Federal Court Cour fédérale

Date: 20191219

Docket: T-514-19

Citation: 2019 FC 1647

Ottawa, Ontario, December 19, 2019

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

EMRAH BULATCI

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision of an Independent Chairperson finding the Applicant, Emrah Bulatci, guilty of possession of contraband in contravention of the *Corrections and Conditional Release Act*, SC 1992, c 20 [the CCRA].

II. Style of Cause

[2] The Applicant improperly named the Minister of Public Safety and Correctional Service Canada as respondents in this matter. Pursuant to Rule 303 of the *Federal Courts Rules*, SOR/98-106, the correct respondent is simply the Attorney General of Canada and the style of cause is hereby amended accordingly.

III. Background

[3] The Applicant is currently serving a sentence at Grande Cache Institution, and at all material times has been in the care of Correctional Service Canada [CSC]. On October 13, 2018, the Applicant was present in the cell of another inmate, Mr. Amer. Correctional Officers [the Officers] noticed a strong smell of cologne, and when they opened the cell, noticed a strong smell of marijuana. Accordingly, the Officers conducted a search of Mr. Amer's cell.

[4] The search produced several items that the Officers seized, including three "dabs" of concentrated marijuana, wrap that smelled of marijuana, and two nail clippers with a brown substance on the end of the nail file. On October 15, 2018, laboratory testing of these items came back positive for THC. That day, CSC served the Applicant with a notice to provide a urine sample for urinalysis. The results of the urinalysis also came back positive for THC.

[5] As a result, the Applicant was charged with possessing contraband and taking an intoxicant into his body under paragraphs 40(i) and 40(k) of the CCRA, respectively.

IV. Decision Under Review

[6] The hearing with respect to these charges took place on November 21, 2018. The Applicant is not aware of any written reasons, but the hearing was recorded and the audio of the entire hearing was submitted to the Court as part of the Certified Tribunal Record. At the outset of the hearing, the charge of taking in an intoxicant under paragraph 40(k) was withdrawn.

[7] The Applicant pleaded not guilty to the charge of possessing contraband under paragraph 40(i) of the CCRA. Counsel for the Applicant began by stating that the facts of the case were substantially similar to the decision rendered by the same Chairperson with respect to a paragraph 40(i) charge against Mr. Amer. That charge also arose from the October 13, 2018 incident in Mr. Amer's cell.

[8] The CSC representative present at the hearing noted that the contraband items that tested positive for THC were "located on the desk in plain view."

[9] In the Applicant's view, the facts in the present case were distinguishable from the Chairperson's finding in Mr. Amer's case, because the contraband items were found in Mr. Amer's cell. Counsel for the Applicant argued before the Chairperson that the fact that the Officers found the items in Mr. Amer's cell creates a reasonable doubt that the Applicant was in possession of the contraband items.

[10] The Chairperson rejected this submission. He found that the strong smell of marijuana coupled with the contraband items in plain view of all in the cell were sufficient for him to find, beyond a reasonable doubt, that the Applicant had knowledge and the ability to exercise control over the contraband items. The fact that he was not in his own cell is not determinative. At the relevant time, the Applicant was in the immediate vicinity of the contraband items that tested positive for THC.

[11] The Chairperson found the Applicant guilty of possessing contraband under paragraph 40(i) of the CCRA. He suggested a $30 fine suspended over 90 days. The Applicant and his counsel made brief submissions on the appropriateness of the fine, but the Chairperson upheld his initial suggestion and issued the suspended $30 fine.

V. Issues

[12] The issues are:

(1) Was the Chairperson's decision procedurally unfair?

(2) Was the Chairperson's decision reasonable?

VI. Standard of Review

[13] The standard of review for a Chairperson's finding that an inmate is guilty of a disciplinary offence is reasonableness (*Alix v Canada (Attorney General),* 2014 FC 1051 at para 18). The Applicant submits that because the decision under review has potentially serious

consequences for him, the Court should scrutinize the decision intensely (*Sharif v Canada (Attorney General)*, 2018 FCA 205 at para 11).

[14] Matters of procedural fairness are reviewed on the correctness standard (*Mission Institution v Khela,* 2014 SCC 24 at para 79).

VII. Analysis

A. *The Applicant's Affidavit Evidence*

[15] As a preliminary matter, the Applicant submitted an affidavit as part of his application record. The general rule on judicial review is that the Court will not consider evidence that was not before the decision maker, subject to certain exceptions (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 19-20).

[16] However, the Applicant submits that the Court need not consider his affidavit. While the affidavit likely falls into the exception for affidavits that highlight procedural defects, making the affidavit admissible, the Applicant submits that the defects in procedural fairness in this case are sufficiently highlighted by the audio recording of the hearing.

B. *Was the Chairperson's decision procedurally unfair?*

[17] A Chairperson conducting a disciplinary offence hearing must give the charged inmate a reasonable opportunity to call witnesses on their behalf (*Corrections and Conditional Release*

Regulations, SOR/92-620, s 31). The Applicant submits that procedural fairness is breached where an inmate is not given the opportunity to call witnesses in a disciplinary hearing. Based on the audio recording of the hearing, the Applicant highlights four points in the hearing that, in his view, were procedurally unfair:

1) First, during the hearing the Chairperson stated that the Applicant was not calling any evidence, however, at no point did the Chairperson ask the Applicant or his counsel if he wanted to introduce any evidence or call any witnesses. No witnesses were called during the hearing.

2) Second, counsel for the Applicant had to ask the Chairperson to clarify if he was issuing judgment during the hearing. The Chairperson responded affirmatively, and found the Applicant guilty. The Applicant submits that this interaction suggests that the parties were confused by the method by which the hearing progressed.

3) Third, the Applicant argues that the Chairperson made his sentencing decision before asking for submissions on the point. However, in the audio recording, the Chairperson clearly states, “unless you have anything to say, I’m suggesting a $30 fine.” The Chairperson was suggesting a sentence, subject to the Applicant’s submissions.

4) Finally, near the end of the recording, the Applicant made some comments to the effect that when he walks into a cell he does not know the contents of that cell. In the Applicant’s submission, these comments suggest that the Applicant did wish to call evidence at the hearing and present his version of the events that took place in Mr. Amer’s cell on October 13, 2018.

[18] The Applicant submits that these four points establish that the Chairperson did not provide the Applicant with a reasonable opportunity to call witnesses on his own behalf.

[19] I do not accept the Applicant’s submissions on this point. Neither the Applicant nor his counsel asked to call any witnesses. Further, counsel for the Applicant did not object to the manner in which the Chairperson conducted the hearing at the time. Allegations of improper

procedure must be made at the earliest opportunity (*Bouchard v Canada (Attorney General)*, 2018 FC 512 at para 11). The Applicant was afforded more than a reasonable opportunity to call witnesses at the hearing, but at no point did he or his counsel exercise the option.

[20] Simply because the Chairperson did not invite the Applicant to call witnesses does not result in a finding that the Chairperson failed to give the Applicant a reasonable opportunity to call witnesses on his behalf.

C. *Was the Chairperson's decision reasonable?*

[21] An inmate who is in possession of contraband commits a disciplinary offence (CCRA, s 40(i)). To convict the Applicant of possession of contraband, the Chairperson needed to find that the Applicant had knowledge and control of the contraband, beyond a reasonable doubt (*Williams v Canada (Attorney General)*, 2006 FC 153 at para 10; CCRA, s 43(3)).

[22] The Applicant challenges the reasonableness of the Chairperson's decision on the basis that the Officers found the contraband items in Mr. Amer's cell. While the Applicant was present in Mr. Amer's cell at the time the items were found, it was not the Applicant's cell. Further, the Chairperson had already found Mr. Amer guilty of possessing the contraband items.

[23] The Applicant submits that the Chairperson's finding must have been based on constructive possession, rather than personal possession. Based on the definition of possession in subsection 4(3) of the *Criminal Code*, RSC 1985, c C-46, constructive possession requires that the individual "(1) has knowledge of the character of the object, (2) knowingly puts or keeps the

object in a particular place, whether or not that place belongs to him, and (3) intends to have the object in the particular place for his "use or benefit" or that of another person" (*R v Morelli*, 2010 SCC 8 at para 17).

[24] Where, as here, the decision maker relies on circumstantial evidence, if the circumstantial evidence leads to reasonable inferences other than guilt, the decision maker has not met the standard of proof beyond a reasonable doubt. When assessing circumstantial evidence, the decision maker must consider other plausible theories inconsistent with guilt (*R v Villaroman*, 2016 SCC 33 at paras 35, 37 [*Villaroman*]).

[25] The basic question the decision maker must ask is "whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty" (*Villaroman*, above at para 38). Alternative inferences must be reasonable, not merely possible.

[26] The Applicant acknowledges that the Chairperson's decision was not based on possession in a criminal context. However, because the same standard of proof beyond a reasonable doubt applies in the criminal context and in the Chairperson's decision, he submits that the analysis in criminal cases is instructive.

[27] As noted above, the Chairperson found the Applicant guilty of possession beyond a reasonable doubt, based on the strong smell of marijuana coupled with the contraband items in plain view of all in the cell, such that anyone in the cell had the ability to control them. The

Applicant submits that the circumstantial evidence before the Chairperson does not support a finding of guilt because he could have made other reasonable inferences.

[28] In the Applicant's view, it is possible that he was only present in the cell for a brief time before the search, and had not recognized the contraband items for what they were. Further, a reasonable inference could be drawn from the evidence that the Applicant did not have control over the contraband items because he was in another inmate's cell. Because reasonable inferences other than guilt could be drawn, the Chairperson unreasonably concluded that possession was established beyond a reasonable doubt.

[29] The Respondent submits that the Applicant is merely asking for a reweighing of the evidence. The Respondent highlights the following pieces of circumstantial evidence that, in its view, support the Chairperson's finding of guilt beyond a reasonable doubt:

- An inmate was attempting to block the Officers' view of the cell;
- There was a strong smell of cologne outside the cell;
- The Applicant was holding a spray bottle containing cologne when the Officers entered the cell;
- There was a strong smell of marijuana inside the cell;
- The contraband items were in plain view and close proximity to the inmates in the cell, including the Applicant;
- The Applicant's subsequent urinalysis tested positive for THC.

[30] The Respondent has included the fact that the Applicant tested positive for THC, which was before the Chairperson, despite the fact that the "taking in an intoxicant" charge was dropped. I think this is relevant circumstantial evidence that supports the Chairperson's decision.

This fact, together with the other circumstantial evidence highlighted by the Respondent, negates the inferences suggested by the Applicant that he had recently entered the cell and did not see the contraband items, or that he did not have control over the contraband because he was in another inmate's cell.

[31] The Chairperson's decision is supported by the record, despite the Applicant's arguments that the fact that he was in Mr. Amer's cell raises a reasonable doubt that he may not have had control over the contraband items.

[32] The application is dismissed. The Chairperson's decision is within the range of reasonable outcomes based on the record that was before him. There was no procedural unfairness.

[33] Costs to the Respondent. Counsel for the parties agreed that $700.00 is a reasonable award of costs.

JUDGMENT in T-514-19

THIS COURT'S JUDGMENT is that

1. The respondent in the style of cause is hereby amended to the Attorney General of Canada only.
2. The Application is dismissed.
3. Costs to the Respondent in the amount of $700.00.

"Michael D. Manson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-514-19
STYLE OF CAUSE:	EMRAH BULATCI v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	EDMONTON, ALBERTA
DATE OF HEARING:	DECEMBER 18, 2019
JUDGMENT AND REASONS:	MANSON J.
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APPEARANCES:

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Keelan Sinnott	FOR THE RESPONDENT

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