Federal Court  Cour fédérale

Date: 20180718

Docket: T-1829-17

Citation: 2018 FC 750

Ottawa, Ontario, July 18, 2018

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

**MIKE LAYCOCK, TAMMY WILSON,
BRIAN GODDEN, SHELDON BATISTA,
BRENDA WILKIE, JOHN HOGEWONING,
JENNIFER LEOPP, MATHEW BLOCK,
DEANA PETERS, ANNA ENGLISH,
MICHAEL CALLAGHAN,
NICHOLAS NARAIN, JOHN MCCLELLAN,
PAUL CHALMERS, TANYA ANDERSON,
IAN STUART, GABRIEL CHOI,
MELINDA DALLA VECCHIA,
SCOTT TIESSEN, CASSANDRA TEMPLE,
SHELBY GROSSMAN,
GRAEME MORRISON, CLINT ISTACE,
NABIL TARIQ, LLOYD LEINS,
TRACY MERCIER, CORRINA LANYON,
NUBIA VANEGAS, DON REELIE,
MELISSA SAUNDERS,
AMBER INDLEKOFER,
SCOTT DOBRANSKI, MIRIAM CAVANAILE,
AARON DYCK, NICK BROOKS,
JASON PETERS, SHAWN KUTROWSKI,
AND STEVE LATULIPPE**

Respondents

JUDGMENT AND REASONS

[1] This application for judicial review seeks to set aside a decision rendered by an Appeals Officer (Adjudicator) of the Occupational Health and Safety Tribunal acting under the authority conferred by subsection 146.1(1) of the *Canada Labour Code* [Code], RSC, 1985, c L-2. That appeal was brought from an order issued to the Correctional Service of Canada [CSC] by a Minister's Delegate under subsection 145(2) of the Code directing CSC to rectify a hazardous condition at a medium security correctional facility [the Mountain Institution] at Agassiz, British Columbia. The underlying direction required CSC to conduct an exceptional search of the prison to mitigate the risk posed by the loss of a "lethal" cutting tool [shears] from the Corcan upholstery shop on October 30, 2014. The Adjudicator determined that the Delegate's direction was well-founded and it was, accordingly, confirmed.

[2] The facts relevant to this application are not in dispute and are thoroughly canvassed in the Adjudicator's 30-page decision. It is sufficient for these purposes to understand that the concern of the Respondent correctional officers was with CSC's refusal to carry out a full search of the prison after the shears went missing. That decision prompted a work refusal which, in turn, led to a reconsideration and ultimately to the conduct of an exceptional search of the facility under section 53 of the *Corrections and Conditional Release Act*, SC 1992, c 20. Despite that effort, the missing shears were never found.

[3] Notwithstanding CSC's about-face, it proceeded with an appeal seeking to have the Delegate's direction reversed. CSC took the position that there was no evidence of actual danger

to correctional staff represented by the missing shears; alternatively, if there was a hazard, it was an inherent condition of prison employment and one that could be managed by routine security measures.

[4] The Adjudicator did not accept CSC's arguments. He acknowledged that there are ever-present dangers in the prison environment and that exceptional searches are disruptive and unpleasant. Nevertheless, past practices in similar situations had led to full searches of living units and inmate cells. The Adjudicator's assessment of the risk appropriately focused on the question of whether the disappearance of a lethal object from the upholstery shop represented a "serious threat to the life or health" of the correctional staff which warranted a full search of the institution. He addressed this issue in the following, thoughtful way:

> [99] I am persuaded that, under the circumstances described in the evidence, the respondents have established that they were facing a condition that could reasonably be expected to be a serious threat to their health or life, for the following reasons.
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> [100] First, the nature of the missing tool itself, which can be used as a dangerous weapon, without further manufacturing, is rather convincing. The snips' blades are razor sharp and pointed at the end. It is small when folded (4,25 inches) and can be easily concealed or hidden. The employer minimized the significance of the snips being used as a weapon, suggesting that many objects, including a pen, could be used as a weapon and inflict serious injuries to a person. I venture to speculate that it is unlikely that the nearly full complement of correctional officers that day would have engaged in a work refusal had the missing object been a pen.
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> [101] Second, the physical areas where the shop is located and the work conditions of the inmates. The upholstery shop supervisor could not have inmates in sight at all times. They were allowed to have breaks outside of the shop. Inmates could use the gate close to the grounds buildings to access the living units without being searched. The area is fenced by a chain-linked fence and there are ample opportunities to pass the tool through the mesh across to the living units. I am not persuaded that the inmate movement controls and protocols referred to by the employer eliminate the possibility

that the snips may have found their way to the general population. There is no video surveillance of the upholstery area. The area located behind the CORCAN upholstery shop adjacent to the chapel is only supervised periodically by security staff and office staff. There are many locations to hide or conceal objects in the area.

[102] Thirdly, the institutional context within which the condition has occurred is also relevant to my finding. It was established that there was an attempted murder by an inmate on another inmate, using a sharpened butter knife and in plain sight of officers approximately two weeks before the work refusals. Such security incident is said to be *not* normal for a medium security facility and was found to constitute an "elevated" behavioural and security issue. There were also documented concerns of security threats at Mountain Institution in the weeks prior to the work refusals, relating to possible violence against sex offenders by other inmates, which would cause potential victims to arm themselves with weapons. Six (6) weapons were seized in the month of October only, which is a record high for the Institution, where the average over the last few years is about nine (9) weapons seized per year.

[103] In light of those facts, I am faced with two possible hypothesis: the respondents' thesis, accepted by the ministerial delegate, that it is very likely that the quick snips had somehow made their way to the general inmate population, and could be used against an officer, which is a condition that could reasonably be expected to be a serious threat to life. The employer's theory is that the likelihood of the snips being in the hands of an inmate, or in an area accessible to inmates, was low, in light of the searches and frisks of inmates with a metal detector, interviews of the inmates in the CORCAN shop, the lack of intelligence pointing to pre-incidents indicators and the possible use of the snips for another purpose (i.e. hobby craft) rather than as a weapon. Or it may simply have been misplaced in the shop, accidentally dropped in waste, in an open box or one of the many areas of the shop where it would be difficult to locate.

[104] In my view, it is possible to speculate on what happened to the quick snips and the answer will never be known. With the passage of time and the fact that they were never found nor used by an inmate, one may argue that the employer's assessment was the correct one. Conversely, it could also be said that the exceptional search of the institution conducted in compliance of the direction had resulted in the tool being flushed down the toilet by the inmate who might have had it in his possession, as many

witnesses have suggested. We are therefore dealing with speculation on both sides.

[105] We must therefore fall back on basic principles and on the fundamental objective of the *Code* which is to prevent work place accidents and injuries. I am unable to rule out the possibility advanced by the respondents that the snips may have found their way in the general population or be hidden purposely for future use. I do not agree with the appellant's contention that the risk is purely hypothetical and speculative, because it rests on the assumption, unsupported by any collateral evidence, that the snips have been deliberately stolen and concealed for future use by an inmate, with the intent to use them as a weapon. The likelihood of the snips being in the general population is an equally valid proposition, in light of the particular context unveiled by the evidence. That being so, the risk of spontaneous assault with a weapon is not far-fetched.

[106] The fact that there is no intelligence gathered through dynamic security practices that staff members may be at risk, is not determinative. Assaults against correctional officers have occurred spontaneously and without warning, as established in the testimony of Messrs. Plentanga, Wilson and Steward. The testimony of Ms. Charmaine Weiss, a correctional officer employed at the Kent maximum security Institution, who was the victim of a brutal and spontaneous assault by an inmate and the picture depicting the wound to her face, are rather striking. The inmate used a hand-made weapon made with the blade of a disposable razor. The physical and psychological damage resulting from such an assault may be profound. In my view, such occurrence is a reasonable possibility in the context of the work performed by correctional officers and in light of the circumstances established by the evidence. I would characterize it as a latent threat, rather than conjecture or speculation.

[107] As the Court reasoned in *Martin* and *Verville*, when attempting to ascertain whether a condition could reasonably be expected to be a serious threat, one is necessarily dealing events that may only materialize in the future. In that sense, for a serious threat to exist, those potential events must be found to be reasonably expected to occur, as a reasonable possibility.

[108] Therefore, accepting as reasonable the possibility that the snips were deliberately passed on to the general population, the fear that an inmate could use them as a weapon, either in self-defence or in an offensive attack, is not an unreasonable inference to be drawn in the broader context described above. The

set of snips was missing and they could have made their way in the general population, raising the possibility that a correctional officer could be seriously injured or killed if the snips were to be used in an assault. The respondents were therefore facing, at the time of the refusal, a condition that could reasonably be expected to be a serious threat to their health or life.

[109] I have given significant weight to the testimony of the correctional officers who testified at the hearing, with the exception perhaps of Mr. Latulippe's, whom I found had a tendency to exaggerate some of the facts and was more argumentative than factual. On the whole, I am persuaded that correctional officers were genuinely concerned about their safety. That concern was based on their firm belief, given their appreciation of the institutional context leading to the refusal and their experience in working in a penitentiary environment, that the snips had likely found their way to the general population. The fact that the near totality of the correctional officers on duty believed this to be the case is not insignificant. A penitentiary is a world of its own. In that very context, the Federal Court in *Verville* has recognized the importance of the opinion of certain witnesses who have more experience than the appeals officer in the subject matter at issue:

> [51] A reasonable expectation could be based on expert opinions or even on opinions of ordinary witnesses having the necessary experience when such witnesses are in a better position than the trier of fact to form the opinion.

[110] Consequently, that possibility being real, it follows that it could present a serious threat to the respondents' health or life, before the condition can be altered. There is no need to belabour that point, as the possible use of the quick snips as a weapon is capable of inflicting severe and lethal injuries. While correctional officers are provided stab-protection vests, the vest does not protect all areas of the body: it would not prevent life threatening lacerations to the head, neck or other unprotected parts of the body. Assaults of correctional staff may occur without warning, in a matter of a few seconds, and without having received intelligence or indicators that attacks against staff were contemplated. Clearly, the threat can therefore materialize before the condition can be corrected, thereby satisfying the third element of the test as set out in *Ketcheson*.

[111] The employer has referred to a number of mitigation measures that it has put in place, which purports to minimize the

> risk of a tool finding its way into the general population and the risk of assaults against correctional officers. It is not necessary to repeat those security measures at length. In my view, while those measures are highly appropriate, they address the basic framework within which correctional officers carry out their duties, in the normal scheme of things and in the day to day operations of the penitentiary.
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> [112] The respondents have submitted that the tool control measures in effect at the time of the refusal (such as the colour-code, the missing tool report, etc.) were not followed. While this assertion is supported by the evidence, it is not material to the issue raised by the appeal. I note that the employer has taken additional measures after the refusal, to ensure that the tools used in the shops wold [sic] be adequately controlled. Those measures are as follows: inmates are no longer able to leave the area of employment until all tool cribs are inspected and locked; all inmates must sign out the tools on a register that is controlled by the supervisor; tool cribs cannot be left unlocked during the work day; all tools are to be accounted for in a crib or secure location at the end of a work day. These measures are designed to prevent the recurrence of situations such as the present case, where someone notices, at the end of a work shift, that a tool is missing.
>
> [113] However, what is at issue in the present case are the measures to be taken *after it is noticed that the quick snips are missing* and the real possibility that they are accessible to the general inmate population.
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> [114] It results from the above analysis that on the day of the refusal, a condition existed in the respondents' work place that constituted a danger to them, within the meaning of the *Code*.

[5] The Attorney General contends that the Adjudicator's decision was unreasonable because it expresses a fundamental error in the application of the definition of "danger" found in subsection 122(1) of the Code. That provision states:

danger means any hazard, condition or activity that could reasonably be expected to be an imminent or serious threat to the life or health of a person exposed to it before the hazard	***danger*** Situation, tâche ou risque qui pourrait vraisemblablement présenter une menace imminente ou sérieuse pour la vie ou pour la santé de la personne qui y est

or condition can be corrected or the activity altered; (*danger*)	exposée avant que, selon le cas, la situation soit corrigée, la tâche modifiée ou le risque écarté. (*danger*)

[6] The above definition differs from the earlier version by the removal of the word "potential" in front of the words "hazard", "condition", and "activity". This change is said to have profoundly altered the statutory test for finding an actionable danger which, prior to the addition of "potential", had required a finding of actual danger: see *Canada (Correctional Service) v Glen Brown and Kevin Kunkel,* 2013 OHSTC 20 at para 73, 2013 CarswellNat 4491.

[7] There are a number of problems with the Attorney General's position, beginning with the standard of review. Although the Attorney General accepts that deference is owed to the Adjudicator's decision, what is actually urged upon the Court is a *de facto* correctness review.

[8] What the Court is required to apply is a standard of reasonableness which affords to the statutory decision-maker considerable latitude in the interpretation of its home statute. A very recent restatement of this point can be found in *Canada (Canadian Human Rights Commission) v Canada (Attorney General),* 2018 SCC 31 at para 55, [2018] SCJ No 31:

> [55] In reasonableness review, the reviewing court is concerned mostly with "the existence of justification, transparency and intelligibility within the decision-making process" and with determining "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 14). When applied to a statutory interpretation exercise, reasonableness review recognizes that the delegated decision maker is better situated to understand the policy concerns and context needed to resolve any ambiguities

> in the statute (*McLean*, at para. 33). Reviewing courts must also refrain from reweighing and reassessing the evidence considered by the decision maker (*Khosa*, at para. 64). At its core, reasonableness review recognizes the legitimacy of multiple possible outcomes, even where they are not the court's preferred solution.

[9] It was not an unreasonable interpretation of the current definition of "danger" to conclude that the disappearance of a razor-sharp lethal object from the upholstery shop, possibly into the general prison population, would represent "a serious threat to the life or health" of correctional officers working there. The removal of the previous reference to a "potential hazard or condition" does not meaningfully alter the import of the current provision. Both are concerned with prospective risks to the life or health of employees exposed to a dangerous condition.

[10] I also reject the Attorney General's argument that the Adjudicator misapplied the relevant jurisprudence. The Adjudicator was alive to the legislative change and applied the leading authorities of *Correctional Service of Canada v Ketcheson*, 2016 OHSTC 19, 2016 CarswellNat 6830 and *Keith Hall & Sons Transport Limited v Robin Wilkins*, 2017 OHSTC 1, 2017 CarswellNat 800. Those decisions do not attribute any particular significance to the legislative change relied upon by the Attorney General. In the *Keith Hall* decision, the danger issue was framed in the following way:

> [52] However, the direction is based on the existence of a serious threat to Mr. Wilkins' life or health as opposed to an imminent threat. Again, to conclude to the existence of a serious threat, it is not necessary to establish precisely the time when the threat will materialize. One must assess the probability that the alleged hazard, condition or activity will cause serious (i.e., severe) injury or illness at some point in the future. The issue is whether the circumstances are such that the threat can reasonably be expected to result in serious injury or illness, even if the harm to the life or health of the employee might not be imminent.

[11] To a similar effect is the decision in *Ketcheson*, above, at paras 199 to 200:

> [198] In the New Shorter Oxford English Dictionary (1993) the word "threat" is defined as: "a person or thing regarded as a likely cause of harm". Thus, it can be said that based on that definition, a threat entails the probability of a certain level of harm. Some risks are threats and some are not. A very low risk, either because of low probability or because of low severity, is not a threat. Both probability and severity each have to reach a minimum threshold before the risk can be called a threat. It is clear that a low risk hazard is not a danger. A high risk hazard is a danger.
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> [199] To simplify matters, the questions to be asked whether there is a "danger" are as follows:
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> 1) What is the alleged hazard, condition or activity?
>
> 2) a) Could this hazard, condition or activity reasonably be expected to be an imminent threat to the life or health of a person exposed to it?
>
> Or
>
> b) Could this hazard, condition or activity reasonably be expected to be a serious threat to the life or health of a person exposed to it?
>
> 3) Will the threat to life or health exist before the hazard or condition can be corrected or the activity altered?
>
> [200] The purpose of the Code will be served by this interpretation of "danger". The various provisions of the Code address all non-trivial hazards and risks. This interpretation of "danger" covers a small subset of hazards and risks that people in the work place may face. If the other means of addressing OHS concerns are dealt with adequately by the work place parties it should be rare that a person is faced with a "danger". Conversely, inadequate efforts using other mechanisms in the Code will result in "dangers" that can then best be addressed by work refusals.

[12] Although the Adjudicator also applied the pre-amendment decision in *Verville v Canada (Service correctionnel)*, 2004 FC 767, [2004] FCJ No 940, it was only in relation to the likelihood or expectation of injury from an extant hazard and as to when a residual hazard can be

said to be a normal condition of employment. These are not matters of controversy in this case and, as the Adjudicator noted, *Verville* continues to offer useful guidance on those issues.

[13] Notwithstanding the reversal of the initial decision not to conduct an exceptional search of the institution, the Attorney General remains concerned that exceptional searches should not become a default response in similar cases. However, this position raises its own concerns. If the loss of a lethal object, possibly into the general prison population, does not justify taking full mitigation measures, one is left to wonder when such measures will ever be required going forward. There can be no doubt that the missing shears were extremely dangerous in a medium risk correctional environment. As the Adjudicator noted, the tool control measures in place at the time were lax and even those measures were seemingly not followed. Those lapses rendered it more likely that the shears had been deliberately moved out of the upholstery shop. At the relevant time the institution was also quite tense.

[14] The risk environment that the Adjudicator considered was unique. For instance, the shears did not require any modification to be weaponized. Some hazards are greater than others and some are more or less inherent to prison employment. Presumably the more robust tool control practices now in place will substantially reduce the chance of recurrences of this sort.

[15] In this case, the Adjudicator thoroughly reviewed the evidence. He then applied that evidence to a very reasonable and well-established interpretation of the statutory provision. This was a fact-laden exercise leading to a determination of the likelihood of serious harm. Great deference is owed by a reviewing Court where highly specialized expertise is applied in the

employment context. This is particularly true in a prison environment where multifactorial considerations abound. The Adjudicator was alive and sensitive to these nuances and, in particular, to the need to separate the specific risk presented here from the background risks that are always present in a correctional setting. There is no basis to interfere with the Adjudicator's findings or with his legal conclusions and the application is accordingly dismissed.

[16] Costs are payable by the Attorney General to the Respondents in the amount of $2,500.00.

JUDGMENT IN T-1829-17

THIS COURT'S JUDGMENT is that this application is dismissed with costs payable to the Respondents in the amount of $2,500.00.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1829-17
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v MIKE LAYCOCK, TAMMY WILSON, BRIAN GODDEN, SHELDON BATISTA, BRENDA WILKIE, JOHN HOGEWONING, JENNIFER LEOPP, MATHEW BLOCK, DEANA PETERS, ANNA ENGLISH, MICHAEL CALLAGHAN, NICHOLAS NARAIN, JOHN MCCLELLAN, PAUL CHALMERS, TANYA ANDERSON, IAN STUART, GABRIEL CHOI, MELINDA DALLA VECCHIA, SCOTT TIESSEN, CASSANDRA TEMPLE, SHELBY GROSSMAN, GRAEME MORRISON, CLINT ISTACE, NABIL TARIQ, LLOYD LEINS, TRACY MERCIER, CORRINA LANYON, NUBIA VANEGAS, DON REELIE, MELISSA SAUNDERS, AMBER INDLEKOFER, SCOTT DOBRANSKI, MIRIAM CAVANAILE, AARON DYCK, NICK BROOKS, JASON PETERS, SHAWN KUTROWSKI, AND STEVE LATULIPPE
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