Cour fédérale  Federal Court

Date: 20150911

Docket: T-1646-14

Citation: 2015 FC 1058

Ottawa, Ontario, September 11, 2015

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

JARRETT DERKSEN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of a decision rendered June 18, 2014 by an adjudicator of the Public Service Labour Relations Board [PSLRB] (now the Public Service Labour Relations and Employment Board) [PSLREB] [the adjudicator]. In her decision, she dismissed the Applicant's grievances regarding his suspension without pay and the subsequent termination of his employment.

[2] The application for judicial review shall be dismissed for the reasons below.

I. Background

[3] The Applicant was a correctional officer [CX] at Kent Institution, a maximum security penitentiary in British Columbia, from March 18, 2009 until August 24, 2012, when Correctional Service Canada [CSC] suspended him without pay then subsequently dismissed him.

[4] In the summer of 2012, the Applicant was investigated for his role in two separate alleged incidents of excesses use of force on inmate "Z" (incidents on July 20 and 21, 2012).

[5] On August 11, 2012, the Applicant witnessed another incident of alleged use of excessive force by CX, Mark Legere, on inmate "B".

[6] He was also investigated for facilitating two assaults on inmate "N" by another inmate on August 12, 2012.

[7] The Applicant allegedly covered up these incidents in collusion with other officers by hiding the incidents in omitting key details in the required Officer Statement/Observation Reports [OSORs]. He specifically met other officers outside Kent Institution on two occasions to discuss how they subsequently would report the events.

[8] CSC suspended the Applicant without pay on August 24, 2012 after hearing about the August events. CSC accused the Applicant of facilitating the assaults against inmate "N". CSC later learned of the July events.

[9] Three investigations were launched. Mary Danel headed the investigation into the events of July 20, Brian Podesta those of July 21 and Laura Contini those of August 11 and 12, 2012.

[10] On September 11, 2012, the Applicant filed two unsuccessful grievances regarding his suspension without pay.

[11] CSC terminated the Applicant's employment on March 13, 2013, effective retroactively to August 24, 2012. On March 20, 2013, the Applicant filed a grievance challenging his employment termination. The grievance was denied by CSC then referred to adjudication.

II. Decision under review

[12] The adjudicator heard the grievances of both the Applicant and CX, Mark Legere, whose employment was also terminated in relation to the August 2012 events.

[13] In her decision, she stated that she agreed with the grievors' statement that the Contini report was biased. The Danel and Podesta reports were deemed thorough and in line with the video footage of the events that were seen and analysed by the adjudicator.

[14] She heard many witnesses, including the Applicant himself. She notably refused that John McKay, an expert witness for the Applicant; give his opinion on the use of force displayed by the Applicant on July 20 and 21, 2012. Mr. McKay instead was accepted to "testified as an expert on the use of force in policing, on use of force investigations and on the use of force within the context of the Canadian Criminal Code" [Adjudicator's decision at para 123].

[15] The adjudicator allowed CX Legere's grievances in part and ordered that he be reinstated, as the decision to terminate his employment was "clearly unreasonable" [Adjudicator's decision, para 248].

[16] She concluded that the decision to terminate the Applicant's employment was reasonable, finding that he violated Commissioner's Directive 568-1 and the *Code of Professional Conduct* "by failing to report an incident, by trying to disguise information related to a use of force in which he was involved and by mistreating an inmate in his custody" [Adjudicator's decision, para 250].

[17] The adjudicator further concluded that the employer had authority to retroactively set the termination date to the date of suspension without pay, that the investigations were administrative (and not disciplinary) and that the Applicant's grievance concerning his suspension without pay was moot [Adjudicator's decision, para 254].

III. Issues

[18] The Court is of the view that the relevant issues in this case are as follow:

(1) What is the appropriate standard of review applicable to the adjudicator's decision?

(2) Was there a breach of procedural fairness by the adjudicator?

(3) Did the adjudicator err in dismissing the Applicant's Termination Grievance?

IV. Standard of Review

[19] The Applicant submits that the appropriate standard of review for procedural fairness is correctness. The Respondent argues that reasonableness is applicable.

V. Analysis

(1) What is the appropriate standard of review applicable to the adjudicator's decision?

[20] The Applicant maintains that the adjudicator's decisions on admissibility of evidence and on the lack of a written record should be quashed because these are grounds that attracts procedural fairness which warrants a correctness standard of review, as stated in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43 [*Khosa*].

[21] The Respondent on the other hand, notes that reviewing Courts have already established reasonableness as the applicable standard with regards to admissibility of evidence, and that both the Federal Court and the Federal Court of Appeal have consistently ruled accordingly. He cites *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] for the same proposition. The Respondent underscores that Section 233 of the *Public Service Labour Relations Act*, SC 2003, c 22, s 233 [*PSLRA*] is a strong privative clause that highlights the recognition of the adjudicator's expertise in matters such as the ones involved here.

[22] The Respondent further argues that the question of admissibility of expert evidence is reviewable on reasonableness *Rhéaume v Canada (Attorney General)*, 2003 FCA 188.

[23] The Applicant submits that the adjudicator violated his right to be heard. Procedural fairness violations are generally regarded as jurisdictional issues and reviewed on the standard of correctness.

[24] In *Canada (Attorney General) v Amos*, 2011 FCA 38, the Federal Court of Appeal found s 233 *PSLRA* to be a strong privative clause, requiring deference when reviewing decisions made by an adjudicator. The *PSLRA* is a specialized Tribunal, and its adjudicators are experts in dealing with federal labour disputes. Moreover, the termination of a federal public servant clearly falls within the jurisdiction of the *PSLRA*.

[25] In this case, the adjudicator had to assess and analyse the evidence before drawing her conclusions. High deference is owed and it is in the province of the adjudicator to determine such issues. Therefore, the Court is of the opinion that the standard of reasonableness should be applied to review the adjudicator's decision as a whole.

(2) Was there a breach of procedural fairness by the adjudicator?

[26] The Applicant contends that the adjudicator committed a breach of procedural fairness in refusing John McKay's expert testimony on the Applicant's use of force on the July 20 and 21 incidents; violated his right to be heard in not recording the proceedings, depriving him of his ability to review the decision and by not discussing the Applicant's credibility for the July use of force incidents.

[27] Mr. McKay was permitted to testify as to the general theory of use of force, but not to the Applicant's specific use of force for the incidents of July 20 and 21, 2012, whereas several

witnesses for the Respondent gave their opinion on the matter. Thus, the adjudicator only heard the Respondent's version of the events and excluded the Applicant's relevant evidence (*Université du Québec à Trois-Rivières v Larocque*, [1993] 1 SCR 471 [*UQTR*]).

[28] The Applicant adds that by not recording her decision about the admissibility of Mr. McKay's report, the adjudicator prevented this Court from properly reviewing her decision (Applicant's memorandum of fact and law, para 43).

[29] The Applicant admits that the Supreme Court has held that there is no general requirement for administrative tribunals to provide a transcript or record of their proceedings but submits that, in this case, the Court has an inadequate record upon which to base its decision for review (*Canadian Union of Public Employees, Local 301 v Montreal (City)*, [1997] 1 SCR 793 [*CUPE*]). Both parties submitted contradictory affidavits for the adjudicator's oral reasons in refusing Mr. McKay's testimony in part, further confirming lack of reviewability.

[30] The adjudicator found the Applicant credible in relation to the events of August 11 and 12, 2012, but failed to make a similar finding for the events of July 20 and 21, 2012. The Applicant argues that his credibility on these two incidents was central and determinative. That failure constitutes a breach of natural justice (*Yu v Canada (Attorney General)*, 2011 FC 38). He adds that the adjudicator was bound to state in clear and unmistakable terms why she preferred the Respondent's evidence over the Applicant's regarding the July events (*Fuentes v Canada (Minister of Citizenship and Immigration*), [2003] 4 FCR 249).

[31] The Respondent does not agree. He states that the exclusion of part of Mr. McKay's expert testimony was well decided because it offended the rule of necessity *R v Mohan*, [1994] 2 SCR 9. Moreover, Mr. McKay was not properly qualified to give evidence for the use of force in correctional institutions.

[32] The Respondent argues that arbitrators are regularly asked to determine whether a grievor has used excessive force, and generally do so without the need of expert testimony. Similarly, arbitrators routinely review video evidence without other assistance.

[33] As for the absence of written reasons for the interlocutory decision, the Respondent notes that such decisions are normally issued orally, and are not subject to review (*Agnaou v Canada (Attorney General)*, 2014 FC 850). The record is sufficiently complete to allow the Court to review the decision. As long as the decision viewed as a whole is reasonable it is not necessary for the decision maker to comment or make observations on every elements submitted by the parties (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*]).

VI. Analysis

(a) Refusing to accept John McKay as an expert for the July incidents.

[34] The Applicant relied heavily on UQTR, in which Lamer CJ wrote:

> For my part, I am not prepared to say that the rejection of relevant evidence is automatically a breach of natural justice. A grievance arbitrator is in a privileged position to assess the relevance of evidence presented to him and I do not think it is desirable for the

> courts, in the guise of protecting the right of parties to be heard, to substitute their own assessment of the evidence for that of the grievance arbitrator. It may happen, however, that the rejection of relevant evidence has such an impact on the fairness of the proceeding, leading unavoidably to the conclusion that there has been a breach of natural justice. [emphasis added]

[35] The part of Mr. McKay's testimony excluded by the adjudicator was not crucial to resolving the issue of whether or not the applicant had acted inappropriately. The adjudicator was free to determine if the use of force by the Applicant on July 20 and 21 was excessive. She was not bound by the opinions given by the witnesses for the Respondent. In fact, she expressly made findings of fact based on her own independent appreciation of the video footage of the July events.

[36] No expert opinion was required to determine whether or not the conduct of the Applicant was consistent with CSC guidelines or whether it was appropriate within a maximum security penitentiary's segregation unit. It was in the adjudicator's purview to make such findings.

[37] The Applicant cites *Camaso Estate v Egan*, 2013 BCCA 6, para 71, for the proposition that expert evidence was needed to properly assess the July incidents. In that case, expert evidence was crucial because the facts (involving a police officer's use of his firearm and attempt to arrest a person who was a threat to public safety) went beyond ordinary experience. The facts in the case at bar are completely different. The knee strikes by the Applicant to the head of the inmate seen through the video footage are significantly evident to justify the adjudicator's conclusions that the Applicant applied excessive use of force. She describes in great details what she has seen on the videotapes of July 20 and 21, 2012 incidents, (Adjudicator's decision, paras 246 and 249).

[38] Therefore, the adjudicator cannot be faulted for not accepting Mr. McKay's testimony as an expert for the July incidents.

(b) Decision reviewable despite a lack of recordings

[39] The proceedings were not recorded, as was usual for the then PSLRB and is still usual for the PSLREB. Nonetheless, the Court is satisfied that the record is sufficiently complete to understand the adjudicator's decision.

[40] The following part of the adjudicator's reasons references her determination on Mr. McKay's testimony:

> [123] John McKay testified as an expert on the use of force in policing, on use-of-force investigations and on the use of force within the context of the Canadian Criminal Code […] on behalf of the grievors. Following examination by both parties, and submission of his resume, Mr. McKay was qualified by me as an expert in this area.

[41] The affidavits submitted by the parties are not contradictory as the Applicant suggests. Patricia Demers (for the Respondent) states that Mr. McKay's testimony was excluded in part because he was not specialized in correctional facilities, because his opinion evidence was not necessary under the Mohan test and because assessing use of force was within the ambit of the adjudicator's common experience. Corinne Blanchette's (for the Applicant) in reviewing her notes, indicates that the adjudicator stated that it was her job to make conclusion of fact, and that was a determination for her to make whether or not the use of force deployed by the Applicant on July 20 and 21, was excessive or not (Applicant's Record, Volume 2, paras 59 and 60).

[42] Both shed light on a key point of the adjudicator's rationale: that she did not deem Mr. McKay's opinion evidence to be necessary for making her findings of fact on the July incidents.

[43] Therefore, the Court cannot accept the Applicant's argument concerning a lack of recording.

(c) The adjudicator did not have to explicitly make a finding of credibility

[44] The cases referred to by the Applicant to suggest that the adjudicator needed to make an explicit finding of credibility are all immigration cases. They are fact driven and of little use in this matter.

[45] The adjudicator in the case at bar weighed the evidence. It is relevant to note the last sentence at para 246 of the adjudicator's decision "Mr. Derken's application of force, as evidenced on the videos, posed a threat to his safety and that of others by further agitating the inmate, causing him to struggle against the officers' attempt to control him". This conclusion is justified and based on the evidence.

[46] The adjudicator's description of the Applicant's knee strikes (Adjudicator's decision, para 249, last two sentences "…The knee strikes he used were not taps, as described by the grievor's representative. It is evident from the videotape that Mr. Derksen brought his leg back, fully extended it and lifted it off the floor in order to bring it forcefully into the inmate's side" can easily be seen on the video. The adjudicator was right to conclude that "… Mr. Derksen has not demonstrated a true understanding of the potential consequences of his actions and would no doubt resort to these tactics if faced with similar circumstances in the future, which would put

the institution, the inmates and his fellow coworkers at risk…" (Adjudicator's decision, para 250).

[47] In such circumstances, the adjudicator was not obliged to further discuss the Applicant's credibility for the July incidents.

(3) Did the adjudicator err in dismissing the Termination Grievance?

[48] The adjudicator correctly instructed herself regarding her jurisdiction in the present instance.

[49] The Court agrees with the Respondent that she provided detailed reasons as to why she believed that the Applicant's conduct gave rise to disciplinary measures, and why these measures were not unfounded.

[50] Her decision falls within the range of possible acceptable outcomes that are defensible on both facts and law (*Dunsmuir* at para 47).

[51] Here, the adjudicator dismissed the Applicant's Termination Grievance. She found that the Applicant had been involved in several incidents that adversely affected his relationship with his employer in a manner that gave his employer just cause to terminate him. That conclusion is reasonable.

[52] The evidence presented to the adjudicator was extensive. Among other things, she reviewed the minutes of the Applicant's disciplinary hearing, his OSOR on the incidents, the

standards of professional conduct for CSC, the Commissioner's Directives on use of force, mandatory training documents, the investigation reports and the investigation handbook, reports on the inmate involved in the incidents, and videos of the incidents. She heard the Applicant's testimony. Moreover, she visited the correctional facility herself and heard an expert on the theory of use of force.

[53] The adjudicator particularly relied on the videotapes evidence also available to the Court. The videotapes clearly document the Applicant's excessive use of force on an inmate on July 20 and 21, 2012.

[54] Regarding the August 11 and 12, 2012 events, the adjudicator observed that several CXs failed to report the incidents and that not all of them were disciplined equally. The Applicant admitted to being involved in collusion and to planning not to report the incidents with his fellow officers.

[55] She concluded that the sum of all the incidents constituted misconduct that warranted discipline.

[56] The reasons given for the adjudicator's decision are lengthy. She begins by a thorough review of the evidence before her. The precision in which the adjudicator relates the events demonstrate a full command of the case. Parties' submissions were heard, and weighed. She takes care to distinguish the circumstances which led to sanctioning the different CXs involved in the many incidents reported. She duly addresses the bias in the Contini report and states clearly how this affects her final decision.

[57] Finally, the adjudicator's decision to dismiss for mootness the Applicant's grievance for suspension without pay is not unreasonable considering the facts of this case.

[58] The parties agreed that no costs would be awarded.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review be dismissed.

2. No costs are awarded.

"Michel Beaudry"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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