Federal Court

Cour fédérale

Date: 20171109

Docket: T-161-17

Citation: 2017 FC 1028

Ottawa, Ontario, November 9, 2017

PRESENT: The Honourable Mr. Justice Pentney

BETWEEN:

ALLAN MACDONALD

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a final level grievance decision made by the Assistant Commissioner of Correctional Services Canada ("CSC"), upholding the first level decision to dismiss the Applicant's grievances. The Applicant is an inmate of Warkworth Institution, a federal penitentiary. He filed several grievances relating to the seizure of his personal computer, including that: (i) it was done without justification, (ii) the process took too long to complete, and (iii) the Respondent has failed to acknowledge that this seizure imposed additional burdens on him because of his disability, which makes it difficult and painful for him

to communicate in writing other than through the use of his computer. The dismissal of these grievances is what gives rise to this proceeding.

[2] At the outset of the hearing, counsel for the Respondent indicated that the style of cause should be amended to reflect the correct entity: the Attorney General of Canada. The Applicant agreed, and the style of cause is to be amended accordingly.

I. Background

[3] The Applicant owns a personal computer, which he is permitted to possess under the applicable policies and directives of CSC, subject to various restrictions (Commissioner's Directive 566-12 – *Personal Property of Offenders*). He has a medical condition called "essential tremors", which is a progressive neurological disorder that causes his hands to shake, and is most prominent with tasks such as eating or writing. The Applicant uses his computer to communicate, since his medical condition makes handwriting both difficult and painful.

[4] On October 3, 2014, his entire computer system and peripheral devices were seized by the Respondent's officials, together with other inmates' personal computers. On October 30, 2014, the Applicant submitted a request for the return of his computer. The Deputy Warden of Warkworth replied two days later, advising that his computer would be searched sometime after November 7, 2014. The Applicant then received a memorandum distributed to the inmate population of Warkworth Institution, explaining that the computers were seized pursuant to sub-section 52(1) of the *Corrections and Conditional Release Act*, SC 1992, c 20 [*CCRA*], because prison authorities had discovered "concealed contraband USB drives with images and programs

that are unauthorized." The memorandum indicated that CSC had hired a contractor to inspect all inmate computers, and that the computers would be returned once it was determined that they did not have unauthorized material and had not been used to access the contraband USB drives. In the meantime, all grievances and complaints were to be held in abeyance pending completion of the inspection. The memorandum concludes: "Management recognizes the length of time this is taking but are committed to having this completed as quickly as possible."

[5] The Applicant filed his first grievance related to this seizure on November 4, 2014; he complained of the delay in conducting the search of his computer, and noted that he needed his computer to communicate because of his medical condition. He filed a second grievance on November 7, 2014, which appears to have been triggered by the memorandum explaining the reasons for the seizure and inspection of the computers, and that grievances would be held in abeyance. The second grievance raises three issues: (i) it asserts that the Warden and Deputy Warden were impermissibly "making policy" and were not complying with CSC policy and regulations regarding the return of inmate property and the handling of grievances; (ii) it repeats the assertion that the Applicant needed his computer to communicate due to his medical condition; and (iii) it claims that he was being punished because someone else had broken the rules regarding computer use. The Applicant's computer was searched and returned to him on December 23, 2014, but CSC flagged a concern regarding the video card found on his computer and they demanded that this be removed from his system. He filed a third grievance relating to this demand, saying that the card had previously been found to be compliant with CSC requirements.

[6] There was a delay in dealing with these grievances, though the record shows that the Applicant was advised of the status of his matters on a regular basis. He eventually filed a fourth grievance complaining about the delay, but it was not specifically dealt with in the decision under review.

[7] On December 9, 2016, the Assistant Commissioner for Policy for the Respondent issued a decision dealing with the first three grievances together, since they "connote a common underling theme; your concern with your personal computer system." On the first two grievances, the decision finds that the Applicant's computer system was returned to him on December 23, 2014. The decision also notes that the issue of the video card has been resolved because, upon further inquiry, it was found not to be "outside allowable standards", as set out in the applicable policy statement; as such, the video card did not need to be removed from his computer. The decision concludes by stating: "As your computer system has been returned to you, and the video card's compliance with Commissioner's Directive 566-12 has been confirmed, these grievances require no further action."

II. Issues

[8] The Applicant has raised a number of concerns regarding the process and decision, but in my view this case raises three legal issues:

(1) Should the grievance decision be overturned because the original seizure of the computer equipment was not reasonable or in accordance with applicable laws and policies?

(2) Was there unreasonable delay in dealing with these grievances, and if so, what is the legal effect of that delay?

(3) Does the failure to address the disability issue render the grievance decision unreasonable?

III. Analysis

A. *Standard of Review*

[9] The issues here each involve questions of mixed fact and law in the application of the decision-maker's "home statute"; therefore, the appropriate standard of review is reasonableness: *Dunsmuir v New Brunswick,* 2008 SCC 9; *Johnson v Canada (Correctional Service)*, 2014 FC 787, at para 37.

(1) Was the seizure reasonable and in accordance with applicable laws and policies?

[10] The Applicant submits that the seizure was unreasonable and not in compliance with the legal requirements. He says that the fact that some other inmate(s) may have broken the rules about computers does not provide reasonable grounds to seize his equipment. Furthermore, he says that he has always complied with CSC requirements regarding the use of personal computer equipment, and the fact that he relies on it to communicate due to his medical condition means that he has even more reason to comply than other inmates. He argues that the final level grievance decision should be overturned because it erred in not finding the search to have been unreasonable and illegal.

[11] The explanation provided in the memorandum from the Deputy Warden clearly indicates that the computers were seized because contraband USB drives had been discovered, which

contained unauthorized images and programs. Since a USB drive can only be useful if it is connected to a computer, the Respondent argues that it was both necessary and reasonable for the authorities to seize and inspect all inmates' personal computer equipment.

[12] The legal framework for this analysis begins with the *CCRA*, which sets out the general principles that animate the federal correctional system and impose obligations on CSC in regard to the treatment of inmates, and in relation to the overall security of the institutions for inmates and staff (see, for example, ss. 3, 4, 70 and 87). Of particular relevance here is Rule 52(1) of the *Corrections and Conditional Release Regulations*, SOR/92-620 [*CCRR*] which governs the searches of inmate cells:

52 (1) Subject to subsection (3), where a staff member believes on reasonable grounds that contraband or evidence of an offence is located in an inmate's cell, the staff member may, with the prior authorization of a supervisor, search the cell and its contents.	**52 (1)** Sous réserve du paragraphe (3), lorsque l'agent a des motifs raisonnables de croire que des objets interdits ou des éléments de preuve relatifs à la perpétration d'une infraction se trouvent dans la cellule du détenu, il peut, avec l'autorisation préalable d'un supérieur, procéder à la fouille de la cellule et de tout ce qui s'y trouve.

[13] The Applicant's argument that there were not "reasonable grounds" for seizing his computer equipment rests essentially on the proposition that wrongdoing by another inmate in relation to computer equipment is not sufficient to give rise to reasonable grounds for a search of his computer. Here there is no dispute that contraband USB drives were found containing unauthorized material, or that this was the trigger for the seizure and inspection of the inmates' computer equipment. In view of the legal obligation on the Respondent to maintain a safe and

secure environment for inmates and staff, and the obvious concerns that the contraband USB drives would have caused for prison authorities, I cannot accept the Applicant's argument on this point. In light of my findings below, it is not necessary to deal further with this issue beyond finding that, on the facts here, the Respondent had reasonable grounds to search the Applicant's computer in accordance with Rule 52(1) and the applicable policies. The final level grievance decision should not be overturned on this point.

(2) Was there unreasonable delay, and if so, what is the legal effect of that delay?

[14] The chronology in this matter is simple: the computers were seized for inspection on October 2, 2014; the Applicant's three grievances were filed between November 2014 and January 2015; the grievance decision was dated December 9, 2016. The only other relevant fact is that the Applicant's computer was returned to him on December 23, 2014, so he has not been deprived of its use for the entire period these grievances have been extant.

[15] There are two aspects of delay here: first, the period of time taken for the inspection of his computer; second, the time it took to render the grievance decision.

[16] The Applicant argues that the Respondent violated the provisions of Rule 59 of the *CCRR*, which governs the return or forfeiture of items seized from inmates. Sub-section 59(1) states that CSC "shall, as soon as practicable, notify the owner in writing, if the owner is known, of the seizure." Paragraph 59(3)(d) further states that "An item referred to in subsection (1) shall be returned to its owner where… (d) the owner requests that that item be returned to the owner within 30 days after being notified of the seizure."

[17] The Applicant argues that this means that the Respondent was under an obligation to return his computer within 30 days, yet it took from October 3rd until December 23rd to do so. The Applicant also argues that the Respondent ignored the "undue hardship" he experienced during this period due to his inability to communicate with his family, his legal counsel, or the Courts (he had several legal matters underway during this period). He argues that when inmates do not follow the rules there are consequences, and contrasts that with the situation where CSC officials do not follow the *CCRR*. He says there should be consequences for the Respondent's officials when they breach clear rules.

[18] The Respondent acknowledges that there was some delay in conducting the inspections, and that there has been a delay in dealing with the grievances. However, the Respondent submits that this did not cause the Applicant any specific prejudice such that the delay caused procedural unfairness. The Applicant was kept informed of the status of his grievances and, as required by the rules governing the handling of inmate grievances, he was advised each time when the time period was extended. Indeed, the receipt of the twelfth notice of extension provoked the Applicant to file his fourth grievance.

[19] The Respondent argues that mere delay is not enough to render a process unfair; absent any finding of specific prejudice to the party involved, delay cannot provide a basis for overturning a decision under administrative law principles.

[20] Here the Applicant argues that the delay caused him particular harm, because it denied him the opportunity to communicate with his family, his lawyer, and the Courts. I will deal with

this aspect of the matter below. No other harm or prejudice has been established here, and the Applicant did not claim relief based on the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*]. I would add that it is not clear whether he would have any such claim even if one were asserted.

[21] In view of my determination on the third issue, it is not necessary for me to deal further with this question, other than to note that it may be that a very lengthy delay in rendering a decision can be presumed to cause harm in some circumstances. That is not the situation here, and so I will say no more on this topic.

(3) Does the failure to address the disability issue render the decision unreasonable?

[22] From the very outset, the Applicant has made clear that one key aspect of his complaints was that the seizure of his computer equipment had a particularly severe impact on him because of his medical condition. In his initial grievance, the Applicant states: "I have a medical condition that makes it hard and painful for me to write. I also have 2 cases before the Courts. Legal files, testimonial documents are on my computer. I need my computer system returned immediately." The Applicant also submitted a Doctor's report regarding his medical condition, together with a document that states the point even more clearly:

> I need constant use of a computer system because of this medical/physical disability. It is the only way I can communicate clearly in writing. Letters to family, lawyers, the Courts and now a University Law Course through George Brown College require a computer for legible correspondence.

[23] The Applicant argues that the Respondent's failure to acknowledge his medical condition and the associated need for him to use a computer gives rise to a need for a court order to ensure that his disability is recognized and that specific time limits are fixed so that he is not denied this essential form of communication. He states that if he used a wheelchair, or required a hearing aid, CSC would take that into account in its treatment of him as an inmate; all that he is seeking is equal treatment. The Applicant makes reference to the *Charter*, as well as the requirement in the *CCRA* that CSC "shall take into consideration an offender's state of health and health care needs" in making decisions about the offender (s. 87). He also invokes s. 70 of the *CCRA*, which requires that CSC "shall take all reasonable steps to ensure that penitentiaries, the penitentiary environment, the living and working conditions of inmates and the working conditions of staff members are safe, healthful and free of practices that undermine a person's sense of personal dignity." He essentially seeks an order in the nature of *mandamus*, to require the Respondent to recognize his disability and to set strict time limits on how long he can be deprived of his computer.

[24] The Respondent argues that the legal requirements for an order in the nature of *mandamus* have not been met here. In particular, the Respondent says that since the Applicant's computer has been returned to him, the order he seeks is not necessary. In order to continue to have access to his computer, all that he has to do is to continue to comply with the applicable rules and regulations regarding computer use. The Respondent acknowledges, however, that there is no reference in the final grievance decision to this aspect of the Applicant's complaints.

[25] The law tells me that I must review the reasons for a decision as an aspect of reasonableness; inadequacy of reasons is not a stand-alone ground to overturn a decision. The question is whether the reasons demonstrate the "justification, transparency and intelligibility" of the decision. If the reasons "allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16).

[26] This is not to be a "treasure hunt for errors": *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 54. However, one of the badges of an unreasonable decision is the complete failure to engage with an essential issue: *Kok v Canada (Citizenship and Immigration)*, 2005 FC 77 at para 46; *Smoudi v Canada (Citizenship and Immigration)*, 2005 FC 1139 at para 9. Here there is simply no basis to assess the "justification, transparency and intelligibility" of the decision since there is no indication in the record or the decision that the authorities ever considered the disability aspect of the Applicant's grievances. A minimum requirement of a reasonable process and outcome is that the decision-maker engage with the relevant issues and facts. Here there is simply no indication that this was done.

[27] The Respondent argues that the Applicant is seeking access to a computer to communicate, and that he now has access so no order is required. In addition, the Respondent says not enough is known about his disability-related needs, or what the appropriate comparator group is, and thus the Court is being asked to speculate whether CSC acted unreasonably in not

considering or addressing the Applicant's needs flowing from his disability. Finally, the Respondent asserts that it would not be appropriate to narrow the discretion available under the applicable laws or policies regarding inmates' personal computers and institutional security requirements. There is not sufficient evidence on the record to support an order that would require advance notice of any seizure, or fix a specific time by which the Applicant's computer must be returned to him.

[28] In this case the Applicant has made very clear from the outset that one key aspect of his complaints was the failure of CSC to acknowledge that he has a medical condition which makes it difficult and painful for him to communicate in writing other than through the use of a computer. This was stated in his original two grievances, and he provided supporting information in the form of a doctor's report. Although the Applicant does not invoke the legal concept of the Respondent's "duty to accommodate" his disability, he does refer to the "undue hardship" that the seizure caused him.

[29] There is no question that the Respondent is subject to the *Charter*, as well as the *Canadian Human Rights Act*, (RSC 1985, c H-6). Both impose a duty to accommodate the particular needs of persons with a disability, unless doing so would cause "undue hardship" (*Drennan v Canada (AG)*, 2008 FC 10 at paras 29, 41). It is also accepted that the onus on the person seeking accommodation is quite limited – it is sufficient that the employer or service provider be aware of a disability-related need to trigger the duty (*British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 at para 54; *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*,

[1999] SCR 868 at paras 18-22; *Council of Canadians with Disabilities v VIA Rail Canada Inc*, 2007 SCC 15 at paras 126-127). This process may involve some dialogue between the person seeking the accommodation and the authorities who are responsible to provide it, to ensure that the particular disability-related needs of the person are actually being met.

[30] Here, none of that occurred because it appears that the Respondent has not acknowledged the disability aspect of the Applicant's grievances. I therefore find that the final level grievance decision must be overturned, because there is simply no indication in the decision or the surrounding record that the decision-maker ever engaged with the disability aspect of the Applicant's grievances. I cannot find the outcome to be reasonable in the absence of any consideration of this claim. I therefore grant an order of *certiorari* only in relation to this aspect of the matter.

[31] In doing so, I hasten to add that I am not granting any of the other orders sought by the Applicant, nor am I pronouncing on whether the claim for accommodation due to a disability is valid in light of the evidence. It is not clear whether the evidence supports the claim advanced in its entirety, or whether there are other equally available and effective means for the Applicant to communicate. I note that there is an access to justice aspect to his claim, in that he says that he was denied the opportunity to communicate with counsel and the Courts, but the Applicant provided no details on this point. In addition, the Applicant asks for specific rules to be fixed as to how his computer can be seized, how long he can be deprived of its use, and other related remedies. I do not grant any of these orders, since there is no evidence to indicate whether these are necessary or feasible.

[32] It will be for the Respondent to consider how it wishes to address this aspect of the grievances going forward. My order here simply requires that this be considered; nothing in these reasons should be interpreted as an indication of whether the claim for accommodation due to a disability is justified, nor how such accommodation should be accomplished in the particular environment of a federal penitentiary.

[33] I note in passing that what the Applicant is seeking, at its core, is recognition that he has a disability. There is a precedent for this. In *Poulin v Canada (Attorney General)*, 2008 FC 811 [*Poulin*], the Court granted an application for judicial review by an inmate who sought to overturn a decision denying him a scanner for his personal computer, which he needed because of his visual impairment. Although scanners were strictly prohibited under the Commissioner's Directive regarding personal computers, an exception could be made for "hardware, software and peripherals required to provide computer accessibility for those with visual or physical impairment when reviewed and approved by the Deputy Commissioner of the Region." In this case, the issue concerned whether a scanner for the inmate posed too great a security risk for the institution, but there was an acknowledgement by CSC that the applicant had a disability and that some accommodation should be considered. That is what the Applicant seeks here; and again, the *Poulin* decision is instructive because it demonstrates the type of analysis and dialogue that may be involved in accommodating a particular individual's disability-related needs in the context of a federal penitentiary.

[34] For the reasons above, I grant the application for judicial review, on the narrow grounds that the Respondent's failure to consider the disability-related aspect of the Applicant's grievances makes the final level grievance decision unreasonable.

[35] The Applicant has sought costs, including the costs of retaining counsel to assist him in preparing materials for this application. The Applicant represented himself at the hearing, and provided no other information as to the costs he has incurred in relation to this matter. The Applicant has been partially successful in this application, and he should be reimbursed by the Respondent for his disbursements directly related to this application for judicial review: see *Yu v Canada (Attorney General)*, 2011 FCA 42 at para 38.

JUDGMENT in T-161-17

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended to substitute the Attorney General of Canada as Respondent, effective immediately.

2. The application for judicial review is granted, and the matter is remitted back to Correctional Services of Canada to re-consider the Applicant's grievances only in relation to the disability-related aspects of his grievances.

3. The Respondent shall reimburse the Applicant for his disbursements directly related to this application for judicial review.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-161-17
STYLE OF CAUSE:	ALLAN MACDONALD v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 11, 2017
JUDGMENT AND REASONS:	PENTNEY J.
DATED:	NOVEMBER 9, 2017

APPEARANCES:

Allan MacDonald	FOR THE APPLICANT (ON HIS OWN BEHALF)
Stewart Phillips	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT