Federal Court Cour fédérale

Date: 20160503

Docket: T-644-15

Citation: 2016 FC 488

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, May 3, 2016

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

LEUCHERIN BLACKMAN

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The respondent in this case, Leucherin Blackman, is a penitentiary inmate. As such, he must provide a urine sample as part of a prescribed random selection urinalysis program. However, it seems that one of his samples tested positive for cocaine use, and he therefore faced a disciplinary charge.

[2] In his defence against this disciplinary charge, Mr. Blackman submitted that the test he had taken was not "random," as he had had to undergo such tests many times during a short period. He argued that this was no longer a question of a prescribed random selection urinalysis program.

[3] The independent chairperson from the Disciplinary Tribunal assigned to hear the case ruled in Mr. Blackman's favour. The Attorney General filed an application for judicial review of this decision under section 18.1 of the *Federal Courts Act*, RSC 1985, c. F-7.

[4] For the reasons cited below, the Court found that the matter had to be referred to another independent chairperson from the Disciplinary Tribunal because in this case, the principles of procedural fairness had been violated.

I. The facts

[5] It is not necessary to go into great detail on the facts of this case. They are not only simple, but are undisputed.

[6] Mr. Blackman has been incarcerated in several Canadian institutions for many years. He had to provide a urine sample as part of the prescribed random selection urinalysis program while he was an inmate at Cowansville Institution. The sample was tested many times over a relatively short period. He was an inmate at Cowansville Institution when his disciplinary hearing was held on March 25, 2015. He had been incarcerated there for about two years. Between 2006 and 2009, Mr. Blackman was selected four times (December 19, 2006;

January 23, 2007; August 28, 2008 and April 21, 2009). Since the beginning of his incarceration at Cowansville, he was selected five times (March 22, April 5, and October 18 and 24, 2013; and April 8, 2014) to provide a urine sample under the prescribed program. The disciplinary charge at issue here was laid after a sample of the inmate's urine was taken on April 8, 2014. It is noted that he was also selected twice after that: in November 2014 and in February 2015.

[7] The urine sample taken on April 8, 2014 resulted in the charge that was laid on April 15, 2014. This disciplinary offence was addressed in three hearings presided over by the first independent chairperson. These hearings were held on June 5, 2014 and February 24, 2015; the decision was rendered orally on March 25, 2015.

[8] I also note that on April 1, 2014, 646 inmates were incarcerated at Cowansville Institution.

II. The Act

[9] Section 54 of the *Corrections and Conditional Release Act*, SC 1992, c. 20 (the Act) gives jurisdiction for creating a prescribed random selection program for providing urine samples. The section reads as follows:

54 Subject to section 56 and subsection 57(1), a staff member may demand that an inmate submit to urinalysis:	**54** L'agent peut obliger un détenu à lui fournir un échantillon d'urine dans l'un ou l'autre des cas suivants :
. . .	. . .
(b) as part of a prescribed random selection urinalysis program, conducted without	**(b)** il le fait dans le cadre d'un programme réglementaire de contrôle au hasard, effectué

individualized grounds on a periodic basis and in accordance with any Commissioner's Directives that the regulations may provide for; or	sans soupçon précis, périodiquement et, selon le cas, conformément aux directives réglementaires du commissaire;

[10] The prescribed program at issue in subsection 54(*b*) is developed in the *Corrections and Conditional Release Regulations*, SOR/92-620 (the Regulations). These Regulations provide for the appointment of presidents of Disciplinary Tribunals in a chapter that deals with the disciplinary system applicable to inmates. Section 63 of the Regulations sets out that the name of the inmate to provide a urine sample must be chosen at random. The section reads as follows:

63(1) For the purposes of paragraph 54(b) of the Act, the Service may establish a random selection urinalysis program for the purpose of ensuring the security of the penitentiary and the safety of persons by deterring the use of and trafficking in intoxicants in the penitentiary.	**63(1)** Pour l'application de l'alinéa 54b) de la Loi, le Service peut instaurer un programme de contrôle au hasard visant à garantir la sécurité du pénitencier et de quiconque et à prévenir l'usage et le trafic de substances intoxicantes à l'intérieur du pénitencier.
(2) A random selection urinalysis program shall provide for samples to be provided by inmates whose names have been chosen by random selection from among the names of the entire inmate population of the penitentiary.	**(2)** Le programme de contrôle au hasard doit prévoir que chaque détenu doit fournir un échantillon d'urine lorsque son nom a été choisi au hasard parmi les noms de tous les détenus du pénitencier.

A definition of random selection is provided in section 60 of the Regulations. The section reads as follows:

> **random selection** means a selection procedure set out in Commissioner's Directives that ensures that every inmate has an equal probability of being selected, on a periodic basis, to provide a sample and that has reasonable controls and safeguards designed

> to prevent the selection process from being influenced. (contrôle au hasard)

[11] It is quite clear that the frequency with which a name may be drawn depends on the number of names drawn from the total inmate population in an institution. An official's affidavit reveals that the percentage of names drawn at random has grown in recent years. According to Commissioner's Directive 566-10, Urinalysis Testing (June 13, 2012), a monthly list of inmates selected at random has to be established and include the names of at least 5% of the inmate population. By October 1, 2012, the percentage had climbed to 8%. By April 1, 2013, the percentage had climbed to 10%. Therefore, when the alleged offence was committed, 1 in 10 inmates' names were selected every month.

[12] The Act sets out that an inmate commits a disciplinary offence who "takes an intoxicant into the inmate's body." (subsection 40(*k*) of the Act). Mr. Blackman was charged with such an offence after providing a sample in April 2014.

III. Decision by the first independent chairperson from the Disciplinary Tribunal

[13] As noted earlier, the decision that was the subject of the application for judicial review was rendered orally on March 25, 2013.

[14] Mr. Blackman's submission essentially contends that the process implemented, or at the very least followed in his case, was not one in which selection was done at random. It is submitted that the process does not provide sufficient guarantees to meet the obligation that all inmates be given an equal probability of being periodically selected to provide a urine sample.

The fact that Mr. Blackman had to provide five urine samples in the 15 months prior to the date of commission of the alleged offence suggests that selection was not random.

[15] The independent chairperson from the Disciplinary Tribunal noted that testimony was given by several Correctional Service Canada (CSC) employees who tried to prove that the system implemented meets the definition of "random selection." However, she did not recount or discuss the elements of this definition. What she noted is that one of the CSC employees who testified, Stéphane Marcotte, stated that several inmates complained about how often their names were selected. While she did not admit that that was the case, the witness simply reported the complaints heard. He stated that the complaints were often made by individuals who said they were selected more often when positive test results had been recorded in the preceding months.

[16] Having concluded that the comment made by one of Mr. Blackman's witnesses, who said that [TRANSLATION] "the random selection system implemented by CSC is not up to date," the chairperson found that that was not the issue, and could not conclude that the implemented program systematically fulfills the requirements set out in the Act (March 25, 2015 decision, page 20).

[17] The decision made by the first independent chairperson from the Disciplinary Tribunal came down to very little in the end. The chairperson based her decision on her many years' experience as an independent chairperson from the Disciplinary Tribunal. [TRANSLATION] "I even noted on several occasions that some inmates had been selected up to 6 times within a 12-month period—sometimes within up to 3 consecutive months." (March 25, 2015 judgment, page

20). The chairperson did not elaborate on her experience and referred generally to two cases with which she was familiar. She adds:

> [TRANSLATION] I also noted that Mr. Blackman's is not an isolated case; it is a situation that occurs at many institutions.
>
> In some cases, certain inmates were never selected despite a long period of incarceration.

[18] Clearly, this chairperson's experience had a decisive effect on her decision making because she states on page 22:

> [TRANSLATION] At first glance, with all the testimony and documents submitted by CSC, one can be led to believe that what was implemented as a program is random and ensures that all inmates are equally likely to be chosen periodically to provide a urine sample. It also appears to provide reasonable guarantees against any interference in its application. However, the results noted seem to show the opposite.
>
> The fact is that several inmates are selected in the random selection program more than once in a 12-month period; some are even selected in 2 or more consecutive months.
>
> . . .
>
> Yet after having heard the testimony; received the documentary evidence (and believe me, there is a lot of it); reviewed the affidavits submitted, the parties' representations in this case and the case law submitted; and analyzed everything and made the required inferences, I find that Mr. Blackman has proven on a balance of probabilities that the random selection system implemented and applied by CSC does not provide the guarantees required by the Act.
>
> (March 25, 2015 judgment, pages 22 to 24).

IV. The parties' submissions

[19] The Attorney General appeared before this Court to file an application for judicial review in an attempt to have the first independent chairperson's decision set aside. He submitted two arguments before the Court. The first is that she relied on her personal knowledge as an independent chairperson (knowledge not in the evidence) and of which it was impossible for the applicant to make observations or contest the validity. In other words, the applicant could not participate in the discussion because the administrative decision-maker introduced elements that were not in the evidence in order to, at least in her opinion, set aside the considerable evidence that had been submitted to her that the current system produces random selections and satisfies the criterion that the selection of persons to undergo screening is "random.". The applicant also argues that the chairperson's findings are not reasonable.

[20] The respondent submitted an expert's report on the probabilities. This report was noted by the independent chairperson, but she did not use it. The report's author did not testify and his report is not easy to understand. It is made up of mathematical formulas that are not explained. These formulas are applied to certain scenarios that are not further explained or described in the report.

[21] The submission regarding the violation of the principle of procedural fairness is twofold: First, the respondent maintains that it is not enough to raise a concern about the violation of natural justice to succeed; a true violation must still be proven.

[22] Second, the respondent submits that the independent chairperson did not overlook the evidence or base her finding solely on her inadmissible personal knowledge. The respondent

argues that the evidence submitted was reviewed when the decision was made. It is being argued that the experts' testimony was summarized and as a result, it cannot be submitted that the lack of a detailed account would mean that the evidence was not considered in the preparation of the final decision. The examples the independent chairperson used from her own experience are said not to have been new facts. The fact that there is an expert report containing examples would, in the respondent's opinion, be enough to prevent the applicant from having to contradict them. The applicant submits that the independent chairperson [TRANSLATION] "considered all of the evidence in assessing the situation while accepting and rejecting certain parts of the testimony by using her expertise and examples that are the same as those in the report in the evidence. The applicant cannot, at this stage, call these facts new in order to come back to his strategy and fill the gaps in his evidence" (paragraph 41 of the respondent's memorandum of fact and law).

[23] As for the reasonableness of the decision, the applicant essentially submits that the random selection program cannot be considered not random based on only certain results. In other words, you should not pick and choose. The process needs to be reviewed to see whether it produces random results. In an attempt to use an analogy with the case law on jury representativeness, it was submitted that the courts have rejected the idea that the probabilities and the results need to be identical.

[24] In the respondent's opinion, the concept of randomness must not be confused with "equitable chance." What the decisions noted by the applicant deal with is not so much the randomness of the system under review at the time; rather, it is ensuring that the sworn

candidates lists used are accurate and up to date because jury representativeness in criminal matters is at issue. Mix-ups must be avoided.

[25] Regarding the respondent, the independent chairperson did not rule on the selection method that should have been used. Strictly speaking, she sat on the fence. She found she was convinced that the respondent was selected too frequently during the period under review.

V. Analysis

[26] The issue that is the subject of this judicial review is not whether the respondent was the subject of a process that did not meet the requirements of the Act or the Regulations. Of course, that was the chairperson's finding, but it is not the issue before the Court. Rather, what needs to be determined is whether the decision was rendered following the principles of procedural fairness. It has long been known that two of the basic principles of procedural fairness are the right to be heard by an impartial adjudicator and the right to be heard. Here, it is not an issue of questioning the impartiality of the independent chairperson. Instead, it is the applicant's ability to be heard that is called into question and is the subject of the application for judicial review. Nothing more. In addition, the reasonableness of the decision itself may be considered. If the applicant fully participated in the discussion, can the decision be challenged?

[27] Despite the excellent contribution by counsel representing the respondent in this case, the Court must find that the decision made therein by the independent chairperson did not respect the principle of fundamental justice, which states that all parties have a right to be heard.

[28] The Court copied long excerpts from the decision made in order to illustrate as clearly as possible what is at issue in this case. Contrary to what was submitted by the respondent, in the evidence presented by the applicant, there was no analysis of the quality of the process implemented to ensure that names were selected at random. Instead, the decision notes the existence of this abundant evidence that is contradicted, in the decision-maker's opinion, by what she said she noted several times when acting as independent chairperson in the Quebec Region. Drawing from this experience, the independent chairperson refers to two examples, the ins and out of which are not known. These two cases are only noted.

[29] Clearly, these are experiences that are not part of the record and of which it was impossible for the applicant to argue the relevance or even the truthfulness.

[30] It is not as though these comments were unimportant and the decision truly was based on the evidence presented with additional comments that were, however unfortunate, only incidental. After reading the March 25, 2015 decision, I was convinced that it was on only this basis (experience that was not in the evidence and the details of which were not known) that the decision was made, and that the applicant was unable to contest it or to make observations on it. In my opinion, that is a fundamental infringement on a party's ability to be heard before a decision-maker and to participate fully in the discussion. If the independent chairperson bases her decision on any evidence, she should allow the parties to be heard on it, so that it can be contested and argued.

[31] This type of offence is reviewed based on the standard of correctness (*Mission Institution v. Khela*, 2014 SCC 24 at paragraph 79, [2014] 1 SCR 502). Consequently, no deference is afforded to the decision in terms of procedural fairness. In my opinion, the violation is so evident that there should be no reasonable doubt. I cannot see how the evidence submitted by the applicant can be contradicted by personal experience that was not disclosed, proven, contested or commented on by the parties. The result could have been predicted if everything had been disclosed in accordance with legislation and had fully contested. Moreover, support cannot be sought based on judicial notice. Sopinka, Lederman and Bryant define judicial notice as follows in *The Law of Evidence in Canada*, 3rd Edition, Lexis Nexis:

> §19.13 Judicial notice is the acceptance by a court or judicial tribunal, in a civil or criminal proceeding, without the requirement of proof, of the truth of a particular fact or state of affairs. Facts which are (a) so notorious as not to be the subject of dispute among reasonable persons; or (b) capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy, may be noticed by the court without proof of them by any party. The practice of taking judicial notice of facts is justified. It expedites the process of the courts, creates uniformity in decision-making and keeps the courts receptive to societal change. Furthermore, the tacit judicial notice that surely occurs in every hearing is indispensable to the normal reasoning process.

In this case, knowledge of both examples to which the independent chairperson refers is neither judicial notice nor capable of proving its fairness. The overall experience cited by the chairperson is even less so. Yet she based her decision solely on this undisclosed information that was not tested by the parties. Evidence that some inmates complain provides proof of nothing but their complaints.

[32] There is no need to provide a long list of authorities. It will suffice to cite Brown and Evans, *Judicial Review of Administrative Action in Canada* (Toronto, Ont.: Carswell, 2013), at number 10:8330):

> 10:8330:
>
> . . .
>
> Of course, the courts have often stated that parties, although the fact that a decision-maker is merely *aware* of extraneous evidence will not, without more, be a breach of procedural fairness. While specialized knowledge may be used to assist the decision-maker to assess the evidence that has been given on a certain fact, it cannot be a substitute for evidence when none has been introduced.
>
> Accordingly, where a tribunal can identify facts or information on which it intends to rely in making its decision, and where there is doubt as to whether that information is known to the parties, a tribunal should disclose it to the parties as a matter both of prudence and fairness, in order to ensure that the parties are provided with an opportunity to respond.

[33] An equally powerful passage can be taken from Professor Patrice Garant in *Droit Administratif* (Éditions Yvon Blais, 6th edition): :

> [TRANSLATION] A court commits a manifest error if it uses, for their probative value, facts submitted into evidence later in another case without the parties having an opportunity to discuss them. Facts taken from another case, even if it was heard by the same decision-maker, are not part of the judicial notice under which the court reviews certain texts or facts that it can take into account in its decision, if they were neither alleged nor proven. They are therefore not issues of a general nature or the reputation of which makes their existence reasonably incontestable. The Court can use general facts from previous cases, but it cannot import facts from another pending case without informing the parties. In addition, a court would be breaking the *audi alteram partem* rule if it were to base its decision, without advance notice to the parties involved, on another decision that it made itself in another case, particularly on the evidence that was heard in this other case, in which the facts would also be nearly identical.

(pages 645 and 646).

[34] In our case, the situation is even worse in that we cannot even talk about facts from another case; we simply do not know where the information came from. The principle of procedural fairness, which states that parties can be heard on evidence presented before the Court and used by it, was violated.

[35] The applicant's second argument was a criticism of the findings made by the independent chairperson. I must say that the argument as presented is much less convincing and is even confusing.

[36] Strictly speaking, given the Court's finding on the issue of procedural fairness, it may not be necessary to deal with the issue of reasonableness in the decision made. I will simply review the argument as presented. If I understand the applicant's argument correctly, it cannot be found that the selection was not random based on the results obtained; that would be an erroneous approach based on the case law regarding jury representativeness. For the applicant, what the independent chairperson was seeking is the equivalent of parity between inmates: they must be selected the same number of times. The applicant instead argues that the chances of being selected must be equal. Therefore, the results matter little if he can depend on the process.

[37] In my view, this is not what the independent chairperson found in our case. Nowhere did I find an indication that she required equal selection among inmates. I do not question her acknowledgment that a random process could produce some repeated selections. That is the very nature of a random process.

[38] The independent chairperson simply questioned whether a random process could produce results in which some inmates could be "winners" much more often than the probabilities could justify at first glance. It is not a question of representativeness as in the cases cited by the applicant related to criminal jury representativeness (*R. v. Kokopenace*, 2015 SCC 28, [2015] 2 SCR 398). Instead, this is about questioning a process that generates results that can be doubted if too many selections of the same individuals occur. Contrary to the applicant's claims, the independent chairperson is not looking for [TRANSLATION]"inmates to be selected an equal number of times, whereas it is not the number of selections that should be equal, but the chances of being selected periodically" (paragraph 42 of the applicant's memorandum of fact and law). This sentence does not answer the question the independent chairperson asked. How can several inmates be selected more often than others? The chairperson could have asked herself whether there were any statistical gaps, and if there were, were they statistically significant? However, this discussion never happened because it was short-circuited by the independent chairperson's conclusion that she could use her personal experience to decide that the nature was not random. She did not rule on representativeness within the meaning of the judgments in the matter pertaining to jury representativeness.

[39] In this case, it is not a question of jury representativeness in relation to the community from which it comes. It is a selection process that yields results that are perhaps far from that which the probabilities could have generated. The analogy with the case law on jury representativeness is defective.

[40] Therefore, I find that the applicant's submission on the reasonableness of the decision cannot be convincing because it does not deal with the decision that was made. He makes an inappropriate comparison with jury representativeness that does not yield a result leading to a finding of unreasonableness. Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. Whoever contests reasonableness must convincingly argue that the decision falls within a range of possible, acceptable outcomes (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190). The government did not discharge this burden with the submission that it presented.

[41] I want to make it perfectly clear that I am not indirectly supporting the finding that a process that gives rise to cases of individuals who are overrepresented in the selection is not necessarily random because I do not find the decision under review to be unreasonable. It is certainly possible to flip a coin five times and get the same result every time. The sample is too limited to find that there is a problem with the coin. It would be up to the experts to explain how a process that leads to unexpected results can still be random after being submitted into evidence. In this case, the finding made by the independent chairperson based on a few experiences, including Mr. Blackman's case, could have been quashed on judicial review for reasonableness of the decision on a basis other than that presented. However, such is not the content of the government's submission. The applicant believed that the independent chairperson had found that perfect equality in the selections was required and based his submission on that. The decision is instead that there would be too many cases of overrepresentation, which results in a finding that the random testing system is inadequate. The government's submission is not consistent with the decision made. The only thing done here is to use the submission that was

presented. Randomness may be contested on a valid basis in another case where all parties were heard.

VI. Conclusion

[42] What has been decided is quite simple. The independent chairperson, having noticed how frequently the respondent was selected, and basing her finding essentially on her experience, during which she allegedly dealt with frequent selections, said that she was satisfied on a balance of probability that the random testing system did not provide the guarantees required. The independent chairperson based her finding on a few cases, the details of which are unknown, to conclude that the selection system did not produce random selections. There is a defect in procedural fairness.

[43] The Court therefore finds that the decision made on March 25, 2015, by the independent chairperson is invalid with regard to procedural fairness. The decision is based on information that was not submitted into evidence and that it was not possible for the participants to contest or, at the very least, present observations and comments that then should have been taken into consideration. As for the applicant's submission that the decision was unreasonable, the submission as presented is not convincing and is dismissed.

[44] The applicant had required his costs. Because he won his case on only one of the two submissions, and given the nature of this case, there will be no award of costs in this case.

JUDGMENT

THE COURT JUDGMENT is that the application for judicial review is granted. There will be no order as to costs.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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