Cour fédérale  Federal Court

Date: 20101025

Docket: T-711-10

Citation: 2010 FC 1045

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, October 25, 2010

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

JACQUES NICOLAS

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] The *Oxford English Dictionary* defines the word "plagiarize" as "to take and use as one's own (the thoughts, writings, or inventions of another person); to copy (literary work or ideas) improperly or without acknowledgement". The issue to be decided in this case is whether the applicant handed in a plagiarized text and passed it off as his own. Mr. Nicolas, an educated man, obviously knows the definition of the word "plagiarize", but asserts that he did not commit

plagiarism in the assignment he submitted because it was preapproved by the instructors of the course in which he was registered.

[2] This is an application for judicial review made to the Federal Court, under section 18.1 of the *Federal Courts Act*, of a decision of the Director General Canadian Forces Grievance Authority, as Final Authority. While taking a course administered by National Defence, the applicant was accused of plagiarism. He was removed from the course, a note to that effect was added to his file and he is no longer permitted to register for that course. He filed a grievance that the Initial Authority denied, stating that nearly the entire assignment submitted by the applicant is similar to a text taken from the Internet and filed as evidence by the instructors. The Final Authority upheld that decision.

[3] This case is primarily the result of a misunderstanding between a student and his instructors and should never have come to court. Naturally, Mr. Nicolas did not like being called a cheat, which led to a tense atmosphere between the parties. However, since the case is now before this Court, I find that the decision of the Director General was reasonable and that the applicant was treated in a manner that respects the principles of procedural fairness.

FACTS

[4] Mr. Nicolas, a member of the Canadian Forces since 1994, was chosen to take a public affairs officers' course in June 2007. For the course, the students had to write a feature story of about 400 words on a topic of current interest. Before he began writing the assignment, the

applicant presented the topic to an instructor, who approved its theme. The day before the final assignment was to be handed in, the marker read Mr. Nicolas' article to correct any grammar and spelling mistakes. He did not comment on the content.

[5] When the final assignment was handed in, the marker had suspicions about the source and origin of the information and discovered that the applicant's text had been almost entirely copied from a text on the Internet, that no sources were given in the text and that changes had been made to the text to refer to a person whom the applicant knows.

[6] The applicant was then called before a Progress Review Board to discuss the possibility of plagiarism in the feature article. In his denial of the accusation of plagiarism, Mr. Nicolas relied on the fact that he discussed the text and his sources with several instructors before submitting the final version, and that there seemed to be no problems with it. He also asserted that a number of students were given the opportunity to repeat the exercise after having handed in an unsatisfactory assignment. Mr. Nicolas was removed from the course for plagiarism.

[7] He filed a grievance concerning his removal from the course and requested that the note regarding plagiarism be removed from his file. The grievance was denied by the Initial Authority and then by the Final Authority. Mr. Nicolas has applied for judicial review of that decision.

DECISION OF THE DIRECTOR GENERAL CANADIAN FORCES GRIEVANCE AUTHORITY – FINAL AUTHORITY

[8] The Director General denied the applicant's grievance on March 8, 2010. He first studied the Defence Public Affairs Learning Centre (DPALC) directive and policy on misconduct and then analyzed the steps taken by the Review Board that penalized the applicant.

[9] He stated that the DPALC directive describes plagiarism and outlines the responsibilities that everyone has in that respect. Directive 7-002 (DPALC), entitled "Academic Misconduct" states the following:

> Academic misconduct is improper in any academic or training institution. DPALC is no exception and as such academic misconduct will not be tolerated. Incidents of academic misconduct will be dealt with as a disciplinary and not administrative issue. Regardless, once the disciplinary process is complete, a Progress Review Board in accordance with reference A, may be convened to determine a candidate's disposition on and ability to continue with the training program.

[10] In addition, the Directive defines plagiarism as follows:

> Plagiarism is presenting another person's work without acknowledgements, whether in the same or in slightly modified form. . . . Inadvertent plagiarism occurs through the inappropriate application or use of material without referencing the original source or author. In these cases, it should be clear that the student did not have the intention to deceive. Deliberate plagiarism occurs when a student, using material from another source and presenting it as his/her own, has the intention to deceive. Common examples of plagiarism include
>
> - Word for word copying of sentences, phrases, paragraphs . . . directly or in slightly modified form (paraphrased) . . . of other persons without clearly identifying and acknowledging their origin by appropriate referencing (books,

> articles, unpublished works, working papers/notes, seminar and conference papers, internal reports, tapes etc);
> - Copying information from internet websites . . . in whole or in part and submitting it as one's own work without indicating [its]origin.

[11] Noting that no sources or references were provided in the applicant's assignment and that the content of the final assignment was the bulk of an article written by a third party, the Director General found that [TRANSLATION] "[t]here is no doubt in my mind that what the [applicant] submitted to [his] instructors meets the definition of plagiarism or academic misconduct".

[12] Regarding the process undertaken by the Progress Review Board, the Director General agreed that there were irregularities in the process leading to the applicant's removal. However, he found that those irregularities did not infringe the applicant's rights. Indeed, the applicant received oral and written notices of the alleged misconduct, had the opportunity to make his submissions and comments and obtained an impartial decision supported by reasons.

[13] The Director General concluded that it was reasonable to believe that the applicant knew the definitions of and consequences associated with plagiarism and academic misconduct. As well, the applicant suffered no prejudice. Therefore, his claim for relief was denied.

ANALYSIS

Issues

[14] This case raises the following issues:

1. What is the standard of review?
2. Did the Director General, as Final Authority, err in finding that the applicant committed plagiarism?
3. Did the Director General, as Final Authority, err in finding that the principles of procedural fairness were respected in this case?

1. Standard of review

[15] The issue of standard of review is discussed in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. At paragraph 47, Justices Lebel and Bastarche assert the following:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[16] In the case at bar, the question is one of fact. Therefore, the applicable standard of review is reasonableness.

2. Did the Director General, as Final Authority, err in finding that the applicant committed plagiarism?

[17] The applicant asserts that the Director General erred in deciding to deny his grievance and claim for relief. In fact, Mr. Nicolas submits that he was unaware of the procedure applying to plagiarism, that the documents on that subject were never signed and that no information on plagiarism or academic misconduct was provided at the start of the course. In addition, he states that the assignment was approved before he handed it in and that the preliminary proofreading should have addressed the matter of sources and not simply corrected grammar and spelling mistakes.

[18] In rebuttal, the respondent asserts that (1) the decision-maker identified the information he used in making his decision, (2) the decision-maker's finding with regard to plagiarism was reasonable, particularly in light of the comparison of the applicant's assignment with the text found on the Internet, (3) the applicant should have known about Directive 7-002 concerning plagiarism and (4) officers have a university degree, which suggests that they are aware of the rules applying to university assignments and plagiarism. The respondent therefore asserts that the applicant must have been aware that his actions constituted plagiarism.

[19] The respondent also contends that although the instructors approved the source beforehand, that approval was not an authorization to use the text in full without citing the source.

[20] Here is an excerpt of the assignment submitted by the applicant, compared with the source preapproved by his instructors:

[TRANSLATION]

Excerpt of the assignment submitted by Jacques Nicolas	**Excerpt of the source approved by the instructors and presented in the affidavit of Jacques Nicolas**
He then thought of his family's future and decided to take out life insurance. He called an insurance company that sent out an agent to him; he chose a family insurance plan that suited him and, when the conversation was over, the insurer asked him for his email address to send him the application. Disappointed, Jean told him that he didn't have an email address! "That's funny," the insurer told him, "you don't have an email address and you managed to build this empire; imagine where you would be if you had an email." Jean considered that and replied, "I would be unclogging toilets at a high technology company."	He then thought of his family's future, and decided to take out life insurance. He called an insurer, chose an insurance plan and when the conversation was over, the insurer asked him for his email to send him the application. The man told him that he didn't have an email! That's funny, the insurer told him, you don't have an email and you managed to build this empire, imagine where you would be if you had an email. The man considered that and replied, I would be unclogging johns at Microsoft.

[21] It is clear that the use of an entire text taken from the Internet without indicating the source is a deliberate act of plagiarism. When the assignment submitted by the applicant is compared with the version taken from the Internet, it is clear that the applicant copied the text from the Internet. In addition, the claimant made changes to the document to make it seem as though it was a story about his cousin, Jean, which may suggest that he was trying to trick his

instructors and pass the text from the Internet off as his own. However, it should be noted that in this case, the question of whether or not the claimant intended to plagiarize is irrelevant.

[22] Although I do not have to rule on this question, the assignment submitted by the applicant shows an utter lack of imagination and fails in every way to meet the criteria required for the writing of an academic article.

[23] I am not persuaded that the applicant was unaware of the policy on plagiarism. In fact, as the respondent states, a reasonable person, having completed university or even secondary studies, would be aware of plagiarism and therefore have general knowledge on that subject. Furthermore, ignorance of the law is no excuse. Indeed, as Lord Atkin stated in *Evans v. Bartlam*, [1937] A.C. 473, at page 479:

> The fact is that there is not and never has been a presumption that every one knows the law. There is the rule that ignorance of the law does not excuse, a maxim of very different scope and application.

[24] I do not agree with the applicant's argument that the role of the instructor who proofread the final draft, before the final assignment was handed in, was also to correct the draft's contents. The applicant also states that the instructor should have raised his doubts concerning plagiarism at this stage and that, since he did not, it was too late to do so once the final assignment had been handed in. In my opinion, that argument makes no sense. The fact is that the assistance provided by this instructor concerned spelling and grammar, thus enabling students to submit assignments

that were free of errors. The marker did not have to correct the content of the article at that stage or raise his doubts as to the sources used.

[25] It is true that the applicant discussed his source with his instructors, which, moreover, they confirmed. However, even if the source was discussed beforehand, the instructors state that it was clear that this approval did not absolve the applicant of his duty to cite the sources used in his article.

[26] The Director General preferred to rely on the instructors' testimonies to support his decision. The instructors asserted that the approval of the source or text from the Internet should not be considered authorization to use the text by simply changing a few words or to use the text without citing the source, but rather as approval of a theme. The Director General's decision to prefer the instructors' version over that of Mr. Nicolas is reasonable.

3. Did the Director General, as Final Authority, err in finding that the principles of procedural fairness were respected in this case?

[27] The applicant submits that the review process for his file was tainted with procedural errors. He states that the course instructors failed to comply with DPALC policy when they set up the Progress Review Board and that a number of mandatory steps of the process were left out.

[28] In that respect, the respondent acknowledges that the Director General himself conceded that there were procedural irregularities, but shares the Director General's opinion that this did

not affect the applicant's rights. In addition, the respondent submits that the applicant was afforded the full disclosure of his case and had the opportunity to submit his comments.

[29] The issue of procedural fairness is often a subject of discussion in Canadian case law. The Supreme Court first addressed this concept in *Hamel v. Brunelle and Labonté*, [1977] 1 S.C.R. 147, in which Justice Pigeon, writing for the majority, stated at page 156 that "procedure [is] the servant of justice not its mistress".

[30] Later, in *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, Justice Le Dain, writing on behalf of the Supreme Court, stated the following at paragraph 14:

> This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual.

[31] In addition, at paragraph 23, he wrote as follows:

> Certainly a failure to afford a fair hearing, which is the very essence of the duty to act fairly, can never of itself be regarded as not of "sufficient substance" unless it be because of its perceived effect on the result or, in other words, the actual prejudice caused by it. If this be a correct view of the implications of the approach of the majority of the British Columbia Court of Appeal to the issue of procedural fairness in this case, I find it necessary to affirm that the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.

> [Emphasis added.]

[32] In addition, the Supreme Court affirmed the following in *Dunsmuir*, above, at paragraph 79:

> Procedural fairness is a cornerstone of modern Canadian administrative law. Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual.

[33] That same decision establishes that issues of procedural fairness are reviewable according to the correctness standard. At paragraph 129, the Supreme Court noted the following:

> 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.

[34] That notion is also reiterated by the Federal Court of Appeal in *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116 , 389 N.R. 72, in which Justice Evans stated the following at paragraph 26:

> The principal issue that I need to decide in order to dispose of this appeal is whether the appellants had a right to procedural fairness in the process by which PWGSC awarded the submarine contract to CSMG. This is a question of law to be determined on a standard of correctness: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 . . . , at para. 129.

[35] With regard to the components of procedural fairness, the Supreme Court remarked as follows in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at page 837:

> Participatory rights . . . [in] administrative decisions . . . using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker. [Emphasis added.]

[36] To determine whether the adjudicator's decision is correct, it is therefore necessary to ask whether the applicant had the opportunity to defend himself and whether the various procedural errors breached the principles of procedural fairness.

[37] The issue of repeated procedural errors is studied in *Miranda v. Canada (Minister of Citizenship and Immigration)*, [1993] F.C.J. No. 437 (Q.L.), which addresses the issue of errors in the decision of an administrative tribunal. Justice Joyal stated the following at paragraph 5:

> It is true that artful pleaders can find any number of errors when dealing with decisions of administrative tribunals. Yet we must always remind ourselves of what the Supreme Court of Canada said on a criminal appeal where the grounds for appeal were some 12 errors in the judge's charge to the jury. In rendering judgment, the Court stated that it had found 18 errors in the judge's charge, but that in the absence of any miscarriage of justice, the appeal could not succeed.

[38] In that decision, Justice Joyal found as follows at paragraph 7:

> On the basis of that analysis, I find that the conclusions reached by the Refugee Board are well-founded on the evidence. There can always be conflict on the evidence. There is always the possibility of an opposite decision from a differently constituted Board.

> Anyone might have reached a different conclusion. Different conclusions may often be reached if one perhaps subscribes to different value systems. But in spite of counsel for the applicant's thorough exposition, I have failed to grasp forcefully the kind of error in the Board's decision which would justify my intervention. The Board's decision, in my view, is fully consistent with the evidence.

[39] Consequently, the decision of an administrative tribunal may still be reasonable even if the procedure is flawed. In this case, the applicant had the opportunity to defend his position and present evidence at all levels of decision-making. He was afforded a decision made by an impartial decision-maker and supported by legal reasons. I therefore cannot find that the principles of procedural fairness were breached were in this case.

CONCLUSION

[40] To reiterate, right from the outset in this case, it was clear that the instructors could have given Mr. Nicolas the benefit of the doubt and found that his submission of a plagiarized assignment was merely the result of a misunderstanding. However, matters did not unfold in that way. This is unfortunate for Mr. Nicolas, since the incident mars his disciplinary file and prevents him from taking the course in question. With full discretion, although I must dismiss this application for judicial review, I do not believe that it would be appropriate to award costs to the respondent. I also ask that a copy of this order and these reasons be placed in the file of Mr. Nicolas, who remains, to this day, a member of the Canadian Forces.

ORDER

THIS COURT ORDERS that:

1. The application for judicial review of the decision of the Director General Canadian Forces Grievance Authority, as Final Authority, be dismissed.
2. No costs be awarded.
3. A copy of this order and these reasons be placed in the applicant's disciplinary file.

"Sean Harrington"
Judge

Certified true translation
Sarah Burns

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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