Federal Court Cour fédérale

Date: 20150707

Docket: T-2417-14

Citation: 2015 FC 830

Ottawa, Ontario, July 7, 2015

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

BEN MCBEATH

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Background

[1] This is a judicial review of the October 27, 2014 decision of the Correctional Service of Canada (CSC) not to reverse the vacancy of the applicant's employment at CSC and not to reinstate him in his position as Chief of Finance of the Matsqui Institution following the reduction of his criminal sentence on July 15, 2014.

[2] In 2011, the applicant pleaded guilty to: (i) one count of abduction of a child under 16 under section 280 of the *Criminal Code*, RSC 1985, c C-46 [the *Criminal Code*], (ii) two counts of assault causing bodily harm (to his wife) under section 267(b) of the *Criminal Code*, and (iii) one count of being unlawfully in a dwelling house contrary to section 349 of the *Criminal Code*. The applicant was sentenced to 38 months of imprisonment. With credit on a 1:1 basis for eight months' pre-trial custody, the remaining time in his sentence was 30 months.

[3] Subsection 750(1) of the *Criminal Code* provides as follows:

Public office vacated for conviction	*Vacance*
750. (1) Where a person is convicted of an indictable offence for which the person is sentenced to imprisonment for two years or more and holds, at the time that person is convicted, an office under the Crown or other public employment, the office or employment forthwith becomes vacant.	750. (1) Tout emploi public, notamment une fonction relevant de la Couronne, devient vacant dès que son titulaire a été déclaré coupable d'un acte criminel et condamné en conséquence à un emprisonnement de deux ans ou plus.

[4] The applicant was accordingly advised that, by operation of this provision, his employment with CSC had been terminated.

[5] The Court of Appeal for British Columbia subsequently reduced the applicant's sentence and increased his credit for pre-trial custody: *R v McBeath*, 2014 BCCA 305. Specifically, the sentence was reduced from a total of 38 months to 36 months less one day, and his credit for pre-trial custody was increased to from eight months to 12 months, representing an increased ratio of

1.5:1 on the basis of *R v Summers*, 2014 SCC 26. The applicant argued then, and argues now, that the reduced sentence and increased credit for pre-trial custody takes him outside the scope of subsection 750(1) of the *Criminal Code* because his remaining sentence to be served was less than two years.

[6] On August 5, 2014, the applicant's union representative informed CSC of the reduced sentence. By a letter dated October 27, 2014, CSC informed that applicant that it did not consider that the reduction of the applicant's sentence rendered subsection 750(1) of the *Criminal Code* inapplicable. In this letter, CSC noted that though the applicant's sentence had been reduced following an appeal, the applicant's conviction had not been set aside. Accordingly, subsection 750(6) of the *Criminal Code*, which provides that "[w]here a conviction is set aside by competent authority, any disability imposed by this section is removed", was not applicable to the applicant's situation.

II. Questions

[7] The present matter raises three questions:

1. Does the letter dated October 27, 2014, constitute a decision within the meaning of section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [the *Act*] such that it can be subject to judicial review?
2. Did CSC err in interpreting and applying section 750 of the *Criminal Code*?
3. Did CSC breach the principles of procedural fairness?

[8] Because of my conclusion on the second question, I need not consider the other two.

III. Analysis

[9] The parties agree that the question as to whether CSC erred in interpreting and applying section 750 of the *Criminal Code* should be reviewed under the standard of correctness. I agree with the applicant that the jurisprudence confirms that criminal law questions should be determined under the correctness standard due to the importance of consistency in the interpretation of the *Criminal Code*: *Edmond v Canada (Citizenship and Immigration)*, 2012 FC 674 at para 7; *Allen v Alberta (Law Enforcement Review Board)*, 2013 ABCA 187 at paras 13-14.

[10] I agree with the applicant that the dominant approach to statutory interpretation is established in *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27, in which the Court stated as follows at para 21:

> […] Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
>> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[11] I also agree with the applicant's argument that there is a presumption that Parliament does not intend to produce absurd results.

[12] The question that this Court must answer is whether the words "sentenced to imprisonment for two years or more" under subsection 750(1) of the *Criminal Code* refers to the sentence after credit for pre-sentence custody, or the total punishment (<u>including</u> pre-sentence custody).

[13] Subsections 719(1), (3) and (4) of the *Criminal Code* provide:

Commencement of sentence	*Début de la peine*
719. (1) A sentence commences when it is imposed, except where a relevant enactment otherwise provides.	719. (1) La peine commence au moment où elle est infligée, sauf lorsque le texte législatif applicable y pourvoit de façon différente.
Determination of sentence	*Infliction de la peine*
(3) In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence but the court shall limit any credit for that time to a maximum of one day for each day spent in custody.	(3) Pour fixer la peine à infliger à une personne déclarée coupable d'une infraction, le tribunal peut prendre en compte toute période que la personne a passée sous garde par suite de l'infraction; il doit, le cas échéant, restreindre le temps alloué pour cette période à un maximum d'un jour pour chaque jour passé sous garde.
When time begins to run	*Début de l'emprisonnement*
(4) Notwithstanding subsection (1), a term of imprisonment, whether imposed by a trial court or the court appealed to, commences or shall be deemed to be resumed, as the case may be, on the day on which the convicted person is arrested and taken into custody under	(4) Malgré le paragraphe (1), une période d'emprisonnement, infligée par un tribunal de première instance ou par le tribunal saisi d'un appel, commence à courir ou est censée reprise, selon le cas, à la date où la personne déclarée coupable est arrêtée et

the sentence.	mise sous garde aux termes de la sentence.

[14] In *R v Fice*, 2005 SCC 32 [*Fice*], Justice Bastarache, writing for the majority of the Supreme Court of Canada (SCC), considered the issue of whether credit for pre-sentence custody should affect a sentencing judge's discretion to impose a conditional sentence. At the outset of his reasons, Justice Bastarache underlined that this was a problem of statutory interpretation involving the application of sections 719(3) and 742.1 of the *Criminal Code*. Section 742.1(a) provides that a "sentence of imprisonment" of less than two years must be imposed before a conditional sentence can be authorized.

[15] Justice Bastarache concluded that the time spent in pre-sentence custody is part of the total punishment imposed rather than a mitigating factor that can affect the range of sentence with respect to the availability of the conditional sentence: *Fice* at para 18. Justice Bastarache ruled that the words "sentence of imprisonment of less than two years" in section 742.1(a) of the *Criminal Code* refer to the total time taken into account by the sentencing judge in determining the degree of punishment warranted by the gravity of the offence and the moral blameworthiness of the offender: *Fice* at para 40.

[16] In *R v Mathieu*, 2008 SCC 21 [*Mathieu*], Justice Fish, writing for a unanimous SCC, decided that the words "imprisonment for a term not exceeding two years" in paragraph 731(1)(b) of the *Criminal Code*, with regard to the availability of a probation order, refer to the term of imprisonment imposed at the time of sentencing, after credit for time spent in pre-trial custody. Justice Fish considered that an offender's prior detention is merely one factor taken into

account by the judge in determining the sentence: *Mathieu* at para 17. In coming to this conclusion, Justice Fish stated that his interpretation was consistent with the internal coherence and consistency of the *Criminal Code*: *Mathieu* at paras 12-17.

[17] Nevertheless, Justice Fish acknowledged that it is possible, on an exceptional basis, to treat time spent in pre-sentence custody as part of the term of imprisonment imposed at the time of sentence: *Mathieu* at para 7, citing earlier SCC decisions in *R v Wust*, 2000 SCC 18 [*Wust*] and *Fice*. In addition, Justice Fish was careful to state that *Mathieu* is not a reconsideration of the position of the majority in *Fice*.

[18] Justice Fish's recognition of the necessity, in appropriate circumstances, to treat time spent in pre-sentence custody as part of the term of imprisonment imposed at the time of sentence is consistent with the limited weight that is given to the principle that the same meaning is implied by the use of the same expression in every part of an act: *Sommers and Gray v The Queen*, [1959] SCR 678 at p 685; *Schwartz v Canada*, [1996] 1 SCR 254 at para 61. Words used in a different context within the same act might have a different meaning: See Pierre-André Côté, *Interprétations des lois*, 4th ed (Montréal: Édition Thémis, 2009) at p 384.

[19] A key question, therefore, is whether the reference to "sentence" in the phrase "sentenced to imprisonment for two years or more" in section 750 of the *Criminal Code* is intended to fall within the general rule referred to by Justice Fish, or the exception.

[20] In *R v McDonald* (1998), 40 OR (3d) 641, [1998] OJ No 2990 (QL), (CA) (applied by the SCC in *Wust*), the Court of Appeal of Ontario explained at para 57 that the provisions of the *Criminal Code* must be interpreted in accordance to section 718.2(b):

> As Lamer C.J.C. said in *R. v. McIntosh* at p. 699 S.C.R., "interpreting statutory provisions in context is a reasonable approach." It is therefore useful to look at other provisions of the Code that may shed light on the relationship between ss. 344(a) and 719. Section 718.2(b) provides that the sentencing court "shall" take into consideration the principle that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances". If a sentencing court is unable to take into account pre-sentence custody, there can be a huge disparity between two accused who have committed similar offences in similar circumstances but where only one was able to obtain bail pending sentencing.
>
> [Emphasis added]

[21] Similarly, failing to consider time spent in pre-sentence custody as part of the term of imprisonment contemplated in section 750 of the *Criminal Code* would give rise to the possibility that one of two public servants found guilty of the same offense in the same circumstances could suffer the vacancy of their employment, and the other avoid such vacancy, for the sole reason that one of them pled guilty shortly after arrest (and thus had no pre-sentence custody to be credited against sentence), and the other pled not guilty and had many months in pre-sentence custody to be credited. The result would be that the public servant who accepted guilt from the beginning would be treated more harshly than the public servant who refused to accept guilt. In my view, this is an absurd result that Parliament did not intend.

[22] Section 750 of the *Criminal Code* is a reflection of Parliament's intention to prevent individuals who have committed offences of sufficient gravity from continuing their employment

with the public service. Given the importance of decisions taken by public servants in the lives of members of the public, their integrity is a legitimate concern. Therefore, it is my view that this Court should come to a conclusion similar to Justice Bastarache's conclusion in *Fice*, and within the exception contemplated by Justice Fish in *Mathieu*. Section 750 of the *Criminal Code* refers to the total time taken into account by the sentencing judge in determining the degree of punishment justified by the gravity of the offence and the moral blameworthiness of the offender.

[23] It is my opinion that CSC did not err in considering the period of credit for pre-trial custody in applying section 750 of the *Criminal Code*, and it did not err in concluding that section 750 remained applicable in the present case, even after the decision of the Court of Appeal for British Columbia.

IV. Conclusion

[24] In my opinion, the application for judicial review should be dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the present application for judicial review is dismissed with costs.

"George R. Locke"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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