Federal Court  Cour fédérale

Date: 20140316

Docket: T-1185-13

Citation: 2014 FC 363

Ottawa, Ontario, April 16, 2014

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

BRIAN OBEYESEKERE

Applicant

and

THE ATTORNEY GENERAL OF CANADA and THE INDEPENDENT CHAIRPERSON OF COLLINS BAY INSTITUTION

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] An inmate of a federal penitentiary was convicted of disobeying a justifiable order of a staff member under paragraph 40(a) of the *Corrections and Conditional Release Act*, SC 1992, c 20 [the Act]. He now applies for judicial review of his conviction pursuant to subsection 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7.

[2] Brian Obeyesekere (the applicant) seeks to have the conviction set aside and an order directing that he be acquitted and his file corrected. In the alternative, he asks that the matter be

sent back to be heard by a different independent chairperson. The applicant also asks for costs on a solicitor-and-client basis.

I. Background

[3] The applicant is an inmate of the Collins Bay Institution. On April 13, 2013, an emergency lock up was ordered there and a few days later, the applicant was notified of the following charge arising from those events:

> I/M OBEYESEKERE FPS 877090D disobeyed a direct order to lock up in an emergency. Two announcements were made on the unit PA "emergency lock up." OBEYESEKERE remained on the phone. I ordered him to lock up and in response, he waved his hand at me and said, "ya, ya" or something to that effect. I/M OBEYESEKERE proceeded to lock up when the phone was disconnected from the security post. He has been charged i[illegible] the recent past for delaying an institutio[illegible] formal coun[illegible].

II. Decision

[4] The offence was categorized as serious and the matter was heard by an independent chairperson on June 19, 2013. The chairperson convicted the applicant at the end of the hearing.

[5] His reasons were concise. First, the chairperson rejected the idea that the applicant should be held to a higher standard because he is the inmate committee chairman. Then he summarized all of the evidence that he had seen and heard, which included testimony from the charging officer, the applicant, a couple other inmates and a video showing the events in question.

[6] The chairperson found that the applicant hung up the phone shortly after being approached by the officer. The chairperson had no problem with his actions up to this point and would have acquitted him if the applicant had returned to his cell immediately.

[7] However, the applicant did not do so. Rather, he went over to pick up his laundry, then milled about for around a minute before walking slowly back to his cell. The chairperson was therefore left with no reasonable doubt that the applicant disobeyed the officer's direct order to lock up and he found the applicant guilty.

[8] Following that, he invited arguments on the appropriate sanction and he gave the applicant a warning.

III. Issues

[9] This application raises the following issues:

1. What is the standard of review?
2. Did the chairperson err by convicting the applicant for his actions following the phone call?
3. Was the conviction otherwise unreasonable?

IV. Applicant's Submissions

[10] The applicant says that the standard of review is correctness for all the issues raised. In his view, the chairperson had no authority to consider matters not described in the charge and so

he views it as a question of true jurisdiction. Further, it is a question of statutory interpretation and he says the chairperson has no greater experience relative to the Courts and should not be granted any deference on questions of law. He also added at the hearing that it was a matter of procedural fairness, which also attracts a correctness standard.

[11] The applicant relies on subsection 25(1) of the *Corrections and Conditional Release Regulations*, SOR/92-620 [the Regulations], which requires that the notice "describe the conduct that is the subject of the charge." Here, the notice only said that the applicant had failed to hang up the phone when ordered to do so and no reference was made to the conduct for which he was convicted. Therefore, he says the decision should be set aside.

[12] The officer gave a statement saying that the applicant followed orders after hanging up the phone and the applicant says the chairperson should not have ignored that. Further, the applicant legitimately explained that he was retrieving his possessions and that, based on past experience, he knew he had enough time to return to his cell before it would be locked up. The applicant says those explanations should have raised a reasonable doubt in the chairperson.

[13] As well, the applicant states that the chairperson failed to consider the allegations of bias against the charging officer, which was relevant to the credibility of the charges against him. The applicant says that also should have caused the chairperson to reasonably doubt the applicant's guilt.

[14] Finally, the applicant points out that he has limited financial means and was forced to expend those scarce resources by hiring a lawyer. Since the decision of the chairperson was patently improper, he says he should be awarded costs on a solicitor-and-client basis.

V. Respondents' Submissions

[15] The respondents argue that the standard of review is reasonableness and they cite *Gendron v Canada (Attorney General)*, 2012 FC 189 at paragraph 15, 405 FTR 125 [*Gendron*], for the proposition that "[t]he judicial discretion in relation with disciplinary matters must be exercised sparingly and a remedy ought to be granted only in cases of serious injustice." The respondents say this case does not raise any questions of procedural fairness or jurisdiction, only questions of fact or mixed fact and law.

[16] The respondents then argue that the offence was proven. The applicant has never questioned that the order was justifiable and here the applicant received it three times (twice from the PA System and once from the officer). Further, the evidence showed that inmates were expected to return to their cells immediately when an emergency lock up was called and the video shows that the applicant did not do so. The respondents say it was reasonable for the chairperson to infer from this that he intended not to return immediately to his cell and thereby intended to disobey the order.

[17] Further, the respondents say that the chairperson both heard and considered the evidence of the officer's bias, but nevertheless found the testimony and the video evidence credible. That finding attracts deference.

[18] The respondents also advanced an alternative argument in the event that correctness is the appropriate standard of review. In this case, they say the applicant was afforded every procedural right; he was convicted of the same offence with which he was charged and the notice itself disclosed the evidence against him. He always knew the jeopardy he faced and the applicant himself led evidence about the events that occurred after the phone call, so it could not have been unexpected.

VI. Analysis and Decision

Issue 1 - What is the standard of review?

[19] I do not entirely agree with either party regarding the standard of review. For one thing, the applicant's reliance on the true questions of jurisdiction category is misplaced. In *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paragraph 34, [2011] 3 SCR 654, Mr. Justice Marshall Rothstein nearly abolished that category altogether with these words:

> The direction that the category of true questions of jurisdiction should be interpreted narrowly takes on particular importance when the tribunal is interpreting its home statute. In one sense, anything a tribunal does that involves the interpretation of its home statute involves the determination of whether it has the authority or jurisdiction to do what is being challenged on judicial review. However, since *Dunsmuir*, this Court has departed from that definition of jurisdiction. Indeed, in view of recent jurisprudence, it may be that the time has come to reconsider whether, for purposes of judicial review, the category of true questions of jurisdiction exists and is necessary to identifying the appropriate standard of review. However, in the absence of argument on the point in this case, it is sufficient in these reasons to say that, unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of "its own

> statute or statutes closely connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review.

[20] That category may still have some life left to it in an appropriate case, but this is not such a case. Rather, the applicant's argument is that the chairperson was "granted specific statutory authority to consider only cases brought before him under charges described in ss. 25(1) of the CCRR's [the Regulations]," and that he decided to "enlarge his jurisdiction" by considering allegations not set out in the charge sheet. That argument depends entirely on the broad concept of jurisdiction that the Supreme Court of Canada has rejected.

[21] On the other hand, the provision in question is about notice requirements and is therefore procedural in nature. In *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 43, [2009] 1 SCR 339 [*Khosa*], the Supreme Court said that "procedural issues (subject to competent legislative override) are to be determined by a court on the basis of a correctness standard of review." Arguably, the reference to legislative override suggests that correctness review might be limited to the common law duty of fairness and leave intact the presumptions regarding statutory interpretation. However, I disagree for the reasons given by Mr. Justice Ian Binnie in his concurring decision in *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 129, [2008] 1 SCR 190 [*Dunsmuir*]:

> [A] fair procedure is said to be the handmaiden of justice. Accordingly, procedural limits are placed on administrative bodies by statute and the common law. These include the requirements of "procedural fairness", which will vary with the type of decision maker and the type of decision under review. On such matters, as well, the courts have the final say. The need for such procedural safeguards is obvious. Nobody should have his or her rights,

> interests or privileges adversely dealt with by an unjust process. Nor is such an unjust intent to be attributed easily to legislators.

[22] I will therefore apply the correctness standard when applying subsection 25(1) of the Regulations.

[23] As for the other issues, however, I agree with the respondents that the reasonableness standard should apply. All of the applicant's arguments challenge the chairperson's findings of fact or assessment of the evidence. Those types of questions almost always attract a standard of reasonableness (see *Dunsmuir* at paragraph 53), and here the chairperson heard all the evidence orally and was in a much better position than I am to decide them. Deference is required. This means that I will not intervene if the chairperson's decision is transparent, justifiable, intelligible and within the range of acceptable outcomes (see *Dunsmuir* at paragraph 47; *Khosa* at paragraph 59). As the Supreme Court held in *Khosa* at paragraphs 59 and 61, a court reviewing for reasonableness cannot substitute its own view of a preferable outcome, nor can it reweigh the evidence.

Issue 2 - Did the chairperson err by convicting the applicant for his actions following the phone call?

[24] Section 42 of the Act provides the following:

42. An inmate charged with a disciplinary offence shall be given a written notice of the charge in accordance with the regulations, and the notice	42. Le détenu accusé se voit remettre, conformément aux règlements, un avis d'accusation qui mentionne s'il s'agit d'une infraction

must state whether the charge is minor or serious.	disciplinaire mineure ou grave.

Additional requirements are added by subsection 25(1) of the Regulations:

25. (1) Notice of a charge of a disciplinary offence shall	25. (1) Notice of a charge of a disciplinary offence shall
(a) describe the conduct that is the subject of the charge, including the time, date and place of the alleged disciplinary offence, and contain a summary of the evidence to be presented in support of the charge at the hearing; and	(a) describe the conduct that is the subject of the charge, including the time, date and place of the alleged disciplinary offence, and contain a summary of the evidence to be presented in support of the charge at the hearing; and
(b) state the time, date and place of the hearing.	(b) state the time, date and place of the hearing.

[25] Both sections use the word "shall" which is imperative and makes these requirements obligatory (see *Interpretation Act*, RSC 1985, c I-21, s 11). As well, the purpose of these provisions was identified in *Savard v Canada (Attorney General)*, [1997] FCJ No 105 (QL) at paragraph 6, 128 FTR 271 [*Savard*]. There, Mr. Justice Yvon Pinard said that it was intended "to give an inmate charged with a disciplinary offence a specific and particular means of preparing a full and complete defence."

[26] Therefore, how much information needs to be provided will depend on how much an inmate has to know in order to do so. In some circumstances, it may be enough simply to state that an order was given and allege that it was disobeyed, as the respondents allege. For instance, in *Richer v Saskatchewan Penitentiary*, 2006 FC 1188 at paragraphs 9 and 10, 300 FTR 249, Mr.

Justice Barry Strayer held that the following description of an offence under subsection 54(b) of the Act was sufficient:

> On 2005-07-20 at about 1308 inmate Richer FPS 9278328 refused to provide a urine sample when demanded pursuant to Section 54(b) of the *Corrections and Conditional Release Act* and Commissioner's directive 566-10.

[27] However, other circumstances may require more. For instance, in *Langlois v Canada (Attorney General)*, 2004 FC 702 at paragraph 12, 260 FTR 186, Mr. Justice Pierre Blais, then writing for this Court, said that it was not enough for a notice to disclose only that a knife was found in an inmate's cell, but should also have disclosed where the knife was in the cell and in what circumstances it was discovered.

[28] Here, I am not satisfied that the notice adequately disclosed that the applicant could be convicted for his actions after he had hung up the phone. To the contrary, the notice expressly said that "I/M OBEYESEKERE proceeded to lock up when the phone was disconnected from the security post." That implies that he was thereafter obeying the order, and that only by his delay in hanging up the phone was he alleged to be disobedient. Further, he was also provided with the officer's signed statement, in which she said: "At this point, the telephone power was disconnected via the security post switch. It wasn't until this time that I/M OBEYESEKERE chose to follow orders given him" (emphasis added). Far from allowing him to prepare a defence to the charge that his actions after hanging up the phone were an offence, the notice and the evidence disclosed to him reasonably led him to believe his actions complied with the order he was given.

[29] I have reviewed the notice of a charge given to the applicant and I cannot find anything to support a charge relating to the period of time following the applicant's hanging up the phone, but that is apparently the time frame in question as the chairperson stated:

> It is not only an issue of credibility, because I think that the video played a very integral part of this particular case. And it very clearly, in my view, shows Mr. Obeyesekere on the phone, the officer approaches him and fairly shortly thereafter he is off the phone. At that point I don't have a problem with Mr. Obeyesekere and what he is doing. He hung up the phone fairly quickly after that. It is what he did after that that causes me concern.
>
> It shows very clearly that he did not return to his cell forthwith after hanging up the phone. He picked up his laundry. The video confirms that, and Mr. Obeyesekere gave that in his own evidence.
>
> He then walks around the area where the phones are for a moment, going in the opposite direction of where his cell is, and then walking – and I will say very nonchalantly and slowly, in my view – it would appear, without any care or concern about what was transpiring at that time.
>
> He finally did lock up and went to his cell. But did he disobey a direct order to lock up in an emergency? The only conclusion I can come to after having heard the witnesses and viewing the video is that he did not obey the officer's direct order to lock up immediately.
>
> If he had hung up the phone and proceeded directly to his cell without picking up his laundry, without staying in the area where the phones were, then I would have had a reasonable doubt and certainly I would have been bound by law to resolve it in his favour. But having seen the portion of the video, that it was agreed to by Mr. Obeyesekere himself that he did not lock up immediately, but he picked up his laundry, and the fact that he milled about that area for a minute or so, I am satisfied beyond any reasonable doubt that Mr. Obeyesekere did in fact disobey a direct order. Accordingly, the Court will find Mr. Obeyesekere guilty of this charge.

(Applicant's application record, pages 65 and 66)

[30] Therefore, I find the notice of the charge did not meet the requirements of subsection 25(1) of the Regulations, and it was unfair for the chairperson to convict the applicant.

[31] Of course, not all failures to obey an obligatory statutory process are fatal to a decision (see *Society Promoting Environmental Conservation v Canada (Attorney General)*, 2003 FCA 239 at paragraphs 26 to 35, [2003] 4 FC 959). Rather, the consequences of non-compliance will generally flow from analyzing "the object of the statute, and the effect of ruling one way or the other" (see *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development*, [1995] 4 SCR 344 at paragraph 42, 130 DLR (4th) 193 per McLachlin J. (in concurring reasons)).

[32] Here, these notice requirements exist because it is important that anyone facing serious penalties have an opportunity to defend himself or herself (see *Gifford v Canada (Attorney General)*, 2007 FC 606 at paragraph 15, 314 FTR 46). This notice actively misled the applicant into believing that his conduct after the phone call complied with the order he was given, and it is impossible to know now whether he could have defended himself more successfully had he known the full extent of his jeopardy. I am therefore satisfied that the decision should be set aside.

[33] Moreover, it would make no sense to refer the matter back to the officer as no proper written notice of a charge exists for the charge that he was convicted of by the chairperson. The notice of charge did not comply with subsection 25(1) of the Regulations. As well, the

chairperson stated that he would have acquitted the applicant of the conduct relating to the hanging up of the phone.

[34] As to the applicant's file being corrected, I would point out that subsection 24(1) of the Act states the following:

24. (1) The Service shall take all reasonable steps to ensure that any information about an offender that it uses is as accurate, up to date and complete as possible.	24. (1) Le Service est tenu de veiller, dans la mesure du possible, à ce que les renseignements qu'il utilise concernant les délinquants soient à jour, exacts et complets.

[35] If the applicant's file is not updated, he can resort to this section to ensure that the Correctional Service complies with subsection 24(1).

[36] Finally, the applicant requested his costs on a solicitor-and-client basis. I am not persuaded to make such an award. The respondents' conduct in this matter does not justify any such order. I will grant the applicant his costs of the application.

[37] Because of my finding, I need not deal with the remaining issues of the case.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The decision of the chairperson convicting the applicant is set aside.

2. The applicant shall have his costs of the application according to Column III of the table to Tariff B.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

Corrections and Conditional Release Act, SC 1992, c 20

24. (1) The Service shall take all reasonable steps to ensure that any information about an offender that it uses is as accurate, up to date and complete as possible.	24. (1) Le Service est tenu de veiller, dans la mesure du possible, à ce que les renseignements qu'il utilise concernant les délinquants soient à jour, exacts et complets.
…	…
39. Inmates shall not be disciplined otherwise than in accordance with sections 40 to 44 and the regulations.	39. Seuls les articles 40 à 44 et les règlements sont à prendre en compte en matière de discipline.
40. An inmate commits a disciplinary offence who (a) disobeys a justifiable order of a staff member;	40. Est coupable d'une infraction disciplinaire le détenu qui : a) désobéit à l'ordre légitime d'un agent
…	…
42. An inmate charged with a disciplinary offence shall be given a written notice of the charge in accordance with the regulations, and the notice must state whether the charge is minor or serious.	42. Le détenu accusé se voit remettre, conformément aux règlements, un avis d'accusation qui mentionne s'il s'agit d'une infraction disciplinaire mineure ou grave.
…	…
43. (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.	43. (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.
44. (1) An inmate who is found guilty of a disciplinary offence is liable, in accordance with the regulations made under paragraphs 96(i) and (j), to one or more of the following:	44. (1) Le détenu déclaré coupable d'une infraction disciplinaire est, conformément aux règlements pris en vertu des alinéas 96i) et j), passible d'une ou de plusieurs des peines suivantes :

(a) a warning or reprimand;

…

(f) in the case of a serious disciplinary offence, segregation from other inmates — with or without restrictions on visits with family, friends and other persons from outside the penitentiary — for a maximum of 30 days.

a) avertissement ou réprimande;

…

f) isolement — avec ou sans restriction à l'égard des visites de la famille, des amis ou d'autres personnes de l'extérieur du pénitencier — pour un maximum de trente jours, dans le cas d'une infraction disciplinaire grave.

***Federal Courts Act*, RSC 1985, c F-7**

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

…

(3) On an application for judicial review, the Federal Court may

(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

…

(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

***Interpretation Act*, RSC 1985, c I-21**

11. The expression "shall" is to be construed as imperative and the expression "may" as permissive.	11. L'obligation s'exprime essentiellement par l'indicatif présent du verbe porteur de sens principal et, à l'occasion, par des verbes ou expressions comportant cette notion. L'octroi de pouvoirs, de droits, d'autorisations ou de facultés s'exprime essentiellement par le verbe « pouvoir » et, à l'occasion, par des expressions comportant ces notions.

Relevant Regulatory Provisions

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

25. (1) Notice of a charge of a disciplinary offence shall	25. (1) L'avis d'accusation d'infraction disciplinaire doit contenir les renseignements suivants :
(a) describe the conduct that is the subject of the charge, including the time, date and place of the alleged disciplinary offence, and contain a summary of the evidence to be presented in support of the charge at the hearing; and	a) un énoncé de la conduite qui fait l'objet de l'accusation, y compris la date, l'heure et le lieu de l'infraction disciplinaire reprochée, et un résumé des éléments de preuve à l'appui de l'accusation qui seront présentés à l'audition;
(b) state the time, date and place of the hearing.	b) les date, heure et lieu de l'audition.
(2) A notice referred to in subsection (1) shall be issued and delivered to the inmate who is the subject of the charge, by a staff member as soon as practicable.	(2) L'agent doit établir l'avis d'accusation disciplinaire visé au paragraphe (1) et le remettre au détenu aussitôt que possible.
…	…
31. (1) The person who conducts a hearing of a disciplinary offence shall give the inmate who is charged a reasonable opportunity at the hearing to	31. (1) Au cours de l'audition disciplinaire, la personne qui tient l'audition doit, dans des limites raisonnables, donner au détenu qui est accusé la possibilité :
(a) question witnesses through the person conducting the hearing, introduce evidence, call witnesses on the inmate's behalf and examine exhibits and documents to be considered in the taking	a) d'interroger des témoins par l'intermédiaire de la personne qui tient l'audition, de présenter des éléments de preuve, d'appeler des témoins en sa faveur et d'examiner les pièces et les documents

of the decision; and	qui vont être pris en considération pour arriver à la décision;
b) make submissions during all phases of the hearing, including submissions respecting the appropriate sanction.	b) de présenter ses observations durant chaque phase de l'audition, y compris quant à la peine qui s'impose.

***Federal Courts Rules*, SOR/98-106**

400. (1) The Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.	400. (1) La Cour a le pouvoir discrétionnaire de déterminer le montant des dépens, de les répartir et de désigner les personnes qui doivent les payer.
(2) Costs may be awarded to or against the Crown.	(2) Les dépens peuvent être adjugés à la Couronne ou contre elle.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1185-13

STYLE OF CAUSE: BRIAN OBEYESEKERE v
THE ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: MARCH 4, 2014

REASONS FOR JUDGMENT AND JUDGMENT: O'KEEFE J.

DATED: APRIL 16, 2014

APPEARANCES:

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