a case of a judicial tribunal or a review of a decision of a quasi-judicial tribunal, but merely to consider whether there has in fact been a breach of the general duty to act fairly.

6. The judicial discretion in relation with disciplinary matters must be exercised sparingly and a remedy ought to be granted "only in cases of serious injustice" [*Martineau v Matsqui Institution Inmate Disciplinary Board (No 2)*, [1979] SCJ No 121 at para 13, [1980] 1 SCR 602].

[13] The Federal Court of Appeal reiterated these six principles in *Ayotte v Canada (Attorney General)*, 2003 FCA 429 at para 9, 240 DLR (4^{th}) 471, emphasising the sixth principle quoted above, and concluded that: "Simply put, the prison disciplinary process calls for flexibility and

efficiency, but flexibility and efficiency that must be sought and achieved through procedural fairness and compliance with the mandatory provisions of the law" (para 11).

B. *Did the Chairperson err in law by convicting the Applicant of the disciplinary offence solely on the basis of the Applicant's disobedience, without finding that the Applicant actually assaulted Officer Ethridge?*

[14] The Applicant contends that the Chairperson erred by conflating disobedience with assault. While assault is not defined in the *CCRA*, the Applicant references the definition of assault in subsection 265(1) of the *Criminal Code*, RSC 1985, c C-46, and argues that assault is the application or threat of force applied without consent. According to the Applicant, several cases of this Court in the prison disciplinary setting have considered the definition of assault and found that while it need not conform to the *Criminal Code* definition, it necessarily involves some intentional application of force. The Applicant notes that case law in a criminal context holds that attempting to disengage or escape from a lawful arrest does not constitute assault unless there is some intentional application of force. The Applicant further notes that the Chairperson made no finding that the Applicant bumped Officer Ethridge with his chest. In the Applicant's view, it was an error of law for the Chairperson to conclude that the Applicant committed an assault merely by keeping the tray from Officer Ethridge and inviting physical contact.

[15] The Respondent argues that the Applicant's reference to the *Criminal Code* definition of assault is contrary to *R v Shubley*, [1990] 1 SCR 3 at para 38, [1990] SCJ No 1, which holds that the purpose of the prison disciplinary system is "not to mete out criminal punishment, but to maintain order in the prison." The Respondent contends that disciplinary offences are therefore

regulatory or strict liability offences designed to maintain order in an institution. According to the Respondent, with strict liability offences, once the *actus reus* has been proven beyond a reasonable doubt, the persuasive burden is on the inmate to establish a common law defence on balance of probabilities.

[16] The Respondent emphasizes the disjunctive nature of paragraph 40(h), stating that the offence will be made out if an inmate either "fights with", "assaults" or "threatens to assault" another person. Even if the offence of assault was not made out, it is clear, in the Respondent's view that the Applicant fought with Officer Ethridge over the food tray. The Respondent refers to *R v Pelkey* (1913), 12 DLR 780 at para 10, 21 CCC 387, where the court defined "fight" as being "a contest or struggle in which one strives to overcome or conquer the other." According to the Respondent, the Applicant's conduct in disobeying a direct order, taking a tray from another inmate, initiating physical contact through a chest bump, and then swinging the tray to keep it from Officer Ethridge, clearly meets the plain and ordinary meaning of "fighting", especially given the explosive nature of the situation.

[17] The Applicant's arguments with respect to this issue dodge the question of whether his conduct in the dining hall on September 25, 2016, could be considered fighting with Officer Ethridge. The evidence before the Chairperson was such that the Applicant and Officer Ethridge were certainly not fighting as if involved in a boxing match or a schoolyard scrap. They were, however, in the Chairperson's view, fighting or struggling for control or possession of the food tray which the Applicant had taken from another inmate. In my view, given the Applicant's admission at the hearing that he was attempting to keep the tray out of Officer Ethridge's reach,

it was reasonable for the Chairperson to find that the Applicant invited physical contact either by him or by Officer Ethridge. It is true, as the Applicant points out, that the Chairperson did not explicitly state or find that the Applicant had actually assaulted Officer Ethridge. However, in my view it was unnecessary for him to do so because the verbal and physical altercation between them involved circumstances that amounted to fighting for control of the food tray.

[18] Before leaving this issue, it warrants note that the Respondent's argument that disciplinary offences under the *CCRA* are regulatory or strict liability offences, designed to maintain order in an institution, is open to some question. A similar argument was advanced by the respondent in *Schmit v Canada (Attorney General)*, 2016 FC 1293, [2016] FCJ No 1444 [*Schmit*], a case where the applicant had created a disturbance contrary to paragraph 40(m) of the *CCRA*. The Court in *Schmit* remarked as follows:

> [46] The respondent argued instead that the disciplinary offences set out in the Act do not require that *mens rea* be demonstrated: they are strict liability offences (respondent's memorandum of fact and law, paragraph 37). This is a surprising statement because a number of paragraphs in section 40 include expressions that typically fall under the highest *mens rea*: "wilfully" (paragraphs (*c*) and (*r*) of section 40), "for the purpose of" (paragraph 40(*n*)), "knowingly" (paragraph 40(*r.1*)). In addition, the section prohibits theft (paragraph 40(*d*)), assaults (paragraph 40(*h*)) and offering bribes (paragraph 40(*o*)), all common law offences with criminal intent. To contend, as the respondent does, that all the offences are against the public welfare, within the meaning of *R v Sault Ste Marie*, [1978] 2 SCR 1299, was simply not demonstrated.
>
> [47] I am far from being persuaded that all the offences established by section 40 of the Act are without a *mens rea*….

C. *Did the Chairperson err in law and violate procedural fairness by entirely failing to consider the Applicant's defences in his reasons and failing to address whether his evidence raised a reasonable doubt?*

[19] The Applicant claims the Chairperson erred in law and violated procedural fairness by failing to consider whether the offence was proven beyond a reasonable doubt, as required by subsection 43(3) of the *CCRA*, which stipulates that the person conducting the hearing "shall not find the inmate guilty unless satisfied beyond a reasonable doubt, based on the evidence presented at the hearing, that the inmate committed the disciplinary offence in question." In the Applicant's view, the Chairperson completely disregarded the Applicant's defence in his reasons, including the fact that his submissions, if believed, would provide a complete defence to the charge. The Applicant relies upon several cases which hold that the failure of an Independent Chairperson to consider the defence of an accused inmate is an error in law, providing an independent basis for overturning the Chairperson's decision in this case.

[20] The Respondent characterizes the Applicant's arguments on this issue as a question of sufficiency of reasons, and argues that adequacy of reasons is not a stand-alone basis for overturning an administrative decision. The Respondent notes that the Chairperson stated that there was no doubt in his mind that the Applicant was attempting to keep the tray from Officer Ethridge, and that these actions invited confrontation and gave rise to an explosive situation. The Respondent further notes that the Chairperson's decision is supported by the statements of Officer Ethridge, Officer Goodfellow, and Food Steward Carter, all of which describe the confrontational behaviour of the Applicant.

[21] It is true that the Chairperson's reasons for his decision are, to say the least, brief and terse. However, they are intelligible in view of the transcript of the hearing and the record before the Chairperson which included the Inmate Offence Report as well as several Statement/Observation Reports from those who witnessed the incident. The Court is able to understand why the Chairperson made the decision he did and it is within the range of acceptable outcomes. As noted by the Supreme Court in *Newfoundland Nurses*: "Reasons do not have to be perfect. They do not have to be comprehensive" (para 18).

[22] The Chairperson's reasons do not, as the Applicant argues, completely disregard the Applicant's submissions. On the contrary, the Chairperson expressly acknowledged the Applicant's primary argument that the Institution had not proven its case beyond a reasonable doubt. (This argument appears in the transcript of the hearing immediately before the start of the Chairperson's oral reasons.) The Chairperson clearly had the reasonable doubt requirement in his mind when he stated: "there is no doubt in my mind that Mr. Sharif was attempting to keep the tray from the Officer." In the face of this statement by the Chairperson it cannot be said, as the Applicant contends, that the Chairperson erred in law and violated procedural fairness by failing to consider whether the offence was proven beyond a reasonable doubt.

V. Conclusion

[23] In conclusion, it should be noted that, at the outset of the hearing of this matter, paragraph 3 of the Applicant's affidavit dated January 27, 2017, was struck from the record because it contained a version of the incident which occurred on September 25, 2016, that was not before the Chairperson.

[24] For the reasons stated above, the Applicant’s application for judicial review is dismissed.

[25] The Respondent has requested her costs of this application in an amount to be fixed by the Court. Since the application has been dismissed, the Respondent should receive costs. In view of the circumstances of this matter and the various factors noted in Rule 400(3) of the *Federal Courts Rules*, SOR/98-106, as amended, the Applicant shall pay to the Respondent costs in the fixed amount of $200.00 (inclusive of all disbursements and any applicable taxes) within 90 days from the date of this judgment.

JUDGMENT

THIS COURT'S JUDGMENT is that: the Applicant's application for judicial review is dismissed; and the Applicant shall pay to the Respondent costs in the fixed amount of $200.00 (inclusive of all disbursements and any applicable taxes) within 90 days from the date of this judgment.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2230-16
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