Federal Court Cour fédérale

Date: 20110401

Docket: T-1503-10

Citation: 2011 FC 404

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Montréal, Quebec, April 1, 2011

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

RHÉAUME TREMBLAY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the independent Chairperson of the disciplinary court which found the applicant guilty of the disciplinary offence under paragraph 40(*f*) of the *Corrections and Conditional Release Act*, S.C. (1992), c. 20 (the Act), of having been disrespectful or abusive toward a staff member in a manner that could undermine a staff member's authority.

I. <u>Facts</u>

[2] The applicant, Rhéaume Tremblay, is incarcerated at the Cowansville Institution, a medium-security penitentiary. On June 13, 2010, correctional officers in the cell block in which he was incarcerated received a call alerting them that he had been seen hiding something in his pockets. A correctional officer stopped him while he was going up the stairs to his cell. The officer then asked the applicant to empty his pockets, which he proceeded to do. The officer then noticed that the applicant was holding something between his thumb and index finger of his right hand. When asked what he had in his hand, the applicant put his hand up to his mouth and swallowed the substance.

[3] An offence report and notice of charge was issued against the applicant under paragraph 40(*f*) of the Act. A disciplinary hearing was held on August 4 and August 31, 2010. When the hearing concluded, the disciplinary court found the applicant guilty of the offence in question.

[4] In its decision, the disciplinary court stated that in the circumstances this was a search and that the applicant should have handed over the object he was hiding. By swallowing it he had acted in a disrespectful manner and undermined the officer's authority.

Did the Chairperson commit an unreasonable error or an error in law by finding the applicant guilty of the offence in question?

[5] The issue that arises in the case at bar is one of mixed fact and law since it must be determined whether the court assessed the evidence in light of paragraph 40(*f*) of the Act. The applicable standard of review is reasonableness (*Séguin v. Canada (Attorney General)*, 2008 FC 551, at para. 10).

[6] The offence in question reads as follows:

Disciplinary offences 40. An inmate commits a disciplinary offence who:	**Infractions disciplinaires** 40. Est coupable d'une infraction disciplinaire le détenu qui :
(f) is disrespectful or abusive toward a staff member in a manner that could undermine a staff member's authority.	f) agit de manière irrespectueuse ou outrageante envers un agent au point de compromettre l'autorité de celui-ci ou des agents en général.

[7] Under subsection 43(3) of the Act, the Chairperson of the disciplinary court shall not find an inmate guilty unless satisfied beyond a reasonable doubt, based on the evidence presented at the hearing, that the inmate committed the offence in question.

[8] The applicant submits that the factual framework of his case is similar to that of *McCoy v. Canada (Attorney General)*, 2003 FCA 118 (*McCoy*). In that case the appellant was not, as in the present case, charged with the offence set out at paragraph 40(*f*) of the Act, but rather, with the offence described at paragraph 40(*g*), which differs from the former offence by the fact that one of its essential elements is the provocation to violence.

> The *actus reus* of the offence under paragraph 40(*g*) of the Act consists in the fact of engaging in an action that is not simply disrespectful but is actually so disrespectful that it is going to

> provoke the person who is on the receiving end to engage in violence… (*McCoy*, above, at para. 10).

[9] Justice Létourneau found, at paragraph 16, that there was a complete lack of evidence on this essential element of the offence, namely, the provocation to violence. I therefore fail to see how this jurisprudence could be applied by analogy to the present case, given that the offence for which the applicant was found guilty under paragraph 40(*f*) of the Act does not require a provocation to violence. In this case, the only relevant element is the dictionary definition accepted by the judge of what constitutes disrespectful behaviour. For a gesture or remark to be disrespectful, it must necessarily demonstrate "[w]ant of respect, courteous regard, or reverence".

[10] It is not for the Court to substitute its own findings for those of the disciplinary court. In this case, the Chairperson of the disciplinary court found that the applicant had acted in a disrespectful manner because he had not handed over to the officer searching him the unidentified object he was holding in his hand and which may well have turned out to have been illicit, but instead swallowed it, thereby preventing the officer from proceeding with the search he was legally entitled to conduct. This finding is not at odds with the definition accepted in *McCoy*, above. It falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law. Therefore, the Court's intervention is not warranted.

[11] The applicant also submits that the evidence fails to support the essential element of the offence under paragraph 40(*f*) of the Act, that the actions are such that the staff member's authority could be undermined. Moreover, the authority of the staff member or of staff members in general

could only have been undermined if other inmates were present at the time the offence was committed, which was not the case here.

[12] In *MacDonald v. Canada (Attorney General)*, 2007 FC 798, an inmate had been charged with having undermined the authority of the correctional officer who had filed the charge because he had laughed at her when returning to his cell for the inmate count. Taking into account the specific circumstances of the case, Justice Simpson stated, at para. 24:

> The Written Charge was accepted as trustworthy evidence by the Presiding Official and was therefore admissible evidence. However, in my view, the Written Charge did not provide sufficient facts to establish beyond a reasonable doubt that an offence under subsection 40(f) of the Act had been committed. Among other things, the Written Charge included no information about the surrounding circumstances. For example, if no other inmates had been nearby to hear the laugh, it would have been impossible to conclude that it undermined the Charging Officer's authority.
>
> [Emphasis added.]

[13] On reading this passage, it is clear that Justice Simpson did not want the presence of other inmates to become a *sine qua non* condition for a conviction under paragraph 40(*f*) of the Act. In that case, Justice Simpson expressed herself in *obiter* on a situation which could have undermined a staff member's authority in a very specific context where the accused had laughed at the on-duty correctional officer. That *obiter* in no way bound the court.

[14] Furthermore, that situation does not apply to the facts in this matter because the applicant is charged with having undermined the authority of a correctional officer for having impeded a search by swallowing a substance he was holding in his hand, and not for having laughed out loud at the officer. In the circumstances of a search, a staff member's authority can be undermined if the inmate does not comply, regardless of whether other inmates are present or not.

[15] In the present case, the disciplinary court found that the applicant had undermined the correctional officer's authority when he swallowed the substance he was holding in his hand, thereby impeding the search, even though no other inmate was present.

[16] This finding is not unreasonable. It falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law and does not warrant the Court's intervention.

[17] For these reasons, the application for judicial review is dismissed.

JUDGMENT

THE COURT ORDERS that the application for judicial review be dismissed.

"**Danièle Tremblay-Lamer**"
Judge

Certified true translation

Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1503-10
STYLE OF CAUSE:	RHÉAUME TREMBLAY v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Montréal, Quebec
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