Federal Court  Cour fédérale

Date: 20180615

Docket: T-2239-16

Citation: 2018 FC 624

Toronto, Ontario, June 15, 2018

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

TYLER WARK

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] Mr. Tyler Wark (the "Applicant") seeks judicial review of the decision, made on July 26, 2016, by the Independent Chairperson (the "IC") of Warkworth Institution. In that decision, the IC convicted the Applicant of a charge of disobeying a justifiable order of a staff member, contrary to subsection 40 (a) of the *Corrections and Conditional Release Act*, S.C. 1992, c 20 (the "Act"), and imposed a suspended fine of $20.00.

II. **BACKGROUND**

[2] The Attorney General of Canada pursuant to the *Federal Court Rules*, SOR/98-106 (the "Rules"), is the Respondent (the "Respondent") to this application for judicial review.

[3] On April 12, 2016, Correctional Officers found moccasins in the Applicant's cell. Possession of these moccasins was unauthorized. In the course of attempting to resolve the matter informally, the Applicant became agitated.

[4] According to the description of events given by a Correctional Officer, the Applicant was given several orders to return to his cell but did not comply with these orders "as quickly as the situation management model is concerned".

[5] The Applicant says that on the way back to his cell, he turned to the Correctional Officer in anger and the Officer sprayed him with mace. Subsequently, the Applicant was taken to segregation for "decontamination".

[6] On April 13, 2016, the Applicant called the Correctional Investigator's Office and alleged that an excessive use of force had been taken during the incident.

[7] On April 13, 2016, the Applicant received an "Inmate Report and Notification of Charge" (the "Charge Sheet") relative to the incident.

[8] By letter dated May 18, 2016, investigator Patrick Dagenais officially notified the Applicant that the review of the incident was complete and that the use of force was inappropriate.

[9] The hearing was conducted on July 26, 2016. The Applicant was represented at that hearing by a law student from the Queen Correctional Law Project and he entered a plea of not guilty, maintaining that he was returning to his cell before the use of force was taken.

[10] In this application for judicial review, the Applicant argues that he was convicted of a charge that was not identified in the charged sheet. He submits that he was convicted of a charge relating to subsection 40 (a) of the Act, but the reasons of the IC and the evidence adduced support an offence pursuant to subsection 40 (h).

[11] The Respondent, for her part, argues that the Applicant was charged with disobeying a justifiable order, pursuant to subsection 40 (a) of the Act. Pursuant to subsection 43 (3), the IC had to be satisfied beyond a reasonable doubt that the essential elements of the charge were established; those essential elements were that the order was justifiable and that the order was disobeyed.

[12] The Respondent submits that the evidence at the hearing showed that the Applicant was ordered 3 times to return to his cell. The Applicant did not obey the order but rather became verbally and physically aggressive, according to the Observation Report.

[13] The Respondent disputes the Applicant's argument that he should not have been found guilty because the Correctional Officer's inappropriate use of force occurred after he disobeyed the order. The Respondent submits these are two separate incidents.

[14] In any event, the Respondent submits that the record shows that the IC took the excessive use of force into consideration when administering the disciplinary sanction. She argues that the IC considered all of the relevant evidence and made a finding that falls within a range of possible, acceptable outcomes.

III. **DISCUSSION and DISPOSITION**

[15] The Respondent objected to the affidavit of the Applicant; filed in this application for judicial review; on the basis that it introduces evidence that was not before the IC.

[16] The Respondent also objects to the reference, in paragraph 12 of the Applicant's Memorandum of Fact and Law, to his security score. The Respondent submits that this is mere speculation.

[17] To the extent that the Applicant has included in his affidavit any information or evidence that was not before the IC, that information or evidence will not be considered in the disposition of this application for judicial review. The same applies to the Applicant's reference to his security score.

[18] The first issue for determination is the applicable standard of review.

[19] I agree with the submissions of the Respondent that the standard of reasonableness, as discussed in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 applies. That that standard requires that a decision made by an administrative decision maker be justifiable, transparent and intelligible, and fall within a range of possible, acceptable outcomes, defensible upon the law and the facts; see *Dunsmuir*, *supra* at paragraph 47.

[20] The Applicant submits that the decision is not reasonable because he was convicted of the wrong charge. He refers to the reasons of the IC as follows:

[21] The Respondent argues that the decision of the IC is reasonable, in light of the evidence submitted.

[22] In this case, the charge sheet shows that the Applicant was charged under subsection 40 (a) of the Act which provides as follows;

Disciplinary offences	**Régime disciplinaire**
40 An inmate commits a disciplinary offence who	40 Est coupable d'une infraction disciplinaire le détenu qui:
(a) disobeys a justifiable order of a staff member;	a) désobéit à l'ordre légitime d'un agent;

[23] Subsection 40 (h) of the Act provides as follows;

Disciplinary offences	**Régime disciplinaire**
40 An inmate commits a disciplinary offence who	40 Est coupable d'une infraction disciplinaire le détenu qui:

(h) fights with, assaults or threatens to assault another person;	h) se livre ou menace de se livrer à des voies de fait ou prend part à un combat;

[24] However, the transcript of the hearing before the IC shows that the hearing proceeded on the basis only of the charge of disobeying a direct order. The transcript shows no reference to a charge pursuant to subsection 40 (h).

[25] In my opinion, the decision of the IC does not meet the standard of reasonableness as set out in *Dunsmuir, supra*. Considering the charge, the transcript of the hearing and the evidence that submitted at that hearing, together with the reasons of the IC, it is not "transparent" why the Applicant was convicted of an offence contrary to subsection 40 (a). The reasons of the IC are not justifiable or intelligible, when considered against the charge, the evidence and the transcript of the hearing.

[26] The Applicant seeks the following relief:

1. An Order in the nature of *certiorari* quashing the decision of the Independent Chairperson; and
2. An Order direction the respondent to provide a copy of a disciplinary court recording when requested by a retained solicitor; and
3. An Order for costs of the application

[27] I am not prepared to order that the Respondent provide "a copy of a disciplinary court recoding when requested by a retained solicitor".

[28] In the result, the application for judicial review is allowed, the decision of the IC is set aside in its entirety and upon condition that if a charge is issued relative to the same incident, the matter is to be heard before a different IC. The Applicant shall have his taxed costs**.**

JUDGMENT in T-2239-16

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, the decision of the Independent Chairperson is set aside and the matter remitted to the Institutional Head upon condition that if a charge is issued relative to the same incident, the matter is to be heard before a different Independent Chairperson. The Applicant shall have his taxed costs.

"E.Heneghan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2239-16
STYLE OF CAUSE:	TYLER WARK v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 25, 2017
JUDGMENT AND REASONS:	HENEGHAN J.
DATED:	JUNE 15, 2018

APPEARANCES:

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Ms. Susan Jane Bennett	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT