

Federal Court



Cour fédérale

Date: 20180514

Docket: T-1323-17

Citation: 2018 FC 507

Ottawa, Ontario, May 14, 2018

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

DWIGHT CREELMAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Defendant

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Dwight Creelman, is an inmate incarcerated at Warkworth Institution, a medium-security facility located in Northumberland County, in Ontario. He is self-represented. On August 20, 2015, Mr. Creelman filed a grievance with the Correctional Service of Canada [CSC] pertaining to a change in how his Canada Pension Plan benefits were being processed [the accounting change].

[2] This is a judicial review of the decision of the Deputy Senior Commissioner of CSC, in which Mr. Creelman's grievance was denied [the Decision].

[3] For the reasons that follow, this application for judicial review is allowed.

[4] For clarification, the Style of Cause refers to the Applicant as "Creeman," however I note that in his submissions the Applicant is identified as "Creelman." I am ordering that the Style of Cause reflect the Applicant as "Dwight Creelman."

II. Facts

[5] Mr. Creelman turned 60 in April 2015. At that time, he elected to begin receiving his CPP benefits. In August 2015, Mr. Creelman received a letter from the Warkworth finance department notifying him that National Headquarters had mandated that effective September 1, 2015, his pension cheques would no longer be split between two-week pay periods. Rather, they would be processed once a month.

[6] Practically speaking, what this meant for Mr. Creelman is that, prior to the change, \$69 was being deposited in his current account every two weeks. This is the maximum allowable amount pursuant to s 19 of the Commissioner's Directive 860, entitled "Offender's Money" [CD 860 – Offender's Money]. Since the accounting change, however, he receives \$69 in his current account for the pay periods when his CPP cheque is processed, and approximately \$37 for the other pay periods, given how much he currently earns from his employment at the institution. Should there come a time when he is unable to work (Mr. Creelman states he has

Type 2 diabetes and suffers from diabetes-related health problems), then he would receive only \$69 per month in his current account.

[7] The balance of his income is being placed in his savings account, access to which is subject to a number of restrictions.

[8] Upon receiving the letter from the finance department in August 2015, Mr. Creelman filed a final grievance with CSC. He argued that the accounting change was arbitrary, since it treated income that was clearly intended to cover the entire month as if it only covered a two-week period. He also claimed that because his pension income was being treated differently than other sources of income, he was being discriminated against because of his age, contrary to the *Canadian Human Rights Act*, RSC, 1985, c H-6 [CHRA]. He requested that the practice of splitting pension cheques between pay periods continue.

[9] On August 28, 2015, CSC sent a letter to Mr. Creelman acknowledging receipt of his grievance, and that a response was projected for December 22, 2015, “which is within the timeframes established by Commissioner’s Directive 081, Offender Complaints and Grievances” [CD 081 – Offender Complaints].

[10] Although they do not appear in the record, Mr. Creelman claims to have received eight extension notices. He finally received a response on July 7, 2017.

III. Decision under review

[11] In the Decision, the Senior Deputy Commissioner [SDC] began by noting that the first step when assessing a grievance in which discrimination is alleged is to determine whether the allegation, if proven, would meet the definition of discrimination.

[12] Having concluded that Mr. Creelman's allegation indeed met the definition, the SDC moved onto the second step in the analysis, which is to determine whether the alleged misconduct actually occurred. To that end, the SDC:

- Outlined the various provisions that outline how deductions are to be made from an inmate's income for Food and Accommodation (F&A) and other expenses. (emphasis added).
- Noted that the accounting change was made pursuant to a direction from National Headquarters.
- Stated that the change "was put in place to streamline the process and to ensure consistency with inputting the money and it was found that it did not contravene any of the legislation and policy with regard to deductions" (emphasis added).
- Found that because the same process for inputting cheques in one pay period is used when offenders receive other lump sum payments (such as when an inmate operates a business or receives payment for a hobby craft or custom work), "there is no indication of discrimination in this case."

[13] The discrimination portion of Mr. Creelman's grievance was therefore denied.

[14] The SDC then considered whether the direction was arbitrary, and determined that because the change in how pension cheques are processed was aimed at streamlining processes and does not contravene any legislation or policies pertaining to deduction, it is not arbitrary.

IV. Legislative Framework

A. *Canada Human Rights Act*

[15] The relevant provisions of the CHRA are as follows:

Prohibited grounds of discrimination

3 (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

Denial of good, service, facility or accommodation

5 It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public

Motifs de distinction illicite

3 (1) Pour l'application de la présente loi, les motifs de distinction illicite sont ceux qui sont fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'identité ou l'expression de genre, l'état matrimonial, la situation de famille, les caractéristiques génétiques, l'état de personne graciée ou la déficience.

Refus de biens, de services, d'installations ou d'hébergement

5 Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public :

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| (a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or | a) d'en priver un individu; |
| (b) to differentiate adversely in relation to any individual, | b) de le défavoriser à l'occasion de leur fourniture. |
| on a prohibited ground of discrimination. | |

B. *Managing offenders' moneys*

[16] Section 78 of the *Corrections and Conditional Release Act*, SC 1992, c 20 [the Act],

provides authority to CSC to make payments and deductions:

Payments to offenders

78 (1) For the purpose of

(a) encouraging offenders to participate in programs provided by the Service, or

(b) providing financial assistance to offenders to facilitate their reintegration into the community,

the Commissioner may authorize payments to offenders at rates approved by the Treasury Board.

Deductions

(2) Where an offender receives a payment referred to in subsection (1) or income from a prescribed source, the Service may

(a) make deductions from that payment or income in

Rétribution

78 (1) Le commissaire peut autoriser la rétribution des délinquants, aux taux approuvés par le Conseil du Trésor, afin d'encourager leur participation aux programmes offerts par le Service ou de leur procurer une aide financière pour favoriser leur réinsertion sociale.

Retenues

(2) Dans le cas où un délinquant reçoit la rétribution mentionnée au paragraphe (1) ou tire un revenu d'une source réglementaire, le Service peut :

a) effectuer des retenues en conformité avec les règlements

accordance with regulations made under paragraph 96(z.2) and any Commissioner's Directive; and	d'application de l'alinéa 96z.2) et les directives du commissaire;
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(b) require that the offender pay to Her Majesty in right of Canada, in accordance with regulations made pursuant to paragraph 96(z.2.1) and as set out in a Commissioner's Directive, an amount, not exceeding thirty per cent of the gross payment referred to in subsection (1) or gross income, for reimbursement of the costs of the offender's food and accommodation incurred while the offender was receiving that income or payment, or for reimbursement of the costs of work-related clothing provided to the offender by the Service.	b) exiger du délinquant, conformément aux règlements d'application de l'alinéa 96z.2.1), qu'il verse à Sa Majesté du chef du Canada, selon ce qui est fixé par directive du commissaire, jusqu'à trente pour cent de ses rétribution et revenu bruts à titre de remboursement des frais engagés pour son hébergement et sa nourriture pendant la période où il reçoit la rétribution ou tire le revenu ainsi que pour les vêtements de travail que lui fournit le Service.
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[17] CD 860 specifies at ss 17-19 that up to 90% of an offender's income, representing a maximum of \$69 per pay period, may be deposited in an inmate's current account. The balance – that is, 10% or the excess of \$69, whichever is more – is to be placed in the inmate's savings account:

Current and Savings Accounts

17. Ninety percent of the balance of the inmate's income, following the deductions outlined in the Deductions section in this policy, will be deposited in the inmate's current account.

18. The 10% balance will be deposited in the inmate's

Compte courant et compte d'épargne

17. Quatre-vingt-dix pour cent du solde du revenu du détenu, une fois faites les retenues indiquées à la section Retenues de la présente politique, sera déposé dans son compte courant.

18. La somme restante (10 %) sera déposée dans le compte

savings account.

19. Notwithstanding the above, where the inmate's income exceeds the top gross inmate pay level of \$69 per pay period, the amount to be deposited in the inmate's current account will not exceed \$69. The balance will be deposited in the savings account. For more information, refer to Payments to Inmates in CD 730 – Inmate Program Assignment and Payments.

d'épargne du détenu.

19. Nonobstant les dispositions précédentes, si le revenu du détenu dépasse le niveau maximum de rémunération brute des détenus de 69 \$ par période de paie, un montant maximum de 69 \$ sera déposé dans son compte courant. Le solde sera déposé dans son compte d'épargne. Pour de plus amples renseignements, consulter la section Paiements aux détenus de la DC 730 – Affectation aux programmes et paiements aux détenus.

[18] Sections 26 to 33 of CD 860 – Offender's Money places a number of restrictions on an inmate's access to their savings account funds. These sections outline the frequency with which an inmate may access the funds in their savings accounts, and the circumstances under which such transfers are to be approved. They also place limits on the amount that can be transferred from the savings account to the current account in a given year.

C. *Grievance and consultation processes*

[19] Section 74 of the Act states that CSC “shall provide inmates with the opportunity to contribute to decisions of the Service affecting the inmate population as a whole, or affecting a group within the inmate population, except decisions relating to security matters.”

[20] Section 90 of the Act provides for the existence of a grievance procedure for fairly and expeditiously resolving offenders' grievances. According to s 12 of CD-081 – Offender

Complaints, grievances dealing with claims of discrimination are to be rendered within 60 working days.

V. Issues

[21] This matter raises the following issues:

1. Was the decision reasonable?
2. Was there a breach of procedural fairness?

VI. Standard of Review

[22] Allegations of breach of procedural fairness are considered on the standard of correctness (*Moodie v Canada (Attorney General)*, 2015 FCA 87 at para 50; *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43).

[23] Several of this Court's cases have determined that CSC decisions are to be reviewed on a standard of reasonableness, and that the CSC is owed a high degree of deference in grievance matters due to its expertise in inmate and institution management: see *Ewert v Canada (Attorney General)*, 2018 FC 47 at para 15; *McMaster v Canada (Attorney General)*, 2017 FC 25 at para 21; *Skinner v Canada (Attorney General)*, 2016 FC 57 at para 21; *Fischer v Canada (Attorney General)*, 2013 FC 861 at para 22. Under this standard, the Court's task is to determine whether the decision falls within the range of possible, acceptable outcomes that are defensible in respect of the facts and the law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*].

[24] Reasonableness review is not a “treasure hunt for errors”: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 54. Reasons need not include “all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred,” nor is a decision-maker “required to make an explicit finding on each constituent element” (*Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16 [*Newfoundland Nurses*]). Courts may “look to the record for the purpose of assessing the reasonableness of the outcome” (*Newfoundland Nurses*, at para 15).

[25] Nevertheless, it must always be remembered that “[i]n judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process” (*Dunsmuir*, above, at para 47 (emphasis added)). A decision the basis of which cannot be discerned cannot stand: *Leahy v Canada (Citizenship and Immigration)*, 2012 FCA 227 at paras 121-122. And as stated most recently by the Supreme Court of Canada in *Delta Air Lines Inc v Lukács*, 2018 SCC 2 [*Lukács*]: “reasons still matter” (at para 27). Thus, while “a reviewing court may supplement the reasons given in support of an administrative decision, it cannot ignore or replace the reasons actually provided” (at para 24).

VII. Submissions of the parties

A. *The Applicant*

(1) Discrimination

[26] Mr. Creelman submits that the CSC's actions are discriminatory and contrary to ss 3 and 5 of the CHRA. Since "age" is a prohibited ground of discrimination, and since CPP benefits are only provided to those 60 years-old or more, he argues that the accounting change is discriminatory as it results in him being denied full access to his pension money, his main source of income.

[27] He rejects the SDC's conclusion that the accounting change is not discriminatory because other lump sum payments, namely payments for hobby craft/custom work and those received from a business, are treated the same way. At the hearing, Mr. Creelman explained that, unlike business and hobby craft payment, pension benefits are the only type of income where an inmate cannot arrange to receive \$69 of spending money every two weeks.

[28] Finally, although not raised in his grievance before the CSC, Mr. Creelman argues that CSC's deduction policy is discriminatory, since pension payments are subject to a 30% rate of deduction, whereas other sources of income are subject to a 22% deduction rate.

(2) Arbitrariness

[29] In addition to being discriminatory, Mr. Creelman submits that the decision to treat the pension benefits as covering a two-week pay period is arbitrary, since pension benefits are clearly meant to cover a month's worth of living. In his opinion, CSC's decisions on how to process pension benefits are guided only by considerations of how to maximize deductions, while minimizing inmates' access to their funds. According to Mr. Creelman, pension benefits

are being processed in a manner that is contrary to s 19 of CD 860 – Offender’s Money, which outlines how deposits in the current account are to be managed.

[30] Mr. Creelman also argues that the accounting change is contrary to s 78(1)(b) of the Act, which requires “providing financial assistance to offenders to facilitate their reintegration into the community.”

(3) Procedural fairness

[31] Finally, Mr. Creelman submits that the Decision was procedurally unfair. He states that he was never provided with an opportunity to comment on the suggested accounting change, contrary to s 74 of the Act. He also takes issue with the fact that it took nearly two years to process his grievance.

B. *The Respondent*

[32] At the hearing, counsel made no submissions. Rather, he directed the Court to paragraphs 16-18 of the Respondent’s memorandum of fact and law:

[16] The final grievance decision confirms a 2013 direction from the National Headquarters of CSC to all federal inmate institutions in Canada regarding the manner in which pension cheques are to be inputted into the inmate pay system.

[17] The decision of the Senior Deputy Commissioner is five pages long. The decision sets out the facts and issues and refers to the applicable legislation, regulations and Commissioner’s Directive. The decision explains that the revised practice is intended to streamline the process of inputting cheques into the inmate pay system and to ensure consistency with inputting the money. The decision also explains that the revised practice does not

discriminate based on age as it extends to all prescribed sources of lump sum payments to inmates, not only pension cheques.

[18] The decision of the Senior Deputy Commissioner was reasonable and falls within the range of possible, acceptable outcomes that are defensible in respect of the facts and the law.

[33] The Respondent did not address the Applicant's arguments that the process was unfair.

VIII. Analysis

A. *Was the decision reasonable?*

[34] The Court's role in a judicial review process is not to review or assess the legality of the policy but rather to review the decision and determine if it is reasonable under the circumstances.

[35] At the outset I note that the Applicant made submissions relating to age discrimination however the Applicant does not appear to have filed a complaint with the Canadian Human Rights Commission. Nevertheless this Court may determine whether the SDC reasonably concluded that the accounting change was not discriminatory.

[36] The reasonableness of a decision, as stated in *Dunsmuir* above, involves "justification, transparency and intelligibility." Further, as in *Lukács* above, "reasons still matter." Administrative bodies must, when giving reasons for their decisions, do so in an intelligible, justified and transparent way. The Applicant clearly indicated in his grievance that the accounting change resulted in him, as a person receiving a pension, having less funds deposited in his current account. However, the SDC did not directly address this allegation of a

discriminatory impact in its decision. As highlighted above, the bulk of the Decision is devoted to outlining the legislation and policy regarding deductions. Respectfully, this does not address Mr. Creelman's concern that the accounting change, which resulted in fewer funds being deposited in his current account, was discriminatory.

[37] The Decision does state that because the pension payments are treated the same way as other lump-sum payments, the accounting change is not discriminatory. However, in drawing this conclusion, the Decision fails to examine whether the accounting change is discriminatory in its effects. For instance, Mr. Creelman argued before this Court that pension payments are the only type of income that cannot be managed such that deposits are made every two weeks in an inmate's current account. Whether or not this is the case is unclear; this is not a case where the Court can "look to the record for the purpose of assessing the reasonableness of the outcome" (*Newfoundland Nurses*, above at para 15), as the record is silent on the question of other types of lump-sum payments. Since the Court is unable to discern the basis of the SDC's decision, it is unreasonable.

[38] Mr. Creelman argued that the accounting change is arbitrary since it is contrary to s 78(1)(b) of the Act in that the accounting change does not foster offender reintegration. With respect I disagree with the Applicant on this point. The change would appear to foster reintegration by assisting an offender to save funds for their eventual release. That said, I also note that this part of the decision suffers from the same lack of justification, transparency and intelligibility reasoning as the discrimination portion of the SDC's decision, since it fails to engage with any of Mr. Creelman's arguments that the accounting change is arbitrary.

[39] For the above reasons, the application for judicial review is allowed and the matter is referred back for redetermination.

B. *Was there a breach of procedural fairness?*

[40] CSC did not follow its applicable policy for the processing of grievances within the established time frames. Delay in and of itself is not a ground for a breach of procedural fairness. The issue with delay is whether any delays caused prejudice to an applicant: see *MacDonald v Canada (Attorney General)*, 2017 FC 1028 at para 21. The August 28, 2015, letter, in which CD 081 – Offender Complaints was referenced, indicated a response was projected for December 22, 2015, which would have been within the timeframe required. It was not received for approximately 1.5 years, which is not acceptable. However, this delay does not amount to a breach of procedural fairness under the circumstances. As a result, I find that the Applicant's rights to procedural fairness were not breached.

[41] The Applicant argued that CSC did not follow the consultation process on non-security matters as set out in s 74 of the Act. There was nothing before the SDC on this point so I will not address it.

[42] I do not find that the Applicant's rights to procedural fairness were breached, however I do find that the decision was unreasonable for the reasons outlined above.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed and the matter is referred back for redetermination.

“Paul Favel”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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STYLE OF CAUSE: DWIGHT CREELMAN v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING: TORONTO, ONTARIO
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APPEARANCES:

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(ON HIS OWN BEHALF)

Eric Peterson

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