Date: 20080904

Docket: T-1251-07

Citation: 2008 FC 990

Ottawa, Ontario, September 4, 2008

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

DAVID DUTIAUME

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application by David Dutiaume (the applicant) for judicial review under section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 of a decision dated June 6, 2007 by an independent chairperson (the chairperson) convicting the applicant of the offence of fighting, assaulting or threatening to assault another person contrary to subsection 40(h) of the *Corrections and Conditional Release Act*, R.S. 1992, c. 20, s. 41 (the Act).

[2] The applicant requested the following relief from the Court:

1. An order in the nature of *certiorari* to quash the decision of the independent chairperson;

2. An order in the nature of *mandamus* compelling the Correctional Service of Canada (the Service) to delete all information regarding the related allegations, charges and conviction from all files in the applicant's name held by the Service and any other agency that may have received such information from the Service, including the National Parole Board;

3. In the alternative, an order in the nature of *mandamus,* directing the independent chairperson to send the matter back to the institution to determine the outcome of the informal resolution attempted; and

4. The costs of this application.

Background

[3] The applicant is an inmate at Kent Institution, a maximum security institution. On February 8, 2007, the applicant was an inmate at the Regional Treatment Centre (Pacific Region). While in the range yard, the applicant and another inmate were witnessed behaving aggressively towards a third inmate (the alleged victim) by a control post officer (Officer Jensen). Officer Jensen witnessed the incident in the yard via a video monitor, and recorded the incident as a result. Officer Jensen did not call anyone to intervene because the incident did not escalate and he felt that it could be dealt with after the fact.

[4] As a result of the incident, an inmate offence report and notification of charge (the report) was drafted. It stated, “[i]nmate Dutiaume was inciteful [*sic*] towards inmate Buschkewitz (FPS 817920B) and assaultive towards him”.

[5] On March 6, 2007, the applicant was charged under subsection 40(h) of the Act with fighting, assaulting or threatening to assault another person. A disciplinary hearing was held before the chairperson on March 14, May 2, May 23, and May 30, 3007. The applicant testified at the disciplinary hearing that a Corrections employee, Officer Campbell, came to his cell several hours after the incident to obtain the applicant’s side of the story. There appears to be uncertainty on whether the Corrections employee in question was indeed Officer Campbell, as such, I will refer to the individual as “CX2”. After the visit, the applicant was restricted to his unit. Evidence at the hearing included the report which indicated that informal resolution had been attempted, but there were no reports or materials describing the attempt of informal resolution or its outcome presented at the hearing. The videotape of the incident was also before the chairperson. Both the applicant and Officer Jensen testified before the hearing.

[6] In a decision dated June 6, 2007, the chairperson found the applicant guilty of the charge under subsection 40(h) of the Act.

Chairperson's Decision

[7] The chairperson first addressed the delay issues in the hearing and although not pleased by the delays found that they were as much the result of the requests of the applicant or his counsel as anything else. As such, the chairperson rejected the notion of undue delay.

[8] The chairperson then addressed the applicant's argument that Officer Campbell's report should be rejected as it contained "double hearsay" statements and all names but that of the applicant were blacked out in the report. The chairperson agreed with the applicant and rejected the report because it did not contain information that was sufficiently complete due to the blacking out of names.

[9] The chairperson rejected the applicant and his counsel's evidence regarding the mental health of the alleged victim stating that it was opinion only and there was no substantive evidence provided.

[10] The chairperson then turned his attention to the issue of informal resolution as raised by the applicant. The chairperson noted that the report indicated that informal resolution had been attempted, but he also noted that during his testimony Officer Jensen was unable to recall the specifics, other than the fact that the applicant was given the opportunity to speak to CX2 about the incident. Moreover, the chairperson noted that there was no report concerning the discussion between the applicant and the CX2 on record. The chairperson cited Commissioner's Directive 580

(CD 580) on informal resolution and noted that subsection 11(b) of the Act permits documentation of attempts at informal resolution in either the report or the case work record. The chairperson found that this evidence "is something that the institution should produce in cases where the Inmate Offence Report and Notification of Charge form indicates that informal resolution has been attempted." The chairperson found that it was reasonable for the applicant to request this documentation as it is a requirement of CD 580.

[11] The chairperson considered the issue of the severity of the incident and found that the actions of Officer Jensen were consistent with the Act's underlying principle of using as little force as necessary. The chairperson stated "[h]aving reviewed the video tape myself, I would have considered intervention though [*sic*] the use of force to be inappropriate".

[12] The chairperson considered the fact that the applicant and the alleged victim were on the same unit for approximately five days after the incident. The chairperson found that a period of assessment like the one in this case was entirely consistent with the regular procedure used at the Regional Psychiatric Center.

[13] With regards to the video recording of the incident, the chairperson made a number of observations:

- The applicant and a second inmate clearly move into the personal space of the alleged victim repeatedly;

- The applicant places his hands on the alleged victim several times and these actions are not welcomed by the alleged victim;
- The positioning of the second inmate is such that it suggests that the second inmate was in support of the applicant's actions;
- The applicant strikes the alleged victim softly in the belly and assumes a fighting stance on at least two occasions;
- The applicant makes a fist which he extends slowly touching the alleged victim under the chin;
- The alleged victim is smoking when the applicant and the second inmate enter the yard and after an initial interaction, the applicant actually places a cigarette filter into one of the alleged victim's nostrils which the alleged victim removes immediately;
- The alleged victim attempts to leave the yard, but is prevented from doing so by the applicant and the second inmate; and
- The applicant and the second inmate smile a number of times throughout the video, but the alleged victim never smiles or gives the appearance that he is having a good time.

[14] The chairperson noted that the applicant testified that the alleged victim had asked him for a cigarette when they first entered the yard. The chairperson stated that this did not make any sense because the alleged victim was in fact smoking when the applicant and the second inmate entered the yard. The chairperson also noted the applicant's testimony that the alleged victim was a friend and they were just engaging in "horseplay".

[15] The chairperson rendered the following conclusions at the end of his decision:

- Officer Jensen's evidence, namely his oral testimony and the video tape, was highly credible;
- The applicant's evidence lacked credibility as his version of the incident is clearly not supported by the video recording, and his actions were definitely aggressive, and were those of a bully and a thug;
- It would have been reasonable for the applicant's counsel to request the written record of the attempt at informal resolution, but it is not a requirement of the Court to evaluate each and every informal resolution attempt and to rule on its acceptability; and
- Informal resolution was considered by the institution to the extent required.

[16] Based on the above analysis and conclusions, the chairperson found the applicant guilty of the charge under subsection 40(h) of the Act.

<u>Issues</u>

[17] The applicant has submitted the following issues for consideration:

1. What is the standard of review to be applied to the decisions of the independent chairperson in the case at bar?

2. Did the independent chairperson err in finding that the institution considered informal resolution to the extent required by section 41 of the Act?

3. Did the independent chairperson err by failing to properly consider the defence of consent or mistaken belief in consent and thereby erroneously convicted the applicant of assault under subsection 40(h) of the Act?

[18] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the chairperson fail to appreciate his duty in ensuring that informal resolution had been considered by the institution?

3. If not, did the chairperson err in finding that the institution had considered informal resolution to the extent required by section 41 of the Act?

4. Did the chairperson err in finding the applicant not to be credible?

5. Did the chairperson err in his finding that the applicant's actions towards the alleged victim were not consensual?

<u>Applicant's Written Submissions</u>

[19] The applicant submitted that the appropriate standard of review for questions of law including issues of procedural fairness, is correctness, for questions of mixed law and fact is reasonableness, and for questions of pure fact is patent unreasonableness (*Sweet* v. *Canada (Attorney General),* [2005] F.C.J. No. 216). It was submitted that the chairperson's failure to refer the matter back to the institution for clarification on informal resolution is a breach of procedural fairness reviewable on the standard of correctness. In the alternative, the chairperson's finding that

the attempt of informal resolution on record was sufficient is an error of law reviewable on a standard of correctness. The chairperson's failure to properly consider consent and mistaken belief is reviewable on the standard of reasonableness. Moreover, any findings of fact made by the chairperson are reviewable on the standard of patent unreasonableness.

[20] The applicant noted that section 41 of the Act provides that informal resolution must first be considered by the institution before a charge is laid. Moreover, CD 580 underlines the importance of informal resolution. It is the Service through the institution in question that bears the duty of attempting information resolution, and inmates have a parallel right to request informal resolution (*Laplante* v. *Canada (Attorney General)*, [2003] 4 F.C. 1118). The chairperson plays an important role in ensuring an inmate's right to informal resolution has been respected and has the discretion to send the matter back to the institution (*Laplante* above at paragraphs 12 and 13). It was submitted that the chairperson erred in finding that the institution had met its duty under section 41 to attempt informal resolution given the evidence before the chairperson. The applicant noted that while there was evidence that CX2 had spoken to the applicant after the incident, there was no evidence as to the content of this discussion or any further information about the attempt at informal resolution.

[21] The applicant also submitted that the chairperson misapprehended his duty in ensuring that the applicant's right to informal resolution had been respected. Specifically, the applicant noted the chairperson's finding that he was not required to "evaluate each and every informal resolution attempt". The applicant submitted that subsection 11(c) of CD 580 requires that staff members at the institution responsible for quality control ensure that informal resolution is considered,

attempted where possible, and documented. As there was no evidence on the record indicating that this was done, the chairperson should have exercised his discretion and sent the matter back to the institution. The applicant acknowledged that as per *Knight* v. *Canada (Attorney General)*, [2005] F.C.J. No. 909, the chairperson's power to refer matters back to the institution is discretionary and not mandatory, but submitted that where there is insufficient evidence to find that informal resolution was properly considered and attempted, the chairperson has a duty to return the matter to the institution for further consideration.

[22] The applicant also submitted that the chairperson failed to properly consider the defence of consent or mistaken belief in consent and this failure led to an erroneous conviction. It was submitted that the applicant testified that he had an ongoing friendship with the alleged victim that involved horseplay and play fighting, and that the incident in question was another example of this behaviour. The applicant argued that although the chairperson did not find the applicant to be credible, he must still be satisfied that guilt is the only inference that can be drawn from the proven facts (*McLarty* v. *Canada*, [1997] F.C.J. No. 808 at paragraph 10). Even without the applicant's testimony, the video recording does not unequivocally show an assault occurring and as such, the chairperson erred in convicting the applicant.

[23] And finally, the applicant submitted that the chairperson's finding that the applicant was not credible was patently unreasonable. The applicant submitted that the only basis for this finding was his testimony that the alleged victim asked the applicant for a cigarette which was rejected on the basis that the alleged victim was smoking when the applicant entered the yard. The applicant

submitted that a close watching of the videotape reveals that in fact the alleged victim was not smoking when approached by the applicant.

Respondent's Written Submissions

[24] The respondent submitted that the appropriate standard of review with regards to issues of fact is patent unreasonableness, and questions of mixed law and fact is a standard of reasonableness *simpliciter* (*Forrest* v. *Canada (Attorney General)*, [2004] F.C.J. No. 709). Procedural fairness questions and the proper interpretation of section 41 are reviewable on a standard of correctness. It was submitted that disciplinary proceedings conducted by an independent chairperson of a disciplinary Court are not judicial or quasi judicial in nature, but are administrative proceedings. Judicial review with respect to disciplinary matters should be exercised sparingly and where there has been a most serious injustice (*Boudreau* v. *Canada (Attorney General)*, [2000] F.C.J. 2016 (F.C.T.D.) at paragraph 7).

[25] The respondent submitted that the chairperson's finding of guilt was not erroneous given the evidence before him. It was acknowledged that in order to convict, the chairperson had to be satisfied beyond a reasonable doubt that the applicant had committed the offence. The respondent submitted in light of the persuasive evidence in the video recording, credible testimony from Officer Jensen and non-credible evidence from the applicant, the chairperson's finding of guilt was not patently unreasonable.

[26] In response to the applicant's argument on the chairperson's consideration of informal resolution, the respondent submitted that the chairperson did not commit a reviewable error. The respondent noted that while informal resolution is an important aspect of dealing with the offence, it is not a mandatory step (*Knight* above at paragraph 16). As informal resolution was considered in the present case, the rights of the applicant were respected. Neither a failure to document the reasons for not attempting informal resolution, nor a failure to document the reasons for which informal resolution failed is a breach of fairness in the process (*Knight* above at paragraph 20). Moreover, a disciplinary board does not lose its jurisdiction to hear a case if the informal process has not taken place (*Laplante* above at paragraph 12). The chairperson has the ability to return the matter to the institution so that they can evaluate the appropriateness of attempting an informal resolution, but this is discretionary (*Laplante* above at paragraph 13). The respondent submitted that there is nothing on the record to suggest that the chairperson did not bear in mind the significance of attempts at informal resolution. In fact, the chairperson specifically addressed informal resolution, but was satisfied that the institution had considered it to the extent required. There was no error on the part of the chairperson.

Analysis and Decision

[27] **Issue 1**

What is the appropriate standard of review?

Since this application for judicial review was heard, the Supreme Court of Canada in *Dunsmuir* v. *New Brunswick* [2008] S.C.J. No. 9 ruled that there are now only two standards of review: reasonableness and correctness. A detailed analysis of which standard to apply is not required if it has been determined in earlier jurisprudence. The factors to be considered in a standard of review analysis are on one hand the existence of a privative clause and a discrete and special administrative regime in which the decision maker has special expertise which attracts a reasonableness standard, and on the other hand, the nature of the question as being of "central importance to the legal system…and outside the…specialized area of expertise of the administrative decision maker (*Toronto (City)* v. *C.U.P.E., Local 79*, [2003] 3 S.C.R. 77)" attracting a correctness standard (*Dunsmuir*, above at paragraph 55). In many cases it may not be necessary to consider all the factors as some of them will be determinative (*Dunsmuir*, above at paragraph 64).

[28] This case involves decision making by a chairperson of a disciplinary court. It is well established in earlier jurisprudence that the principles and procedures which apply to these proceedings reflect its administrative nature which is neither judicial nor quasi-judicial in nature (*Hendrickson* v. *Kent Institution Disciplinary Court (Independent Chairperson)* (1990), 32 F.T.R. 296, quoted by Justice Kelen in *Forrest*, above at paragraph 16). This is not to suggest, however, that rules of natural justice and statutory provisions or regulations having the force of law to the contrary are not deserving of judicial discretion (*Forrest*, above).

[29] Therefore, the issue of the chairperson's failure to appreciate his duty to ensure informal resolution is reviewable on a standard of correctness as it is a question of procedural fairness. The chairpersons finding that the institution had considered informal resolution to the extent required by

section 41 is a question of mixed fact and law and is reviewable on a standard of reasonableness. The applicant's submissions on the chairperson's credibility findings and the findings of fact related to the applicant's actions towards the alleged victim are reviewable on a standard of reasonableness.

[30] **Issue 2**

Did the chairperson fail to appreciate his duty in ensuring that informal resolution had been considered by the institution?

The applicant submitted that the chairperson did not appreciate his duty to ensure that informal resolution had been considered by the institution. The duty of the chairperson in relation to informal resolution was explored by the Federal Court of Appeal in *Laplante*, above. In that case, the Court determined that the obligation under section 41 of the Act to consider whether informal resolution is reasonable, given the circumstances, is imposed on the corrections officer. Moreover, the Court determined that the inmate has a corresponding right to demand that corrections officials take steps, where possible, to resolve the matter informally. The Court underlined the importance of this duty and the corresponding right. With regards to the chairperson's jurisdiction, the Court found that a failure on the part of an officer to properly discharge their duty does not amount to an ousting of the jurisdiction of the chairperson. In other words, an inmate's right to informal resolution is not a precondition to the legal exercise of the chairperson's decision (*Laplante* above at paragraph 14). The Court went on at paragraph 13 of *Laplante*, above to make the following comments about the role of the chairperson in section 41:

> In practice, this power of the Board to ensure compliance with the rights of an inmate charged with disciplinary offences means this in case of a breach of the duty under subsection 41(1). When informed of a violation of the inmate's right under subsection 41(1), and

> satisfied that the duty imposed by that provision has not been respected, the chairperson of the Board may suspend the hearing of the complaint and return the matter to the institutional head so that the latter can evaluate the appropriateness of attempting an informal resolution. I hasten to explain that the role of the Board chairperson is limited to this referral back. It is not his role to interfere in the negotiation of an informal settlement that Parliament has imposed on the Correctional Services, which are responsible therefor. Similarly, it is not the chairperson's job to substitute his opinion for that of the institutional head who, before laying a charge of disciplinary offence, concluded that an informal resolution could not be achieved or was not possible in the circumstances. […]

[31] The chairperson's conclusion on informal resolution read as follows:

> I believe it would have been reasonable for Counsel to request the written record of the informal resolution that was attempted. At the same time, I do not consider it to be a requirement of the court to evaluate each and every informal resolution attempt, to rule on its acceptability. I am satisfied that the institution considered informal resolution to the extent required.

[32] In my opinion, the chairperson did not err in his interpretation of his role in assuring the inmate's right of informal resolution. As found in *Laplante* above, the chairperson's discretion to send the matter back to the institution head is only triggered if he or she is not satisfied based on the evidence that the institution considered informal resolution to the extent required. In the present case, the chairperson clearly states that he is satisfied that "the institution considered informal resolution to the extent required". Moreover, the chairperson's statement that it was not his role to "evaluate each and every informal resolution attempt, to rule on its acceptability" is rightly inline with the Federal Court of Appeal's comments in *Laplante* above, that the chairperson does not have a role to play in approving or interfering with the institution's handling of informal resolution. In my

opinion, the chairperson correctly interpreted his role. I would not allow the judicial review on this ground.

[33] **<u>Issue 3</u>**

<u>If not, did the chairperson err in finding that the institution had considered informal resolution to the extent required by section 41 of the Act?</u>

The applicant submitted that the chairperson's finding that "the institution considered informal resolution to the extent required" was unreasonable given the evidence before the chairperson. The applicant further submitted that due to the lack of evidence supporting this finding, the chairperson should have exercised his duty to request further information from the institution.

[34] The evidence before the chairperson included a report from Officer Jensen wherein the yes box was checked off under the heading "INFORMAL RESOLUTION ATTEMPTED". Moreover, the applicant testified at the hearing that CX2 had come to his cell after the incident and had asked to hear his side of what had occurred. This was supported by Officer Jensen's testimony, although he could not remember any details and no report was filed. I also note that the chairperson found the applicant not to be a credible witness and Officer Jensen to be a credible witness.

[35] In light of the evidence before the chairperson and the chairperson's credibility findings, I find nothing unreasonable with his finding that the institution had considered informal resolution to the extent required. I would not allow the judicial review on this ground.

[36] **<u>Issue 4</u>**

<u>Did the chairperson err in finding the applicant not to be credible?</u>

The chairperson's credibility findings are owed a high degree of deference. The chairperson found the applicant not to be a credible witness. The applicant claims that the only underlying reason supporting the negative credibility finding was the implausibility of the applicant's submission that the alleged victim had asked the applicant for a cigarette when they all entered the yard. I disagree. The applicant submitted that while the chairperson stated that the alleged victim was already smoking when he entered the yard and thus would not have asked for a cigarette, the video shows otherwise. Having reviewed the video, I find nothing unreasonable with the chairperson's credibility findings. Moreover, given the video recording evidence, I note the implausibility of the applicant's defence of consent which further contributed to the chairperson's negative credibility finding. I would not allow the judicial review on this ground.

[37] **<u>Issue 5</u>**

<u>Did the chairperson err in his finding that the applicant's actions towards the alleged victim were not consensual?</u>

The applicant submitted that the chairperson erred in finding that the applicant's actions were not consented to by the alleged victim. The respondent submitted that the chairperson's finding was in no way unreasonable given the video recording and Officer Jensen's credible testimony. The relevant portions of the chairperson's decision read as follows:

> [The applicant] stated further that [the alleged victim] is his friend, and that he "tried to motivate him" and that they had known each other for "about 7 months". [The applicant] went on to state that the activity was merely "horseplay", and that he had no intention to

> assault [the alleged victim]. He did prevent [the alleged victim] from re-entering the unit, but alleges that he was merely trying to talk to him, to remind him of a show that [the alleged victim] wanted to see.
>
> […]
>
> I find [the applicant's] evidence to lack credibility. The actions portrayed on video tape are clearly not welcomed by [the alleged victim]. There is no time in which [the alleged victim] ever indicates that he is enjoying the interaction between himself and [the applicant] (and the third person). The suggestion that such a one sided series of actions could be described as "horseplay" is fully rejected. I conclude that the actions of [the applicant] and the third person were definitely aggressive toward [the alleged victim].

[38] Having reviewed the video recording of the incident and in light of the chairperson's credibility findings, I am satisfied that the chairperson's finding is in no way unreasonable. The video recording provides ample evidence upon which the chairperson could render the finding that beyond a reasonable doubt, the actions of the applicant were not consensual on the part of the alleged victim. The applicant submitted that his testimony provided a reasonable doubt and therefore the chairperson erred in his finding. In light of my above finding that the chairperson's credibility findings were in no way unreasonable, I cannot accept this argument. I see no reason to interfere with the chairperson's finding on this issue.

[39] The application for judicial review is therefore dismissed.

JUDGMENT

[40] **IT IS ORDERED that** the application for judicial review is dismissed.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

The *Corrections and Conditional Release Act*, R.S. 1992, c. 20:

40. An inmate commits a disciplinary offence who	40. Est coupable d'une infraction disciplinaire le détenu qui :
. . .	. . .
(h) fights with, assaults or threatens to assault another person;	h) se livre ou menace de se livrer à des voies de fait ou prend part à un combat;
41.(1) Where a staff member believes on reasonable grounds that an inmate has committed or is committing a disciplinary offence, the staff member shall take all reasonable steps to resolve the matter informally, where possible.	41.(1) L'agent qui croit, pour des motifs raisonnables, qu'un détenu commet ou a commis une infraction disciplinaire doit, si les circonstances le permettent, prendre toutes les mesures utiles afin de régler la question de façon informelle.
(2) Where an informal resolution is not achieved, the institutional head may, depending on the seriousness of the alleged conduct and any aggravating or mitigating factors, issue a charge of a minor disciplinary offence or a serious disciplinary offence.	(2) À défaut de règlement informel, le directeur peut porter une accusation d'infraction disciplinaire mineure ou grave, selon la gravité de la faute et l'existence de circonstances atténuantes ou aggravantes.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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