Federal Court  Cour fédérale

Date: 20190523

Docket: T-572-18

Citation: 2019 FC 733

Ottawa, Ontario, May 23, 2019

PRESENT: Mr. Justice LeBlanc

BETWEEN:

JEFF EWERT

Applicant

and

ATTORNEY GENERAL OF CANADA
(CORRECTIONAL SERVICE OF CANADA [CSC])

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant seeks judicial review of an Offender Final Grievance Response [Final Grievance Decision] dated December 22, 2017, whereby the Assistant Commissioner, Policy [Assistant Commissioner] of the Correctional Service of Canada [Service] upheld the Applicant's grievance in part. The Applicant challenges the Final Grievance Decision on various grounds, including that the Assistant Commissioner was biased due to his involvement in prior

litigation and that the Assistant Commissioner purposefully backdated the Final Grievance Decision to exclude his further submissions. He also contends that the Assistant Commissioner ignored many of his arguments regarding violations of statute and of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

II. Background

[2] The Applicant is an inmate currently serving life sentences for second degree murder and attempted murder at La Macaza Institution, a medium security penitentiary located in the Province of Québec.

[3] In August 2016, he filed a grievance [Initial Grievance] against his Institutional Parole Officer [IPO] at the time.

[4] The crux of his Initial Grievance was that his IPO had made errors, omissions, and inaccuracies within documents prepared for a hearing before the Parole Board of Canada [Board] regarding his application for an escorted temporary absence [ETA]. The Applicant, who identifies as Indigenous, sought an ETA to visit Wesekun Healing Lodge, a minimum-security institution where he stated he would eventually like to be transferred. In one of these documents, entitled “Assessment for Decision”, his IPO, in dissent, supported his application for an ETA, but his Case Management Team and the Institutional Head did not. As a secondary issue, he alleged that his IPO had intercepted and read privileged communications sent to the

penitentiary's fax machine by his counsel. As a result, he requested to change IPOs and to have the erroneous information corrected.

[5] The next month, the Manager, Assessment and Interventions [MAI] agreed with the Applicant that there had been errors and inaccuracies within documents prepared for the Board's hearing regarding his ETA application, but noted that most of the errors and inaccuracies had been corrected. The MAI also concluded that the interception of the Applicant's faxes was done in accordance with the practices of the penitentiary, hence not finding that a new IPO ought to be assigned to the Applicant.

[6] In October 2016, the Applicant then grieved the MAI's decision to uphold his Initial Grievance in part [Final Grievance]. The Final Grievance materials were supplemented by three addenda filed, two of which were filed in December 2016, and one in May 2017.

[7] The Applicant alleged in the Final Grievance that after filing the Initial Grievance, his IPO at the time withdrew his support for the ETA by amending the Assessment for Decision. He saw this as a means of prohibited retaliation contrary to section 91 of the *Corrections and Conditional Release Act*, SC 1992, c 20 [Act].

[8] As a consequence of amending the Assessment for Decision, the Applicant argued that the Board relied on information which was modified in contravention of the Commissioner's directive CD 701 – Information Sharing, when it denied the ETA.

[9] He also posited that the Institutional Head was complicit in intercepting and withholding the privileged faxes; that his correctional plan should be changed as he was hindered in his ability to participate in a maintenance program which did not involve his former IPO; and that his IPO and the MAI had infringed sections 4, 5, 24, 25, 69, 70, 80, and 91 of the Act, sections 3, 94, and 102 of the *Corrections and Conditional Release Regulations*, SOR/92-620 [Regulations], in addition to paragraph 2b) and sections 7 and 9 of the *Charter*.

[10] The redress the Applicant sought included correcting the changes his former IPO made to his file, being assigned a new IPO, and prohibiting his former IPO from interacting with him.

[11] In October 2017, the Applicant was notified that material from the Final Grievance would be removed and returned to him. The material in question was a settlement agreement [Settlement Agreement] regarding a complaint he had filed against the Service before the Canadian Human Rights Commission. The Applicant was informed that the Settlement Agreement was confidential in nature and that its content was not directly related to the allegations presented in the Final Grievance. In turn, the Assistant Commissioner solely relied on a redacted version of the Settlement Agreement.

[12] On December 22, 2017, the Applicant's Final Grievance was upheld in part by the Assistant Commissioner.

[13] The Assistant Commissioner summarized the Applicant's arguments as follows:

> In your final grievance, you claim that your Institutional Parole Officer (IPO) is seeking vengeance against you and fabricated a

> justification to withdraw his support for your ETA. You also believe that the Institutional Head (IH) of La Macaza institution and your IPO withheld legal correspondence from you for 48 days, for no legitimate reason. You are also dissatisfied with the complaint response received from the Manager, Assessment and Interventions (MAI) on 2016-09-15, and believe that this response does not properly address your Request for File Corrections. As corrective action, you demand that your File Corrections be made immediately, and that a new IPO be assigned to your case.
>
> (Respondent's Record at 2)

[14] The Assistant Commissioner responded as follows.

[15] First, he wrote that pursuant to section 17.1 of the Act, the Board is the granting authority for ETAs. He then summarized the denial of the ETA: the Institutional Head did not recommend the ETA; the Board agreed; the decision was reversed on appeal by the Appeal Division and a new hearing was ordered; the Board adjourned so that the Service could elaborate on the statutory criteria for granting ETAs; ultimately, the Case Management Team, the Institutional Head, and the Board agreed that the ETA should not be granted. He noted that the Institutional Head was not supportive of the ETA and, as such, the Applicant did not meet the criteria specified in paragraph 17(1)(b) of the Act. Thus, the Assistant Commissioner denied this portion of the Final Grievance.

[16] Second, the Assistant Commissioner upheld the portion of the Final Grievance regarding the interference with the Applicant's legal correspondence. He acknowledged that the Applicant was informed that the fax from his counsel had been destroyed, whereas, in fact, it had been sent to the MAI, who was absent at the time. He also underscored the fact that the Institutional Head

informed the Applicant's counsel that the institutional fax could only be used on an exceptional basis for urgent Court matters with prior arrangement with staff at the institution.

[17] Third, the Assistant Commissioner upheld the Applicant's Final Grievance in relation to the proposed file corrections, as corrections were made, but did not refer to a "Memo to File", a document outlining the details of the request for final corrections, contrary to the Commissioner's directive CD 701 – Information Sharing. In addition, one of the Memos to File in question was not sufficiently detailed. As corrective action, the Assistant Commissioner wrote that the Institutional Head would ensure that the Memo to File in question be amended to comply with the relevant directive, and would also ensure that several other documents would be unlocked and amended to reflect the presence of the amended Memo to File. The Assistant Commissioner further wrote that the Institutional Head would ensure that the use of the offender complaint and grievance process would not be mentioned in any file information. He reminded the Applicant that a new IPO was assigned to him as of May 2017.

[18] The Final Grievance Decision was rendered on December 22, 2017, but the Applicant was not informed until February 2018. In the interim, he filed a further addendum in January 2018, which was refused for filing by the Service in February 2018 as the decision had already been rendered.

[19] The Applicant now seeks judicial review of the Final Grievance Decision.

[20] He alleges several violations of procedural fairness. He contends that the Assistant Commissioner was biased when rendering the Final Grievance Decision, in part because he testified on behalf of the Service in an action commenced by the Applicant. He also claims that the Assistant Commissioner purposefully backdated the Final Grievance Decision in order to exclude his further addendum filed in January 2018. Finally, he alleges that the Assistant Commissioner ignored many of his arguments.

[21] The Applicant further submits that his IPO contravened the Act, the Regulations, and the *Criminal Code*, RSC 1985, c C-46. *Charter* rights were engaged and violated, according to him, namely his freedom of expression and his liberty interest. The overarching theme of these contentions is that the Applicant is being punished for resorting to the offender grievance regime and that members of the Service, including his former and current IPO, have been hindering his ability to be transferred to a minimum-security institution by opposing the granting of an ETA.

[22] Prior to the hearing of this matter, the Applicant filed a written motion to supplement his Application Record with a number of exhibits enclosed within his affidavit dated March 29, 2018. He alleged that this material was excluded from the material before the Assistant Commissioner and, hence, it served to demonstrate a breach of procedural fairness. He also sought an extension of time to serve and file the affidavit.

[23] On May 25, 2018, Justice Jocelyne Gagné, as she was then, granted the motion in part, thereby authorizing the Applicant to supplement his Application Record with his affidavit dated March 29, 2018, along with 3 exhibits (Exhibits A, B, and C). Exhibit A consists of his Further

Addendum dated March 31, 2017, to his Final Grievance. Exhibit B is a letter from the Service stating that the Settlement Agreement would be removed from the Final Grievance and remitted to the Applicant. Finally, Exhibit C includes a letter from the Applicant in response to the letter contained in Exhibit B justifying why the Settlement Agreement was included in the Final Grievance.

[24] On May 28, 2018, the Applicant wrote to the Court seeking direction regarding exhibits D through G of his affidavit dated March 29, 2018. On May 31, 2018, Justice Gagné confirmed by way of oral direction that the Applicant was not authorized to supplement his record with these exhibits.

[25] At the hearing of this matter, the Applicant informed the Court that he had been successful in obtaining an ETA. However, he claims that the present matter is not moot as the impugned decision had the effect of illegally hindering his access to an ETA for a period of two years, thereby impacting his liberty interests.

III. Issues and Standard of Review

[26] The Applicant raises many issues, some of which are beyond the scope of this judicial review (alleged commission of criminal offences, jurisdiction of this Court to try indictable offences and to restore the integrity of the Applicant's sentence).

[27] In my view, the relevant issues can be summarized in the following manner:

a. Was the Final Grievance Decision rendered in violation of the rules of procedural fairness?
b. Is the Final Grievance Decision reasonable?

[28] It is well settled that questions of procedural fairness arising from offender grievance decisions, including issues of bias, are reviewed on a standard of correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *McDougall v Canada (Attorney General)*, 2011 FCA 184 at para 24; *Sweet v Canada (Attorney General)*, 2005 FCA 51 at para 16).

[29] The merits of an inmate grievance are reviewed on a standard of reasonableness (*McMaster v Canada (Attorney General)*, 2017 FC 25 at para 20, aff'd 2018 FCA 37). The Service is owed a high level of deference in grievance matters due to its expertise in inmate and institution management (*Creelman v Canada (Attorney General)*, 2018 FC 507 at para 23).

[30] As a preliminary issue, the Respondent submits that the Applicant's second affidavit dated June 7, 2018, should be struck from the record as it was filed without obtaining leave from the Court contrary to rule 312(a) of the *Federal Courts Rules*, SOR/98-106. The Respondent concedes that several of the exhibits contained therein are admissible because they are found in the Certified Tribunal Record [CTR]. However, the Respondent contends that the remaining exhibits must be struck from the record as they do not fall under one of the noted exceptions in *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*Access Copyright*]. These exceptions are:

a. Information which provides general background information in circumstances where the information might assist the Court in understanding the issues relevant to the judicial review;

b. Information that brings to the attention of the Court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker; and

c. Information that highlights the complete absence of evidence before the administrative decision-maker when it made a particular finding.

(*Access Copyright* at para 20)

[31] The Federal Court of Appeal has subsequently stated that the second and third exceptions are "really just one exception" because "where a tenable ground of review is raised that can only be established by evidence outside of the administrative decision-maker's record, the evidence is admitted" (*Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at para 98).

[32] The Respondent has identified the following exhibits in the Applicant's second affidavit which are not in the CTR: exhibits M, T, W, AB, AC, AD, AE, AF, AH, AI, AJ, AK, AL, BD, BE, BG, BH, BI, BM, BO, BT, BY, BZ, CB, CC, CD, CE, CF, CG, CH, and CJ.

[33] The Applicant contends that the Respondent was well aware that his second affidavit was forthcoming as he referred to it in his first affidavit dated March 29, 2018. He claims that the

information contained in the second affidavit and the exhibits therein provide general background information to the Court.

[34] The Applicant's second affidavit canvasses general background information on his incarceration, the crimes he committed, his childhood background, and his time spent at La Macaza Institution. It also reiterates many of the issues the Applicant raised in his memorandum. Whereas the second affidavit most certainly provides general background information, I am not convinced that this information aids the Court in understanding the issues relevant to this matter. The same can be said of the exhibits enclosed in the affidavit.

[35] In any event, I am of the view that the evidence at issue does not have any bearing on the final disposition of this matter.

IV. Analysis

[36] From the outset, I am of the view that the Applicant's bias argument is dispositive of this matter. This is because a reasonable apprehension of bias arose as the Assistant Commissioner had testified on behalf of the Service in an action which the Applicant commenced regarding the reliability of psychological risk assessment tools on Indigenous inmates (*Ewert v Canada*, 2015 FC 1093 [*Ewert FC*], rev'd 2016 FCA 203, rev'd in part 2018 SCC 30) and then later was the final decision-maker for the Final Grievance Decision. Hence, it is not necessary, nor opportune, to examine the reasonableness of the Final Grievance Decision.

[37] It is well established that an allegation of bias cannot be raised on judicial review if it could have reasonably been the subject of a timely objection in the first-instance forum (*Hennessey v Canada*, 2016 FCA 180 at para 20 [*Hennessey*]). The reason underlying this rule is that a first-instance decision-maker ought to be afforded the chance to address the matter, to try to remedy any harm, or to explain itself (*Hennessey* at para 21). Hence, a party cannot withhold a disqualifying procedural ground in reserve and later brandish it on judicial review if they are unsatisfied with the first-instance decision (*Hennessey* at para 21).

[38] The record clearly indicates in this case that the Applicant did not raise any bias arguments in his Final Grievance. However, the record does not show that the Applicant was aware that the Assistant Commissioner would be rendering the Final Grievance Decision. Insofar as the Applicant's bias argument rests on the identity of the decision-maker, I find that he was therefore not barred from raising this argument on judicial review, as this was the first reasonable occasion he could raise this ground. This is bolstered by the fact that section 80.1 of the Regulations empowers a variety of senior staff members of the Service to render final grievance decisions.

[39] In the oft-cited case of *Committee for Justice v National Energy Board*, [1978] 1 SCR 369 [*Committee for Justice*], the Supreme Court determined the applicable test for a reasonable apprehension of bias:

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. […] [T]hat test is "what would an informed person, viewing the matter realistically and practically - and having thought the matter through – conclude. Would he think that it is more likely than not

> that [the decision-maker], whether consciously or unconsciously, would not decide fairly."
>
> (*Committee for Justice* at 394)

[40] This Court has articulated that the *Committee for Justice* test is applicable to allegations of bias stemming from the offender grievance scheme (*Johnson v Canada (Attorney General)*, 2018 FC 582 at para 46; *Spidel v Canada (Attorney General)*, 2011 FC 601 at para 23 [*Spidel FC 2011*], aff'd 2012 FCA 26; *Crawshaw v Canada (Attorney General)*, 2010 FC 1110 at para 50 [*Crawshaw*]).

[41] The bias inquiry is inherently contextual and fact-specific (*Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 at para 26 [*Yukon*]). The duty of impartiality may vary in order to reflect the context of a decision-maker's activities and the nature of its functions (*Imperial Oil Ltd v Quebec (Minister of the Environment)*, 2003 SCC 58 at para 31). Nonetheless, an apprehension of bias is analyzed through the lens of a reasonable, informed person (*Yukon* at para 21; *Nadeau v Canada (Attorney General)*, 2018 FCA 203 at para 12).

[42] In the correctional context, Parliament has mandated that the Service follow certain guiding principles in the administration of its legislated mandate (Act, ss 3, 4; *Spidel v Canada (Attorney General)*, 2012 FCA 275 at para 9; *Spidel v Canada (Attorney General)*, 2012 FC 958 at para 6). One of these principles is that the Service must render grievance decisions in a fair manner, as reflected in the language used in paragraph 4(f) and section 90 of the Act:

Principles that guide Service	**Principes de fonctionnement**
4 The principles that guide the Service in achieving the purpose referred to in section 3 are as follows:	4 Le Service est guidé, dans l'exécution du mandat visé à l'article 3, par les principes suivants :
[…]	[…]
(f) correctional decisions are made in a forthright and fair manner, with access by the offender to an effective grievance procedure;	f) ses décisions doivent être claires et équitables, les délinquants ayant accès à des mécanismes efficaces de règlement de griefs;
[…]	[…]
Grievance procedure	**Procédure de règlement**
90 There shall be a procedure for fairly and expeditiously resolving offenders' grievances on matters within the jurisdiction of the Commissioner, and the procedure shall operate in accordance with the regulations made under paragraph 96(u).	90 Est établie, conformément aux règlements d'application de l'alinéa 96u), une procédure de règlement juste et expéditif des griefs des délinquants sur des questions relevant du commissaire.

[43] The rules of procedural fairness entitle offenders to the right to make their case, by way of a grievance, and for the grievance decision to be rendered by an impartial decision-maker (*Spidel FC 2011* at para 23). This means, at a minimum, that the final decision-maker in the grievance process ought not to have rendered the initial grievance decision, nor have participated in investigative steps leading up to the final grievance (*Spidel FC 2011* at para 23; *Crawshaw* at paras 49-52).

[44] In the instant case, the Assistant Commissioner, who was the decision-maker for the Final Grievance, testified on behalf of the Service in an action commenced by the Applicant against the Service in *Ewert FC*. In that case, the Applicant's claim was that the Service had infringed sections 7 and 15 of the *Charter*, in addition to subsection 24(1) of the Act by using various psychological risk assessment tools without having ensured that they were valid when applied to Indigenous offenders. Justice Phelan ruled that the Service had infringed section 7 of the *Charter*, without justification, in addition to subsection 24(1) of the Act. The Supreme Court upheld the decision in *Ewert v Canada*, 2018 SCC 30 with respect to the infringement of subsection 24(1) of the Act.

[45] The Assistant Commissioner was the only fact witness on behalf of the Service in *Ewert FC* (*Ewert FC* at para 3). He testified in his capacity as former Director General of the Research Branch and current Assistant Commissioner of Policy for the Service (*Ewert FC* at para 67). His testimony covered the general nature of decision-making within the Service and the effects of the risk assessment tools (*Ewert FC* at para 68). He also spoke of unfulfilled Service research projects alluded to by the Court in past litigation commenced by the Applicant against the Service (*Ewert FC* at para 72, with reference to *Ewert v Canada (Attorney General)*, 2007 FC 13 at paras 62-67 and *Ewert v Canada (Attorney General)*, 2008 FCA 285 at paras 10-11). Finally, he described the purpose and objective of the Service's decision-making and risk assessment (*Ewert FC* at para 96).

[46] *Ewert FC* overlaps, to a certain extent, the allegations contained in the Final Grievance, particularly those pertaining to the impact of the denial of an ETA on the Applicant's liberty

interest, which form part of the arguments for the first prong of the Final Grievance. Of importance is the effect of risk assessments on the denial of ETAs and their influence on the Applicant's liberty interest (*Ewert FC* at paras 64-66, 89). One of the underlying themes in the Applicant's contention in the case at bar is that he must complete ETAs in order to lower his security risk with the hopes of transferring to a minimum security facility.

[47] Although I am mindful of the strong presumption of impartiality afforded to decision-makers (*Gagliano v Gomery*, 2011 FCA 217 at para 44), I find that the situation arising from this matter is problematic for two reasons.

[48] First, testifying on behalf of the Service in the context of adversarial litigation commenced by the Applicant on similar subject matter, and then later rendering the Final Grievance Decision gives rise, at a minimum, to a reasonable apprehension of bias. The Respondent contended at the hearing of this matter that there was no nexus between the Assistant Commissioner's testimony in *Ewert FC* and the Final Grievance, and that, in any event, the passage of time was sufficient to dissipate any ground of disqualification for bias.

[49] Given the overlapping content of the Assistant Commissioner's testimony and the Final Grievance Decision, in addition to the relatively short timeframe between these two events, approximately four years, I cannot agree with the Respondent's submission.

[50] Although the Assistant Commissioner did uphold the Final Grievance in part, he rejected what appears to be the crux of the Final Grievance, that is the Applicant's arguments regarding

his liberty interest, specifically relating to the denial of an ETA. In *Ewert FC*, the Assistant Commissioner testified precisely on this very same point regarding the Applicant. There is thus a strong nexus between the Assistant Commissioner's testimony in *Ewert FC* and the dismissal of the Applicant's liberty interest arguments in the Final Grievance Decision.

[51] The Assistant Commissioner may very well not have had a particular interest in the Final Grievance Decision, but the relevant facts of this case certainly lead to a reasonable apprehension of such interest in the matter (*Wewaykum Indian Band v Canada*, 2003 SCC 45 at para 77). This is a situation where the proximity between the decision-maker and the matter oversteps the limits of a fair grievance procedure.

[52] Second, this series of events calls into question whether the Assistant Commissioner had prior knowledge of the litigious matter before the Final Grievance was presented to him. The risk that outside information stemming from the previous litigation influenced the Assistant Commissioner's decision is additionally a ground of disqualification (*Russell v Commissioner of Royal Canadian Mounted Police*, 2013 FC 755 at para 38; *Rothesay Residents Association Inc v Rothesay Heritage Preservation & Review Board et al*, 2006 NBCA 61 at para 14).

[53] In closing, I must address one of the Applicant's bias arguments raised in written submissions and in oral argument. The Applicant is of the view that as Justice Gagné had found that he had met his burden when she granted his motion to supplement his record in part, that this was sufficient for me to conclude that a reasonable apprehension of bias arose. The granting of a

pre-trial motion to supplement a record is not, in and of itself, evidence that any decision-maker infringed the rules of procedural fairness.

[54] The Applicant's Application for Judicial Review will therefore be granted.

[55] The Applicant is seeking his costs in the present matter. As he was successful, he will be entitled to them. The Applicant also seeks his costs in Court file T-154-17, in which his Application for Judicial Review in relation to the underlying grievance process was struck out on the basis of prematurity. This request cannot be sustained as it is only in the course of the disposition of this other matter that the costs issue in that matter could be determined.

JUDGMENT in T-572-18

THIS COURT'S JUDGMENT is that:

1. The Application for Judicial Review is granted in part;
2. The decision of the Assistant Commissioner, Policy, of the Correctional Service of Canada, dated December 22, 2017, dismissing the Applicant's final grievance in part is set aside and the matter is remitted to a differently constituted panel for reconsideration;
3. Costs are awarded to the Applicant.

"René LeBlanc"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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