Federal Court  Cour fédérale

Date: 20101021

Docket: T-1544-09

Citation: 2010 FC 1028

Ottawa, Ontario, October 21, 2010

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

MICHAEL AARON SPIDEL

Applicant

and

CANADA (ATTORNEY GENERAL)

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] Michael Aaron Spidel, the Applicant, is a prisoner incarcerated at Ferndale Institution (Ferndale) in Mission, British Columbia. He seeks judicial review of a decision made by a prison official which required the Applicant to choose between two paid jobs within the prison in accordance with a prison policy that no prisoner could hold more than one paid position.

II. BACKGROUND

[2] In January 2009 the Inmate Committee at Ferndale created the new position of Secretary-Treasurer. Previously, the Inmate Committee had been composed of two positions. The third position was approved by the Institutional Head at Ferndale, the Warden.

[3] The Applicant at the time was a Social Development Clerk which was a paid position within Ferndale.

[4] In July 2009 the Applicant was elected to the new position of Secretary-Treasurer by acclamation.

[5] The position of Secretary-Treasurer fell within the Commissioner's Directive 083 which stipulates that all such positions are to be held as full-time paid positions.

[6] Shortly after being elected Secretary-Treasurer of the Committee, the Applicant was advised that he could not occupy two full-time paid positions at once, and that he had to choose between his job as Social Development Clerk and his new position as Secretary-Treasurer of the Inmate Committee.

[7] On September 2, 2009, the Applicant filed a First-Level Offender Grievance Presentation (First Level Grievance). He subsequently advised that the grievance would be put on hold pending

the outcome of this judicial review application, which he filed before receiving any response to his initial grievance.

[8] This litigation has been the subject of several motions, five in all, brought by the Applicant without success.

[9] The Applicant takes the position that he is not seeking to obtain double the inmate pay for holding two positions, as he contends that the Regulations preclude such “double dipping”. He further indicates that he is not challenging the policies, the *Corrections and Conditional Release Act*, or the Regulations. Therefore, it is difficult to know on what precise legal basis the Applicant says that the decision is *ultra vires*.

[10] This judicial review presents two issues:

(a) Whether the Court should hear the judicial review in spite of the Applicant failing to exhaust his remedies under the grievance process; and

(b) Whether the decision is unreasonable or otherwise without merit.

[11] In view of the Court’s disposition on the first issue, it will refrain from making comment on the merits, if any, of the second issue.

III. ANALYSIS

[12] There is no standard of review in respect of the first issue. The Court is required to consider relevant factors and to reach a reasonable conclusion regarding the exercise of its discretion. The Court's discretion with respect to hearing a judicial review where there is an adequate alternative remedy is subject to consideration of whether there are exceptional circumstances which might otherwise require the Court to hear a matter despite the existence of an adequate alternative remedy (see *Froom v. Canada (Minister of Justice)*, 2004 FCA 352 and *McMaster v. Canada (Attorney General)*, 2008 FC 647 at paras. 23 and 27).

[13] The Applicant raises a number of arguments, not always easy to follow, to establish that there are exceptional circumstances. These arguments include that the grievance process outcome is a foregone conclusion since the policy concerning two paid positions was established by the Head of Ferndale; that there are systemic delays within the prison grievance process; that this particular grievance was subject to mishandling and should have been dealt with at a higher priority level.

[14] The Applicant has claimed that the Regulations anticipate and permit the processing of a judicial review before the internal grievance process has been exhausted and relies on section 81(1) of the Regulations which provides for a stay of the grievance process when an inmate pursues an alternate remedy. That argument was specifically rejected by Justice Dawson in *McMaster*, above, at paragraphs 32-33 and I concur with that conclusion.

> **32** Subsection 81(1) operates to stay the grievance procedure while an inmate pursues an alternate remedy. That regulatory stay cannot operate to take away or limit the Court's discretion on

judicial review. Similarly, the Supreme Court did nothing more than recognize that the existence of the grievance procedure did not preclude an inmate from pursuing a legal remedy. The Court did not alter existing jurisprudence concerning how a reviewing court would treat an application for judicial review where existing grievance procedures were not followed.

33 I find support for this interpretation of subsection 81(1) in the *Giesbrecht* decision, cited above. There, Justice Rothstein wrote at paragraph 13:

> In the present case, it is the filing of the judicial review itself that precludes the grievance from proceeding by reason of subsection 81(1). However the judicial review is within the control of the Court, as contrasted with the Canadian Human Rights proceeding in Hutton over which the Court had no control. It would be anomalous if an applicant, by filing a judicial review application, could arrogate to himself the determination of whether the grievance process constituted an adequate alternative remedy. That is a decision for the Court. Judicial review is a discretionary remedy and the Court cannot be precluded from determining that an adequate alternative remedy exists simply because an applicant has filed a judicial review application. Subsection 81(1) of the Regulations is not intended to detract from the Court's discretion in this respect. It is simply a statutory stay of grievance procedures where another proceeding is commenced in order to avoid a multiplicity of concurrent proceedings involving the same matter. Subsection 81(1) does not act as a bar to the grievance proceeding should the Court find that procedure to be an adequate alternative remedy and thereby dismiss the judicial review. This argument of the applicant must therefore fail.

[15] In *Gates v. Canada (Attorney General)*, 2007 FC 1058, I held the following:

26 In my view, the Court should not lightly interfere with the complaints process. There are strong policy and statutory reasons

> for requiring inmates to use this process. It is in cases of compelling circumstances, such as where there is actual physical or mental harm or clear inadequacy of the process that a departure from the complaints process would be justified (this is not an exhaustive list of the circumstances justifying departure from the usual process).
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> **27** As recognized in *May v. Ferndale Institution*, [2005] 3 S.C.R. 809, the complaints process is not a complete statutory code. While not dealing with freedom issues, as in *Ferndale*, the Court is faced with health issues which are serious matters. In addition, the factual background as to cold temperatures in the TDU is not substantially challenged which gives credence to the health concerns brought on by cold temperatures.
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> **28** As outlined earlier in these Reasons, s. 81 specifically contemplated an inmate seeking alternative legal remedies to those internal remedies. It is consistent with this regulatory scheme that, where there are urgent substantive matters and evident inadequacy in the internal procedures, it is open to the Court to consider the issue of remedial action.

[16] Therefore, there must be compelling or exceptional circumstances before the Court will exercise its discretion to trump the grievance process. Those circumstances do not exist in this case.

[17] The grievance process generally has been held to be adequate (see *Giesbrecht v. Canada* (1998), 148 F.T.R. 81 (T.D.) and *Ewert v. Canada (Attorney General)*, 2009 FC 971).

[18] There is no evidence that the conclusion of the Applicant's grievance process is a foregone conclusion nor is there any reason to believe that the grievance will not be fairly considered. In any event those claims are not "exceptional circumstances" which require Court intervention at this point in the grievance process.

[19] Concerning the Applicant's claims of systemic delays, it is noteworthy that there is no indication that this particular grievance has been unduly delayed. Any delay has been caused by the Applicant's choice of seeking judicial review which operates as a stay of the grievance process. It is therefore impossible at this stage to claim a systemic delay when no delay exists.

[20] With respect to the Applicant's arguments that his grievance has been frustrated, that it has not been forwarded properly up the chain of command and that somehow his case is related to another prisoner, a Mr. McDougal, it is less than clear how these arguments are relevant. If there is improper handling of the grievance, that may be rectified within the process or upon later review.

[21] The Court is unable to find any exceptional circumstances which would justify departing from the general proposition that an applicant ought to exhaust his or her available remedies within the grievance process before coming to this Court.

[22] Indeed, given the nature of this case, it would be a more useful record if, in the future, there was a complete process before the Court upon review.

[23] As stated earlier, given the Court's finding that this is a case which it ought not to hear at this stage, it will make no comment with respect to the merits of the Applicant's grievance.

[24] The issue of costs was briefly addressed before the Court. Under the circumstances, there will be no award of costs.

IV. CONCLUSION

[25] This application for judicial review is dismissed without prejudice to the right to bring a judicial review at the conclusion of the grievance process.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed without prejudice to the right to bring a judicial review at the conclusion of the grievance process.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1544-09
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APPEARANCES:

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