Federal Court  Cour fédérale

Date: 20100128

Docket: T-1117-09

Citation: 2010 FC 94

Ottawa, Ontario, January 28, 2010

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

MARIO CYR

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of Jean Claude Lagacé, Independent Chairperson of the Disciplinary Court (Chairperson), dated June 10, 2009, finding Mario Cyr (the applicant) guilty of the disciplinary offence set out at section 40 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (Act) and ordering him to pay a $25 fine, with 6 days' segregation suspended for 90 days (page 15, Applicant's Record).

Facts

[2] The applicant is currently serving a term of imprisonment at the penitentiary in Drummondville. On March 25, 2009, he received a *Notification to Provide a Urine Sample* in

institution under paragraph 54(*b*) of the Act. That notice was issued by random selection as part of a urinalysis program.

[3] Under the *Corrections and Conditional Release Regulations* (Regulations), the applicant had two hours to provide the sample. The applicant tried twice, without success. He explained to the officer that he was unable to provide the sample without defecating. The correctional officers then offered to perform a strip search. Apparently, the purpose of such a search was to ensure that the applicant did not have on him any object he might use to falsify the test. The officers could thus allow the applicant to produce the sample in private in a washroom after the search. The purpose of the search was not explained to the applicant. He refused the search, but offered to go to the washroom and bring back the sample. The officers refused that offer. The applicant left the room before the end of the two-hour period without providing a sample. Under subsection 66(2) of the Regulations, failure to provide a sample is considered a refusal to do so. Consequently, an offence report and a notice of charge were issued against him.

[4] The disciplinary hearing took place on May 27, 2009. The applicant and the two correctional officers testified. The applicant testified that he had drunk several glasses of water in an attempt to facilitate production of the sample, but that he was still unable to do so without defecating. According to him, his inability to provide a urine sample was not wilful. One of the officers stated that he had not explained to the applicant the reason for offering the strip search because the applicant could easily deduce the reason for it.

[5] On June 10, 2009, the Chairperson issued his oral sentence and found the applicant guilty of the disciplinary offence. That decision is the subject of this application.

Impugned decision

[6] The Chairperson ordered the applicant to pay a $25 fine, with 6 days' segregation suspended for 90 days. In his reasons, he stated that the applicant had made the decision to leave by saying that it was impossible for him to urinate, since it would be impossible for him to do so without defecating. The applicant therefore left and decided not to provide the sample. The Chairperson added that the evidence pertaining to the offer of a strip search was immaterial to his decision.

[7] The Chairperson then stated that he had considered the applicant's defence and that, unfortunately, he did not find it acceptable. He therefore found, without a reasonable doubt, that the applicant was guilty.

Issues

[8] A single issue is material: are there adequate reasons for the decision?

[9] The application for judicial review will be allowed for the reasons that follow.

Relevant legislation

[10] The excerpts from the legislation at issue are annexed to this decision.

Applicant's allegations

Adequacy of reasons

[11] The applicant alleges that the Chairperson's decision is laconic and that several issues are still unclear. The applicant submits that it is impossible to know if the Chairperson did not believe his statements or for what reason the Chairperson did not accept his defence. According to the applicant, the reason that he was found guilty can only be speculated. Therefore, this Court's intervention is necessary.

Grounds for defence

[12] The applicant submits that his defence is based on an involuntary act on his part. The Chairperson cannot ignore that defence without compromising procedural fairness.

[13] The applicant adds that the burden of proof imposed on the correctional service is the same as in criminal matters, that is, proof beyond a reasonable doubt. Failure to apply that standard is a reviewable error. The applicant points to the following remarks by the Chairperson (page 84, Applicant's Record):

> [TRANSLATION]
> Because, you know, Mr. Tabah, this is a penitentiary, here. I am not rendering my decision right now, but I have observed for some years that inmates are often very creative. Understand me? And this one, for example, this defence, I can tell you that this is the first time in nearly ten (10) years that I have heard it. That does not mean that it has no merit.

[14] The applicant alleges that from the transcript, it may be thought that the Chairperson did not accept the applicant's defence because the applicant had to support it with expert testimony to show that it was plausible (page 91, Applicant's Record). That is an error of law, since in *Durie v. Canada (Attorney General)*, 2001 FCT 22, 201 F.T.R. 8, the Court found that medical evidence was not required to support a defence of a reasonable excuse in a similar case.

Credibility and burden of proof

[15] The applicant acknowledges that it was open to the Chairperson to reject his defence on credibility grounds. However, he submits that it was the Chairperson's duty to explain why the excuse provided did not raise a reasonable doubt. Since the Act requires proof beyond a reasonable doubt, the applicant states that the Chairperson must follow the process set forth in *R. v. W.(D.) [D.W.]*, [1991] 1 S.C.R. 742. According to him, the Chairperson failed to do so and, therefore, altered the standard of proof, which warrants this Court's intervention.

Respondent's allegations

[16] The respondent alleges that, contrary to what the applicant submits, the Chairperson considered and analyzed the applicant's defence. In the respondent's opinion, the Chairperson dealt with all of the evidence, which was clear and uncontradicted, and did not accept the defence or, in other words, did not believe the applicant. He adds that this finding is reasonable given that the officers gave the applicant the opportunity to go to the washroom alone, but on the condition that he first submit to a strip search. However, the applicant refused that alternative for no good reason.

[17] The respondent submits that the Chairperson considered the applicant's defence, but did not accept it. Accordingly, there was no doubt that the applicant had refused to provide the urine sample demanded. The Chairperson finding the applicant guilty is reasonable, since he had been satisfied beyond a reasonable doubt that the applicant had committed the offence of which he was accused.

Analysis

Standard of review

[18] The issue of adequate reasons is a question of procedural fairness. Questions of procedural fairness are questions of law which are subject to the correctness standard (*Sweet v. Canada (Attorney General)*, 2005 FCA 51, 332 N.R. 97, at paragraph 16).

[19] It may be said that the Chairperson's failure to rule on both the defence relied on and the applicant's credibility raises questions of procedural fairness. As the Federal Court of Appeal wrote in *Ayotte v. Canada (Attorney General)*, 2003 FCA 429, 240 D.L.R. (4th) 471, at paragraph 19:

> The chairperson of the court could not disregard the only true defence raised by the appellant without compromising procedural fairness and failing in his duty to hold a full hearing. . . .

[20] In this case, I believe that the Chairperson's errors on the question of the defence and his failure to make a credibility ruling warrant this Court's intervention.

Are there adequate reasons for the decision?

[21] The applicant alleges that the Chairperson's decision is laconic and that without speculating, it is impossible to know if the Chairperson did not believe the applicant or for what reason the Chairperson did not accept his defence.

[22] I believe that the remarks of Justice Binnie in *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869 may be of assistance. He mentions that the purpose of reasons is to preserve and enhance meaningful appellate review of the correctness of the decision (paragraph 25). He writes that "[t]he threshold is clearly reached . . . where the appeal court considers itself unable to determine whether the decision is vitiated by error" (paragraph 28). In *Ayotte*, the Federal Court of Appeal recognized that persons charged with disciplinary offences have the same procedural safeguards as those in ordinary trials, in terms of defences, and the same goes for the adequacy of reasons.

[23] In this case, it is impossible to determine for which reasons the applicant was found guilty. The only thing known for certain is that the Chairperson did not deem the offer of a strip search to be relevant.

[24] In that same vein, it is impossible to know whether the Chairperson rejected the applicant's defence merely because he did not believe the applicant or because he found his defence implausible. The following statement, without further explanations or details, is inadequate and requires this Court's intervention:

> [TRANSLATION]
> I have given thought, sir, to your defence. Unfortunately, I believe that it is unacceptable to me. . . . I find, without a reasonable doubt, that you are guilty" (page 9, Applicant's Record).

[25] The Court acknowledges that when decisions are delivered orally, some phrasing may be difficult to understand. However, the parties must know the true reasons relied on by the decision-maker in reaching his or her conclusion. Regrettably, that is not the case here. When it is necessary to speculate or imagine which evidence the conclusion is based on, then, as held by this Court, there is an absence of reasons for the decision.

[26] The parties left the award of lump sum costs up to the discretion of the Court.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be allowed. The file is referred back to a different Chairperson for redetermination. The respondent will be required to pay lump sum costs in the amount of $1,000 plus GST.

"Michel Beaudry"
Judge

Certified true translation
Sarah Burns

ANNEX

Corrections and Conditional Release Act, S.C. 1992, c. 20.

40. An inmate commits a disciplinary offence who . . . (*l*) fails or refuses to provide a urine sample when demanded pursuant to section 54 or 55;	40. Est coupable d'une infraction disciplinaire le détenu qui : […] *l*) refuse ou omet de fournir l'échantillon d'urine qui peut être exigé au titre des articles 54 ou 55;
43. (1) A charge of a disciplinary offence shall be dealt with in accordance with the prescribed procedure, including a hearing conducted in the prescribed manner.	43. (1) L'accusation d'infraction disciplinaire est instruite conformément à la procédure réglementaire et doit notamment faire l'objet d'une audition conforme aux règlements.
(3) The person conducting the hearing shall not find the inmate guilty unless satisfied beyond a reasonable doubt, based on the evidence presented at the hearing, that the inmate committed the disciplinary offence in question.	(3) La personne chargée de l'audition ne peut prononcer la culpabilité que si elle est convaincue hors de tout doute raisonnable, sur la foi de la preuve présentée, que le détenu a bien commis l'infraction reprochée.
54. Subject to section 56 and subsection 57(1), a staff member may demand that an inmate submit to urinalysis . . . (*b*) as part of a prescribed random selection urinalysis program, conducted without individualized grounds on a periodic basis and in accordance with any Commissioner's Directives that the regulations may provide for; or	54. L'agent peut obliger un détenu à lui fournir un échantillon d'urine dans l'un ou l'autre des cas suivants : […] *b*) il le fait dans le cadre d'un programme réglementaire de contrôle au hasard, effectué sans soupçon précis, périodiquement et, selon le cas, conformément aux directives réglementaires du commissaire;

Corrections and Conditional Release Regulations, SOR/92-620.

66. (1) A sample shall be collected in the following manner: (*a*) a collector shall be of the same sex as the donor;	66. (1) La prise d'échantillon d'urine se fait de la manière suivante : *a*) l'échantillonneur doit être du même sexe que la personne qui fournit l'échantillon d'urine;
(*b*) the collector shall ensure that the donor washes the donor's hands before providing a sample;	*b*) il doit veiller à ce que la personne se lave les mains avant de fournir l'échantillon d'urine;
(*c*) the collector shall provide the donor with a container for the sample and shall supervise as	*c*) il doit remettre à la personne un contenant

the donor provides the sample;

(*d*) the collector shall give the donor up to two hours to provide a sample, from the time of a demand;

(*e*) the collector shall ensure that the donor is kept separate from any other person except the collector and is supervised during the two hour period referred to in paragraph (d);

(*f*) once the sample has been provided, the collector shall, in the presence of the donor,

(i) seal the container with a pre-numbered seal,
(ii) affix a label identifying the sample in such a manner that the identity of the donor is not disclosed to the laboratory,
(iii) initial the label to certify that the container contains the sample provided by that donor,
(iv) request the donor to initial the label and to certify in writing that the sample in the container was provided by that person, and
(v) where the person is unable or refuses to comply with a request referred to in subparagraph (iv), initial the label in the place of the donor and certify in writing, in the presence of another person, that the person who provided the sample was unable or refused to comply with the request; and

(*g*) the collector shall maintain a record that indicates the number on the container that corresponds to the name of the donor.

(2) Where a person fails to provide a sample in accordance with subsection (1), the person shall be considered to have refused to provide the sample.

pour son échantillon d'urine et la surveiller pendant qu'elle s'exécute;

d) il doit accorder un délai de deux heures à la personne pour fournir l'échantillon d'urine à compter du moment de sa demande;

e) il doit veiller à ce que la personne soit gardée à l'écart de toute autre personne que lui-même et reste sous surveillance pendant le délai de deux heures prévu à l'alinéa d);

f) lorsque la personne lui remet l'échantillon d'urine, il doit, devant elle :

(i) sceller le contenant avec un sceau préalablement numéroté,
(ii) apposer sur le contenant une étiquette désignant l'échantillon de manière que l'identité de la personne ne soit pas révélée au laboratoire,
(iii) parafer l'étiquette pour attester que le contenant contient l'échantillon d'urine fourni par cette personne,
(iv) demander à la personne de parafer l'étiquette et d'attester par écrit que l'échantillon d'urine dans le contenant provient d'elle,
(v) si la personne est incapable ou refuse de se conformer à la demande visée au sous-alinéa (iv), parafer à sa place l'étiquette et attester par écrit, en présence d'un témoin, que la personne est incapable ou refuse de se conformer à cette demande;

g) il doit garder un registre indiquant le numéro de contenant et le nom qui y correspond.

(2) Le défaut de fournir un échantillon d'urine conformément au paragraphe (1) est réputé être un refus de le fournir.

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	Montréal, Quebec
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APPEARANCES:

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