Federal Court  Cour fédérale

Date: 20110223

Docket: T-874-10

Citation: 2011 FC 213

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, February 23, 2011

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

MARIO CYR

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision by Marie-Claude Landry, Chairperson of the disciplinary court (the Chairperson), dated May 19, 2010, finding Mario Cyr (the applicant) guilty of failing or refusing to provide a urine sample, a disciplinary offence under paragraph 40(l) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (the Act).

I. Facts

[2] The applicant is currently incarcerated at the Drummond Institution, a medium security penitentiary. On March 25, 2009, he received a Notification to Provide a Urine Sample in Institution under paragraph 54(*b*) of the Act. This notice was issued as part of a prescribed random selection urinalysis program.

[3] Although the correctional officers informed him that he had two hours to provide the urine sample, he left the site an hour later without providing one. Since subsection 66(2) of the *Corrections and Conditional Release Regulations*, SOR/92-620, states that the failure to provide a urine sample is considered a refusal, an Offence Report and Notification of Charge was issued against the applicant under paragraph 40(*l*) of the Act.

[4] The applicant pleaded not guilty to the alleged disciplinary offence, relying on his inability to provide the sample. On May 27, 2009, a first disciplinary hearing took place at which the disciplinary court had the opportunity to hear the applicant's testimony and that of the correctional officers in order to examine the reasons why the applicant had refused to provide a urine sample.

[5] Based on the uncontradicted evidence at that hearing, the sequence of events surrounding the applicant's refusal may be summarized as follows. It appears that the applicant was asked to provide a urine sample at 8:45 a.m. Since he had just urinated when he got up, he drank one or two glasses of water before leaving his cell, then two to three more glasses in the waiting room adjacent to the place where he was to provide his urine sample. He subsequently tried to provide the requested sample twice, first around 9:20 a.m., then at 9:42 a.m., but to no avail.

[6] The applicant explained to the two officers that his stomach was upset and that he was unable to provide the sample without defecating. In view of this situation, the officers told the applicant that he could submit to a strip search so they could verify that he had nothing in his possession that could falsify the test. This accommodation measure was suggested because the Commissioner's Directive on urinalysis testing provides that when the sample is collected the officers must watch the person to ensure that the sample is not altered. The suggested accommodation would have allowed the applicant to provide the sample in private, in a washroom, and to defecate at the same time if necessary. When questioned about this, the officers said, however, that they did not remember explaining to the applicant why they were giving him the opportunity to submit to a strip search, saying they thought that he could make that inference on his own.

[7] The applicant refused the offer of a strip search, saying that he would not be able to submit to one without defecating. Instead, he asked the officers if he could go to the washroom and bring back a urine sample, but they denied that request. It was at that point that he left the room he was in with the officers, even before the allotted two-hour time limit had expired, without providing the urine sample as requested.

[8] The disciplinary hearing took place on May 27, 2009; at that time, the applicant and the two correctional officers present testified. The applicant reiterated that he had been unable to provide the urine sample without defecating although he had drunk a number of glasses of water to make things

easier. He said he had never refused to participate in a urine test, had not used drugs for three years or alcohol for thirteen years, and had no major report in his disciplinary file. Moreover, one of the two correctional officers indicated that Mr. Cyr was very co-operative and behaved normally during the time he was under their supervision.

[9] After deliberating, the Chairperson of the court found the applicant guilty of the disciplinary offence as charged. That decision was challenged, and Mr. Justice Michel Beaudry allowed the application for judicial review on the basis that the reasons for the decision were inadequate.

II. Impugned decision

[10] In her oral decision, the Chairperson of the court began by noting that this Court had allowed the first application for judicial review and that the matter had been remitted for redetermination. She added that the parties had agreed that there would be no new hearing and that the court would make a decision based on the recording of the original proceedings. Thus, the parties were not heard again with respect to the second decision.

[11] Then, after briefly summarizing the facts, the Chairperson found Mr. Cyr guilty of the offence as charged. Her reasoning can be seen in the following lines:

> [TRANSLATION]
>
> The court does not accept Mr. Cyr's defence because, in its view, the order that he be searched first so that he could attend to his needs alone and comply with the order to provide a urine sample was reasonable and logical in the circumstances.

III. Issues

[12] In my opinion, this case raises two issues:

a. Did the Chairperson of the court err by convicting the applicant without explaining why the reason he provided did not raise a reasonable doubt?

b. In convicting the applicant, could the Chairperson take into account his refusal to submit to a strip search?

IV. Analysis

[13] The first of the two issues identified above involves questions of mixed law and fact and also raises the issue of the applicant's credibility. As such, it must be examined by applying the reasonableness standard. On the other hand, the second issue is a question of law and is therefore reviewable on the standard of correctness.

A. *Did the Chairperson of the court err by convicting the applicant without explaining why the reason he provided did not raise a reasonable doubt?*

[14] Subsection 43(3) of the Act clearly states that the burden of proof that applies to disciplinary offences is proof "beyond a reasonable doubt". This provision reads as follows:

> The person conducting the hearing shall not find the inmate guilty unless satisfied beyond a reasonable doubt, based on the evidence presented at the hearing, that the inmate committed the disciplinary offence in question.

[15] This heavy burden of proof is the corollary to the presumption of innocence, which is entrenched in the Canadian Charter at paragraph 11(*d*) for all criminal and penal offences. As

Mr. Justice Gilles Létourneau pointed out in *Ayotte v. Canada (Attorney General)*, 2003 FCA 429 (at paragraph 16), the failure to understand and to properly apply this standard of proof irreparably prejudices the fairness of the trial or hearing.

[16] In this case, the Chairperson's decision is silent as to the applicable standard of proof. This would not be fatal if it could be inferred from her reasoning and comments that she was aware of the fact that that was the burden of proof the respondent had to meet. Her somewhat cursory decision does not permit the Court to draw this inference.

[17] In fact, the Chairperson did not provide any explanation for convicting Mr. Cyr except that it did not appear reasonable to her to refuse the offer that was made to him to submit to a strip search before using the washroom in private. I will return to this issue later. Even assuming that the Chairperson did consider this factor in assessing Mr. Cyr's guilt, that did not excuse her from considering the applicant's reason for not providing the urine sample in front of the correctional officers.

[18] The Chairperson would have been entitled to disbelieve the applicant and to not find him credible when he claimed he was unable to urinate without defecating. But if that were the case, she had to explain why she did not believe his testimony especially since an officer testified that Mr. Cyr was co-operative at all times, had no major disciplinary offence in his file and had stopped using drugs and alcohol a number of years ago.

[19] Had Mr. Cyr's explanation been accepted, it would have negated the *actus reus* of the offence in that he was unable, despite reasonable efforts, to provide the requested urine sample. It is true that this case can be distinguished from the *Ayotte* case, above, because the inmate said he was unable to urinate even after drinking a glass of water (there was conflicting evidence as to the amount of water that had been given to him). In this case, Mr. Cyr did not say that he was unable to urinate but maintained that he was not able to urinate without defecating. However, in my view, this difference is immaterial. Apart from arguing that an individual may be required to provide a urine sample in front of other people even if, in doing so, he or she has to also defecate in front of them without being able to use the washroom, I believe that Mr. Cyr's situation was the same as Mr. Ayotte's. I cannot bring myself to admit that persons who are inmates must submit to degrading treatment that violates their most basic dignity in order to establish that they did not refuse to comply with an obligation under the Act.

[20] In these circumstances, the Chairperson therefore had an obligation to make a determination on Mr. Cyr's credibility and to consider the defence he put forward in his testimony. By failing to do so, the Chairperson erred and did not comply with section 43 of the Act. She could not be satisfied beyond a reasonable doubt that the applicant was guilty without examining the defence he put forward; and she could not convict him without determining not only that the applicant was not credible but also that his defence did not raise a reasonable doubt, taking into account all the evidence. By failing to conduct this exercise, the Chairperson not only erred in her application and interpretation of the Act, but she also jeopardized procedural fairness.

[21] In concluding on this point, I will repeat Mr. Justice Létourneau's comments in *Ayotte*, above, which, in my view, are also completely appropriate in the context of this case:

> [22] Moreover, the chairperson of the disciplinary court misdirected himself on the law in this case where credibility was important because all of the evidence rested on the contradictory testimony of the two witnesses. Even if he did not believe the appellant's testimony, he had to acquit him if a reasonable doubt subsisted as to his guilt. Even if he did not believe the appellant's deposition, he should have examined it in the context of the evidence as a whole and the reasonable inferences that he could draw from each and every piece of evidence. But after that examination he had to acquit him if he was not convinced of his guilt beyond a reasonable doubt. A reading of the transcript of the arguments clearly indicates that the chairperson of the disciplinary court did not conduct this exercise. He was content to make an inappropriate equation between the appellant's guilt and his absence of credibility, thereby altering the standard of proof required by the Act to support a guilty verdict.

[22] On this ground alone, the Chairperson's decision must therefore be set aside and the case remitted for redetermination in accordance with these reasons. Considering the fact that this is the second time the disciplinary court's decision has been set aside, I would also like to deal with the second argument of counsel for the applicant so that the disciplinary court that will again decide on the applicant's complaint knows where the Court stands on this point.

B. *In convicting the applicant, could the Chairperson take into account his refusal to submit to a strip search?*

[23] The applicant argues that the Chairperson erred by not accepting his defence because the correctional officers had offered him a reasonable alternative. In the applicant's view, the

Chairperson thereby penalized him for exercising his constitutional rights. It appears to me that this argument must also be accepted.

[24] The respondent acknowledged that the strip search suggested to the applicant was not authorized under sections 48, 49, 53 or 60 of the Act. This is quite correct. Section 48 of the Act provides that a strip search may be conducted, without individualized suspicion, in certain clearly defined circumstances that do not exist here. Moreover, subsection 49(1) states that where a staff member suspects on reasonable grounds that an inmate is carrying contraband or carrying evidence relating to a disciplinary or criminal offence, the staff member may conduct a frisk search of the inmate. In this case, the search that the staff members wanted Mr. Cyr to submit to was not a frisk search, and there has been no allegation that there were reasonable grounds to suspect that he was carrying another urine sample or any product that could have falsified the urine test.
Subsection 49(3) provides that a strip search may be conducted in situations not set out in the Regulations where a staff member believes on reasonable grounds that an inmate is carrying this type of object, a strip search is necessary to find it and the institutional head is satisfied that there are reasonable grounds to so believe; these requirements were clearly not satisfied here. Last, section 53 deals with frisk or strip searches authorized by the institutional head while section 60 relates to searches of visitors.

[25] It is well settled since the Supreme Court of Canada's decision in *Hunter v. Southam*, [1984] 2 S.C.R. 145, that a warrantless search or seizure is presumptively unreasonable. To establish that it is nonetheless consistent with section 8 of the Charter, the onus is on the prosecution to demonstrate that it is authorized by law, that the law itself is reasonable and that the manner in which the search

was carried out is reasonable. In this case, it is clear that these conditions could not be satisfied, and accordingly there is no question that Mr. Cyr could not be subjected to a strip search against his will without violating his constitutional rights.

[26] It is true that Mr. Cyr could have consented to the search; as long as the consent was informed and voluntary, it would have undermined any subsequent claim that the search was unreasonable under section 8 of the Charter. However, consent was not given, and Mr. Cyr refused of his own volition to undergo a strip search. Could the Chairperson criticize him and dismiss his defence solely on the ground that he had exercised his Charter right to not be subjected to an unauthorized intrusion on his person? I do not believe so. A finding to the contrary would undermine the fundamental rights that the Canadian constitution grants to everyone; punishing individuals for exercising their rights is tantamount to denying their rights.

[27] Counsel for the respondent attempted to rebut this argument by submitting that the offer to conduct a search must instead be analyzed as an accommodation measure offered to the applicant to enable him to comply with the order that had been given to him to provide a urine sample. The offer was made in the context of subsection 41(1) of the Act, which reads as follows:

Informal resolution	**Tentative de règlement informel**
41. (1) Where a staff member believes on reasonable grounds that an inmate has committed or is committing a disciplinary offence, the staff member shall take all reasonable steps to	41. (1) L’agent qui croit, pour des motifs raisonnables, qu’un détenu commet ou a commis une infraction disciplinaire doit, si les circonstances le permettent, prendre toutes les

resolve the matter informally, where possible.	mesures utiles afin de régler la question de façon informelle.

[28] In my view, it does not matter whether the offer made to Mr. Cyr is analyzed from the perspective of a reasonable step to resolve the matter informally, under subsection 41(1), or as a consent to a search that would otherwise be unreasonable. Even assuming that the option of submitting to a strip search could be considered an alternative to a urine sample in front of the officers, this alternative could not be viewed as reasonable without assessing the reasons why Mr. Cyr said he could not submit to the strip search. The transcript shows that the applicant refused to submit to a strip search on the basis that this procedure, like urination, would inevitably result in a desire to defecate. However, the Chairperson did not say a word about this evidence. Again, she was entitled to not believe Mr. Cyr and to find that the alternative suggested to him was reasonable in the circumstances; but she could not make this determination without at least assessing the reason Mr. Cyr gave for not taking advantage of it and explaining why, considering all the evidence, this did not seem reasonable to her.

[29] In light of the foregoing reasons, I find that the disciplinary court’s decision must again be set aside and that the application for judicial review should be allowed.

JUDGMENT

THE COURT RULES that the application for judicial review is allowed. The case is remitted for redetermination by a differently constituted court, with costs.

"Yves de Montigny"
Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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