

Federal Court



Cour fédérale

**Date: 20130917**

**Docket: T-1850-12**

**Citation: 2013 FC 956**

**Ottawa, Ontario, September 17, 2013**

**PRESENT: The Honourable Mr. Justice Manson**

**BETWEEN:**

**MICHELLE BRIDGEN**

**Applicant**

**and**

**DEPUTY HEAD  
(CORRECTIONAL SERVICE OF CANADA)**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review of the decision of the Adjudicator John Steeves of the Public Service Labour Relations Board [the Adjudicator], pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. The Adjudicator allowed the Applicant's grievance in part by reducing a disciplinary suspension imposed upon her. The Applicant argues that no discipline is warranted.

I. Background

[2] In 2007, the Applicant had been an employee of the Correctional Service of Canada [the Respondent] for 23 years, and was working out of the Grand Valley Institution [GVI]. GVI is a women's prison which incarcerates approximately 80 inmates at all security levels.

[3] Through August 2007, the Applicant held the position of Team Leader at GVI. This position involved the supervision of correctional officers. On September 4, 2007, the Applicant took the newly created position of Manager of Intensive Intervention Strategies [MIIS]. In that position she reviewed policies and procedures implemented by the Respondent at the national and regional level and had no supervisory authority over correctional officers.

[4] On August 31, 2007, Ashley Smith, then 19 years of age, transferred to GVI for a final time. By that point she had spent several years incarcerated in various facilities, including a psychiatric hospital and a previous stay in GVI starting in June, 2007. Her behaviour at GVI upon returning was very disruptive. Among other things, she physically assaulted staff and frequently tied ligatures around her neck to cut off her oxygen supply. This required staff intervention. Until October 2007, Ms. Smith stated that she tied the ligatures in order to obtain comfort.

[5] From October 9 to October 11, 2007, 23 members of GVI staff received training from Ken Allen on "Use of Force" with inmates after concern was expressed by Regional Headquarters regarding too many of these incidents with Ms. Smith. Mr. Allen advised those in attendance that they should not enter her cell unless they saw that Ms. Smith was not breathing. This instruction was reiterated by GVI's Acting Warden, Cindy Berry, in a later memorandum.

[6] Following October 12, 2007, Ms. Smith told staff that she was going to kill herself during a specific manager's shift. On October 19, 2007, during the shift of that manager, Ms. Smith tied a ligature around her neck. Staff did not intervene for 24 minutes, at which point Ms. Smith had died from self-inflicted strangulation. The Applicant was not involved with Ms. Smith on the day she died, nor at any time after October 11, 2007.

[7] Following Ms. Smith's death, the Respondent initiated an investigation of various front line and management employees working at GVI by way of a Convening Order dated January 7, 2008 [the Investigation]. The Applicant and many other employees were interviewed by an investigatory board and a final report was released on January 25, 2008. Of relevance to this application, the Investigation report came to the following conclusions:

That the...TL/MIIS Secure Unit (Michelle Bridgen)...provided direction contrary to the SMM by telling staff they had no reason to enter the cell, to remove Smith's ligatures, as the A/Warden and DW did not concur that she was in distress when there were clear signs she was. This action contravenes CD 56;

That explicit direction was provided to CM's and PW's regarding not entering Smith's cell as long as she was breathing by...MIIS Bridgen...(and that) this direction...and follow up actions taken by...MIIS Bridgen...contributed to staff and CM's belief they were not to go into Smith's cell as long as she was breathing.

[8] The primary basis for this conclusion was interviews with three employees who worked with the Applicant at GVI and dealt with Ms. Smith prior to her death in 2007: Nancy Dickson, Heather Magee, and Angie Fancey. Ms. Dickson alleged that there was an instance when she and others were about to enter Ms. Smith's cell to remove a ligature from her neck because her eyes were protruding and she was turning blue. However, as they were entering the cell, the Applicant

stopped them, saying that Ms. Smith was still breathing. Ms. Magee testified to a similar effect, recalling an incident where the Applicant directed staff not to enter the cell because Ms. Smith was still breathing. Finally, Ms. Fancey spoke to an occasion where she and the Applicant listened to Ms. Smith's breathing, and even after two minutes had elapsed between breaths, the Applicant maintained that intervention was not warranted. These events all occurred prior to October 2007, and none of these witnesses were present or involved with Ms. Smith when she died on October 19.

[9] The Applicant rebutted these claims in a memorandum to the Respondent on March 12, 2008. With regard to Ms. Dickson's testimony, she labels it as confusing and states that she cannot pinpoint the specific incident referred to. However, she says that generally she would tell staff to not go into Ms. Smith's cell when it was unsafe or when Ms. Smith was not in distress. With regard to Ms. Fancey, she claims that after using all alternative measures to ascertain whether Ms. Smith was in distress, they entered her cell. With regard to Ms. Magee, she stated that she told staff not to go into Ms. Smith's cell but to develop a plan of action to ensure everybody's safety.

[10] The Respondent reviewed the Investigation report and the Applicant's March 12 memorandum. On May 5, 2008, the Respondent informed the Applicant that she was being suspended for 20 days without pay. The reasons for the suspension were (in part):

I am of the view that in your role as Manager Intensive Intervention Strategies (MIIS), you provided Correctional Managers and Primary Workers with explicit direction not to enter the cell of an inmate on high suicide watch, as long as she was breathing/talking and that this contributed to their confusion also to when interventions were required with inmate Smith.

You erred in the interpretation of what constituted a medical emergency or medical distress. The direction you provided to staff not to intervene and to withdraw/reassess contravened CD

(Commissioner's Directive) 800, CD 843 and CD 567. I believe that the misdirection you provided to employees and managers contributed to the slow response to the inmate's self-injurious behaviour on October 15th and 19th, 2007.

[11] The Applicant grieved this disciplinary decision before the Adjudicator over six days in 2011 and 2012. On September 7, 2012, the Adjudicator rendered his decision.

[12] The Adjudicator describes at length the disciplinary process to date, including the background facts which led up to Ms. Smith's death, the convening of the Investigation, its processes, the evidence presented, its conclusions, the Applicant's March 12, 2008 memorandum, and the Respondent's discipline decision.

[13] The Adjudicator's analysis focuses chiefly on competing testimony of the Applicant and Ms. Dickson, Ms. Magee, and Ms. Fancy. The Adjudicator found that the evidence of these witnesses was reliable and preferable where contradicted by the Applicant. However, the Adjudicator also found that Ms. Bridgen's actions were not directly responsible for or related to Ms. Smith's death (para 180 of the Adjudicator's decision) and that Ms. Bridgen was misled by management superiors about how to manage Ms. Smith and her threats of suicide (para 181 of the Adjudicator's decision). Further, Ms. Bridgen was following instructions as part of a broader management initiative in instructing primary care workers for Ms. Smith.

[14] The Adjudicator refused to draw an adverse inference based on the lack of video evidence of the incidents described by the three witnesses (*Vieczorek v Piersma*, [1987] 58 OJ No 124 (Ont CA) at para 17). He notes that there is no requirement that such an inference be made, and since this is

not a case involving dishonesty or a failure to raise any material evidence, such an inference is not warranted.

[15] The Adjudicator also determined that despite an error in the Applicant's discipline letter, which stated that she was in the MIIS position when she gave misdirection to staff members, the grounds of discipline were sufficiently clear to the Applicant. The Adjudicator finds that the Investigation clearly gave the Applicant notice of the discipline case against her, such that the principle in *Aerocide Dispensers Ltd v United Steelworkers of America (Walker Grievance)*, [1965] 15 LAC 416 at para 24, which requires that a cause of discipline remain consistent throughout the discipline process, was not offended.

[16] On the whole, he found that the witnesses' testimony demonstrated these instances rose to the level of "Medical Emergency" and the Applicant's misdirection contributed to confusion among the staff. However, the Adjudicator found that since the Applicant only contributed to the misdirection as a result of largely following the position of management, her discipline should be reduced. With limited information about the other individuals who had been disciplined in relation to the death of Ms. Smith, he was unable to form a meaningful comparative basis for her discipline. Ultimately, he reduced her suspension to ten days.

## II. Issue

[17] The issue raised in the present application is as follows:

A. Was the Adjudicator's decision unreasonable?

III. Standard of review

[18] The parties agree that the standard of review applicable to the Adjudicator's decision is reasonableness (*Bernard v Canada (Attorney General)*, 2012 FCA 92 at para 39; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

IV. Analysis

[19] The Applicant argues that there are four factual grounds that, when taken together, make the decision unreasonable:

- i) The Applicant's conduct was authorized by the Respondent;
- ii) The Adjudicator failed to consider the Respondent's work place policies concerning staff safety and did not give proper consideration to what constitutes a "medical emergency";
- iii) The Adjudicator had no evidentiary support to conclude that the Applicant was aware that Ms. Smith was on suicide watch before she moved into the MIIS position; and
- iv) The Adjudicator failed to draw on adverse inference against the Adjudicator in failing to call GVI employees who were present on the day of Ms. Smith's death to testify.

[20] The Applicant also alleges two grounds of legal error:

- i) The Adjudicator erred in that the discipline letter sent to the Applicant erroneously states that she was in the MIIS position when she gave instructions to staff members which led to confusion and delay in responding to incidents involving Ms. Smith on October 15 and 19, 2007. However, during the Applicant's initial discipline hearing the Minister's position changed: only then did the Adjudicator rely on alleged confusion caused by Ms.

Bridgen through instructions given prior to September, 2007 to three witnesses who were not involved with Ms. Smith on October 15 and 19, in her role as Team Leader; and

- ii) The Applicant also argues that the penalties received by other individuals involved in Ms. Smith's death are inconsistent with that received by the Applicant, contrary to *Re Canron Ltd and International Molders & Allied Workers, Local 16*, [1975] OLAA No 147.

*A. The Applicant's conduct was authorized by the Respondent*

[21] The Applicant did not raise the argument that the Applicant's conduct was authorized by the Respondent with the Adjudicator, and cannot raise it for the first time on judicial review. While I agree that the Applicant was just following orders, she was, as were others, found to have contravened the Respondent's policies. This fact was acknowledged by the Adjudicator and was reflected in his lessening of her punishment. This outcome is reasonable.

*B. The Adjudicator failed to consider relevant evidence*

[22] This argument is effectively a guise to asking this court to re-weigh the evidence evaluated by the Adjudicator. The Adjudicator accepted the testimony of the witnesses, and Ms. Dickson in particular, who stated that pursuant to instructions of Ms. Bridgen and other management that GVI, including Acting Warden Cindy Berry, employees were not to intervene because Ms. Smith was still breathing. He did not accept a health and safety rationale. As a result, his findings gave due regard to relevant evidence and his conclusion was reasonable.



*C. The Adjudicator made findings without evidentiary support*

[23] The Applicant emphasizes that Ms. Smith only declared her intentions with regard to suicide after the Applicant had left her Team Leader position. However, it would be inappropriate for this to be viewed as the determining factor on the facts of this case. There is a sufficient factual basis to reasonably establish that the Applicant knew, before leaving her Team Leader position, that Ms. Smith was a suicide risk to some degree.

*D. The Adjudicator failed to draw an adverse inference*

[24] The Adjudicator performed a correct analysis in his decision. The Adjudicator was not required to draw an adverse inference based on the facts of this case.

[25] Moreover, as *Vieczorek v Piersma*, [1987] 58 OJ No 124 (Ont CA) states, the evidence in question was not particularly and uniquely available to the Respondent. The Applicant could have requested that the Adjudicator exercise his power under section 226(1)(e) of the *Public Service Labour Relations Act*, SC 2003, c 22 to compel the production of documents. The Applicant did not do so. It was reasonable that the Adjudicator did not draw an adverse inference.

*E. The Adjudicator changed the grounds or basis for the discipline*

[26] This ground must also fail. While there was an error in the discipline letter, the extensive communication during the Investigation and the Applicant's submissions, as discussed at paras 136-154 of the Adjudicator's decision, clearly establish that she had appropriate notice of the case against her. Moreover, the misdirection of the Applicant to employees and managers was held to

have contributed to the slow response to Ms. Smith's injurious behaviour, not to have caused it.

This is a reasonable finding.

*F. The penalty was inconsistent with penalties to others*

[27] While it would be inequitable to punish only one of a number of responsible management, here, other staff were disciplined to various degrees. In addition, considering the limited evidence provided on the other staff members disciplined, it would be unreasonable to attempt to tailor the Applicant's punishment to a de-contextualized list of other individuals who received punishment for unspecified transgressions.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that:**

1. The Application is dismissed; and
2. Given the circumstances of this case, including the fact that the Applicant's conduct was consistent with the position of management, no costs are awarded.

"Michael D. Manson"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1850-12

**STYLE OF CAUSE:** Michelle Bridgen v. Deputy Head (CSC)

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** September 10, 2013

**REASONS FOR JUDGMENT  
AND JUDGMENT BY:** MANSON J.

**DATED:** September 17, 2013

**APPEARANCES:**

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