Federal Court		Cour fédérale

Date: 20090916

Docket: T-686-08

Citation: 2009 FC 921

Ottawa, Ontario, September 16, 2009

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

ALLAN MacDONALD

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for a Declaration pursuant to subsection 18(1) of the *Federal Courts Act* that the Warden of Joyceville Institution as represented by the Defendant is in breach of the Order of this Honourable Court.

BACKGROUND

[2] Allan MacDonald is an inmate at Warkworth Institution. He is serving a life sentence for first-degree murder of an off-duty police officer.

[3] On September 10, 2004 Mr. MacDonald was convicted of a minor disciplinary offence at Joyceville Institution. He had been charged under subsection 40(f) of the Corrections Conditional Release Act (CCRA) of being disrespectful towards a CSC staff member. The only evidence was the written report of the charging officer. Mr. MacDonald applied for judicial review of his conviction. On July 31, 2007, Justice Simpson concluded the written charge did not include enough information to justify a conviction and set aside the disciplinary conviction: *Macdonald v. Canada (Attorney General),* 2007 FC 798. Justice Simpson ordered that the all records of the conviction be removed from the CSC files:

> This Court orders that, for reasons given above, this application for judicial review is allowed and the Conviction is hereby set aside and all records thereof are to be removed from the Respondent's files relating to the Applicant.

[4] In 2008 Mr. MacDonald was accused of becoming abusive and was segregated as a result. In the course of review at that time, Mr. MacDonald became aware that CSC written reports in his files contained references to the 2004 incident. The references in question are the portions in capitals set out as:

> ** AS PER CD 701, ANNEX A, A FILE REVIEW TOOK PLACE IN REGARDS TO THE FEDERAL COURT RULING (2007.07.31) IN FAVOUR OF OFFENDER MACDONALD "QUASHING" THE INSTITUTIONAL DISCPLINARY COURT CONVICTION WHICH WAS BASED ON SUBSECTION 40(F) OF THE CORRECTIONS AND CONDITIONAL RELEASE ACT WHICH INDICATES: "40. AN INMATE COMMITS A DISCIPLINARY OFFENCE WHO (F) IS DISRESPECTFUL OR ABUSIVE TOWARD A STAFF MEMBER IN A MANNER THAT COULD UNDERMINE A STAFF MEMBER'S AUTHORITY." ON MAY 13, 2008 THIS REPORT WAS UNLOCKED AND HAS BEEN AMENDED TO INCLUDE THE CHANGES. THE ORIGINAL DATE OF THE REPORT IS 2005.06.20 AND WAS AUTHORED BY PAROLE OFFICER W. COOK. CHANGES WERE MADE BY ACTING PAROLE OFFICER ANDREW VANHORN UNDER THE AUTHORITY OF CCRA SECTION 24 AND MANAGER OF ASSESSMENT AND INTERVENTION ELISABETH HOEDICKS AT JOYCEVILLE INSTITTUTION. CHANGES ARE MADE BELOW UNDERNEATH THE ORIGINAL INFORMATION. **

> …
>
> … On 04/09/08 he received a minor charge for being disrespectful to staff in connection with an incident where he laughed at an officer in a way that undermined their authority on the way back to his cell. As a result of this incident he served 4 days in segregation.
>
> ** THE RELIABLE INFORMATION PROVIDED BY THE CHARGING CORRECTIONAL OFFICER INDICATES THE INCIDENT DID OCCUR. HOWEVER, IN QUESTION, AND FOUND IN FAVOUR OF THE OFFENDER MACDONALD, WAS WHETHER THE INCIDENT UNDERMINED THE OFFICER'S AUTHORITY. FEDERAL COURT RULED THAT THE INCIDENT DID NOT UNDERMINE THE OFFICERS AUTHORITY AND THE INSTITUTIONAL DISCIPLINARY COURT CONVICITION WAS "QUASHED". AFTER A FILE REVIEW ANY REFERENCE TO THIS "QUASHED" CONVICTION HAS BEEN DULY NOTED AND WILL NOT BE TAKEN INTO CONSIDERATION WITH REGARDS TO ANY DECISION MAKING. OFFENDER MACDONALD WAS ORIGINALLY CONVICTED IN DISCPLINARY COURT ON SEPTEMBER 10, 2004. THE FEDERAL COURT RULING IN HIS FAVOUR IS DATED JULY 31, 2007 AND JUDGEMENT GIVEN BY SANDRA J. SIMPSON. **

[5] The Applicant seeks a declaration that the Respondent has breached the order of this Court, and that his files be reviewed and any reference to the 2004 incident be expunged.

ISSUE

[6] I am of the view that the issue is simply did the CSC comply with the order of Justice Simpson?

STANDARD OF REVIEW

[7] In *Dunsmuir v. New Brunswick,* 2008 SCC 9, the Supreme Court of Canada found that an exhaustive analysis to determine the standard of review is not necessary in every case. Rather, if there is jurisprudence that has determined the standard of review in prior cases, it is sufficient determination of the standard of review.

[8] The Applicant submits that the duty to act fairly is triggered by section 24 of the *Corrections and Conditional Release Act*, S.C. 1992 c.20. The Applicant submits that the standard is

correctness based on the duty of prison officials to act fairly: *De Maria v. Regional Classification Board*, [1986] F.C.J. No. 171; and *McInroy v. Canada*, [1985] F.C.J. No. 448. These decisions are mainly prison transfer cases and are not directly on point with respect to the issue at hand.

[9] The Respondent submits that the proper standard of review is reasonableness. In *Brown v. Canada*, 2006 FC 463, Justice Mactavish found that the standard of review in matters of this sort was reasonableness. *Brown* was a judicial review regarding a decision refusing to remove information relating to allegations of an assault from the applicant's record. In *Brown*, Justice Mactavish affirmed Justice Lemieux's pragmatic and functional analysis in *Tehrankari v. Canada*, [2000] F.C.J. No. 495 where Justice Lemieux concluded that:

> I would apply the standard of reasonableness *simpliciter* if the question involved is either the application of proper legal principles to the facts or whether the refusal decision to correct information on the offender's files was proper.

[10] I agree with the analysis in *Brown and Tehrankari*. The standard of review when applying the statutory requirements of section 24, CCRA to the facts the standard of reasonableness is appropriate.

LEGISLATION

[11] Section 24 of the CCRA states:

Accuracy, etc., of information	Exactitude des renseignements
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.

Correction of information	Correction des renseignements
(2) Where an offender who has been given access to information by the Service pursuant to subsection 23(2) believes that there is an error or omission therein,	(2) Le délinquant qui croit que les renseignements auxquels il a eu accès en vertu du paragraphe 23(2) sont erronés ou incomplets peut demander que le Service en effectue la correction; lorsque la demande est refusée, le Service doit faire mention des corrections qui ont été demandées mais non effectuées.
(*a*) the offender may request the Service to correct that information; and	
(*b*) where the request is refused, the Service shall attach to the information a notation indicating that the offender has requested a correction and setting out the correction requested.	

ANALYSIS

[12] The Applicant submits that he was segregated in 2008 on the basis that he was acting in a similar manner as the 2004 incident which he had denied. This conviction was set aside by Court Order. He submits the CSC was in breach of Justice Simpson's Order because the CSC records continue to contain information regarding the Applicant's conduct in the 2004 incident.

[13] The Respondent submits that they have complied with the Court Order. The reports in issue were amended by inserting the information that the minor charge had been quashed by the Federal Court, along with a notation that the quashed conviction was not to be taken into consideration for decision making purposes.

[14] In the CPPR report there is reference to the initial incident giving rise to the grievance and that the minor charge occurred. Any mention of the conviction had been removed from the CPPR report. The Respondent submits that the current CSC policy is that Incident Reports and Notification of Charge forms are not removed from the offender's file. Rather, all relevant documents are amended to indicate that he was found not guilty.

[15] In *Brown*, at para. 25, Justice Mactavish noted that there is a difference between allegation of an incident and an assertion that the event took place. I agree with the reasoning in *Brown* that there are valid reasons why the CSC should keep a record of allegations made against an inmate if only as a record of interactions between an inmate and a CSC officer.

[16] The July 31, 2007 Court Order sets aside "the Conviction" and directs "all references thereof are to be removed from the Respondent's files relating to the Applicant." (emphasis added) The wording of the Order clearly refers to the conviction. As such the Order does not include references to the fact that the allegation was made.

[17] Regretfully, that is not the end of the matter. The CSC insertion editorializes on the Court decision. The CSC official's assertion that "The reliable information provided by the charging officer indicates the incident did occur" coupled with the use of the word "quashed" in quotations (a term not used in the Court order) is disingenuous and is not in compliance with the clear direction of the Court Order. If CSC was uncertain about the Court Order's intent, it could seek clarification

from the Court. It is not open for CSC officials to assert the equivalent of a conviction by adding editorial comment.

[18] The application for judicial review is granted in part. The offending reference will be removed and replaced by:

> **ON JUDICIAL REVIEW FEDERAL COURT RULED THAT THE EVIDENCE WAS INSUFFICIENT FOR A CONVICTION OF UNDERMINING THE OFFICER'S AUTHORITY AND THE INSTITUTIONAL DISCIPLINARY COURT CONVICTION WAS SET ASIDE. AFTER A FILE REVIEW ANY REFERENCE TO THIS CONVICTION WILL NOT BE TAKEN INTO CONSIDERATION WITH REGARDS TO ANY DECISION MAKING. OFFENDER MACDONALD WAS ORIGINALLY CONVICTED IN DISCIPLINARY COURT ON SEPTEMBER 10, 2004. THE FEDERAL COURT RULING IN HIS FAVOUR IS DATED JULY 31, 2007 AND JUDGMENT GIVEN BY SANDRA J. SIMPSON.**

[19] Having regards to the divided success in this matter, I make no order for costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is granted in part.

2. The offending reference will be removed and replaced by:

   **ON JUDICIAL REVIEW FEDERAL COURT RULED THAT THE EVIDENCE WAS INSUFFICIENT FOR A CONVICTION ON UNDERMINING THE OFFICER'S AUTHORITY AND THE INSTITUTIONAL DISCIPLINARY COURT CONVICTION WAS SET ASIDE. AFTER A FILE REVIEW ANY REFERENCE TO THIS CONVICTION WILL NOT BE TAKEN INTO CONSIDERATION WITH REGARDS TO ANY DECISION MAKING. OFFENDER MACDONALD WAS ORIGINALLY CONVICTED IN DISCPLINARY COURT ON SEPTEMBER 10, 2004. THE FEDERAL COURT RULING IN HIS FAVOUR IS DATED JULY 31, 2007 AND JUDGMENT GIVEN BY SANDRA J. SIMPSON. **

3. No order is made for costs.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	Allan MacDonald v. The Attorney General of Canada
PLACE OF HEARING:	Toronto, Ontario
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