Federal Court Cour fédérale

Date: 20230515

Docket: T-735-19

Citation: 2023 FC 682

Ottawa, Ontario, May 15, 2023

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

DARYLE WILLIAM HAUG

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Mr. Haug is seeking judicial review of a decision granting in part and denying in part his inmate grievance. I am dismissing his application, because he has not shown that the decision is unreasonable. Moreover, Mr. Haug cannot use an application for judicial review to seek redress for the failure to implement corrective measures prescribed by the grievance decision.

I. Background

[2] Mr. Haug is a federal inmate, serving an indeterminate sentence for sexual assault. He currently resides at Dorchester Penitentiary, in New Brunswick. He filed a grievance regarding the fact that his Correctional Officer II [COII] was not working in the unit in which he resides and did not meet with him before preparing Structured Casework Records [SCR]. He also complained about the processing of two requests for telephone clearances.

[3] Mr. Haug filed a first-level complaint in November 2017. He alleged that his assigned COII was not working on his unit, which negatively impacted his progress on his correctional plan and the processing of his telephone clearance requests. He asked that a different COII be appointed. His complaint was dismissed in December 2017. The complaint officer stated that caseload issues required the assignment of COIIs who were not working on the same unit as the inmate.

[4] Mr. Haug brought the grievance to the second level, based on the same issues. The head of the institution dismissed the grievance, repeating in substance the reasons given at the first level.

[5] Mr. Haug then brought the grievance to the final level in February 2018. He also complained that two telephone clearance requests he made had not been processed. In March 2018, he submitted an addendum to the grievance, in which he highlighted the fact that his COII

was not involved in his Case Management Team [CMT]. He also stated that he only learned recently who his COII was and that he never had a meeting with that person.

[6] In March 2019, a delegate of the Commissioner rendered a decision upholding the grievance in part. The first part of the reasons focused on the preparation of the SCR by the CMT. The decision-maker noted that progress against the correctional plan is assessed by a variety of means, not only the observations of the COII. A review of Mr. Haug's SCR showed that his progress was being documented. Thus, this part of Mr. Haug's grievance was denied.

[7] The decision-maker then turned to the meetings with the COII. He noted that the Commissioner's Directive [CD] 710-1 requires COIIs to meet with their inmates before completing the SCR. Because the staff at Dorchester Penitentiary did not confirm that these meetings took place, this portion of the grievance was upheld. The head of Dorchester Penitentiary was instructed to ensure that COIIs meet with offenders when completing SCRs.

[8] With respect to the telephone clearance requests, the decision-maker made inquiries with the staff at Dorchester Penitentiary and found that Mr. Haug had not made any such request on November 28, 2017 and that his request dated January 2, 2018 had been granted. Accordingly, he denied this portion of the grievance.

[9] Mr. Haug applied for judicial review of the grievance decision. In his notice of application, Mr. Haug seeks several declarations pertaining to the assignment and role of COIIs at Dorchester Penitentiary as well as orders of *mandamus* seeking to redress these shortcomings.

[10] For reasons that need not be discussed here, it took about four years to find a suitable date for the hearing of this application.

II. Analysis

[11] Before delving into the analysis of the issues raised by Mr. Haug, I wish to summarize briefly the Court's role on an application for judicial review. An application for judicial review is not an opportunity to relitigate the matter that was before the administrative decision-maker. Rather, the proper role of the Court is to ensure that the decision rendered is "based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker": *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraph 85, [2019] 4 SCR 653 [*Vavilov*]. Given this focus, the Court performs its role based on the evidence that was before the decision-maker, and applicants are normally not allowed to bring new evidence at the judicial review stage: *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at paragraph 86.

A. *Place of Work of the COII*

[12] In substance, Mr. Haug's first complaint is that his COII is working in a different unit, which makes personal interaction almost impossible. For this reason, the COII cannot meaningfully participate in case management and is not available to process routine requests, such as telephone clearances.

[13] At the first two levels of the grievance process, the answer was that staffing challenges made it impossible to assign a COII who was working in the same unit. At the final level, a somewhat more elaborate answer was given. The decision-maker reviewed Mr. Haug's SCRs to assess whether his allegations regarding the negative effect on case management were substantiated. This may have been prompted by Mr. Haug's addendum of March 2018, which emphasized these alleged effects. The decision-maker found that Mr. Haug's CMT was able to meaningfully monitor his progress and set goals for the upcoming periods, even though Mr. Haug had no interaction with his COII.

[14] Mr. Haug now argues that this is unreasonable. He says that the SCRs cannot be valid if the requirement of a meeting between the COII and the inmate was not met. For this reason, the findings regarding the first and second portions of his grievance would be contradictory.

[15] I am unable to accept these submissions. One must not lose sight of the fact that Mr. Haug's initial complaint pertained to his COII's place of work, not the validity of his SCRs. The decision-maker's reasons must be read in this light. What the decision-maker is really saying is that the fact that Mr. Haug's COII was working in a different unit did not result in negative consequences for his correctional plan, in particular the drafting of his SCRs. From that perspective, the decision is reasonable, as Mr. Haug has not shown that it ignores any legal or factual constraint bearing upon it.

[16] At the hearing of this application, Mr. Haug highlighted several provisions of the *Corrections and Conditional Release Act*, SC 1992, c 20 [the Act]. I am not persuaded that any of these provisions is infringed by the fact that Mr. Haug's COII works on a different unit.

B. *Meetings With the COII*

[17] The second portion of Mr. Haug's grievance was upheld. The decision-maker found that the COII's failure to meet Mr. Haug while completing his SCRs breached paragraph 13 of CD 710-1. He instructed the head of Dorchester Penitentiary to ensure compliance with this requirement in the future.

[18] With respect to this portion of the grievance, Mr. Haug is in effect seeking a remedy for the failure to comply with the decision. An application for judicial review, however, is not the appropriate vehicle to seek such a remedy. Section 44 of CD 081, *Offender Complaints and Grievances*, provides that a further grievance may be brought when corrective action is not implemented. When corrective action is ordered in a final grievance, the inmate may submit another final grievance without having to go through the first two steps of the grievance process.

[19] An application for judicial review may be brought only when administrative remedies have been exhausted: *Harelkin v University of Regina*, [1979] 2 SCR 561 at 587–594; *Strickland v Canada (Attorney General)*, 2015 SCC 37 at paragraphs 40–45, [2015] 2 SCR 713; *CB Powell Limited v Canada (Border Services Agency)*, 2010 FCA 61 at paragraphs 30–33, [2011] 2 FCR 332. The administrative remedies were not exhausted when Mr. Haug brought this application for judicial review, as he could have submitted a "compliance grievance" at the final level.

[20] Mr. Haug argues that he should not be required to exhaust his administrative remedies before obtaining relief from the Court because the grievance process is ineffective and too slow. In support of this proposition, he referred the Court to *Ewert v Canada*, 2018 SCC 30, [2018] 2 SCR 165 [*Ewert*], and the Correctional Investigator's 2017-2018 Report.

[21] However, the Federal Court of Appeal and this Court have consistently required inmates to exhaust their administrative remedies before bringing an application for judicial review, in spite of allegations that the grievance process was too slow: *Condo v Canada (Attorney General)*, 2003 FCA 66; *Mackinnon v Warden of Bowden Institution*, 2016 FCA 14; *Blair v Canada (Attorney General)*, 2022 FC 957 at paragraphs 44–46; *Ritch v Canada (Attorney General)*, 2022 FC 1462 at paragraphs 22–26.

[22] In *Ewert*, the Supreme Court granted declaratory relief so that Mr. Ewert would not be forced to return to the grievance process to have his complaint settled. However, in the same breath, the majority of the Court recognized that declaratory relief should generally not issue when an adequate alternative statutory mechanism exists. In fact, absent "exceptional circumstances," the majority found the grievance procedure provided by section 90 of the Act to be a sufficient reason to decline granting declaratory relief: *Ewert* at paragraph 83.

[23] The exceptional circumstances in *Ewert*, which led to the Court issuing declaratory relief, included the fact that the Correctional Service failed to obtain an opinion on the issue from an independent outside body, as it promised to do. Further, Mr. Ewert's complaint was closed following the start of an internal review of the tool that was the subject of the grievance;

however, the outcome of the review was not communicated to Mr. Ewert. Finally, Mr. Ewert filed his grievance nearly two decades before the Supreme Court heard his case.

[24] Such exceptional circumstances are not present in this case. Mr. Haug's grievance was fully addressed at the final level. Further, Mr. Haug filed his initial grievance in November 2017 and received the decision at the final level in April 2019; this delay is hardly comparable to the one in *Ewert* and does not warrant an exception to the requirement to exhaust administrative remedies.

C. *Telephone Clearance Requests*

[25] The decision-maker denied the third portion of Mr. Haug's grievance, dealing with the processing of two telephone clearance requests. After inquiring with Dorchester Penitentiary staff, he found that Mr. Haug never made one of the two requests and that the second one was granted. In light of these facts, it was entirely reasonable to deny the grievance.

[26] Nevertheless, Mr. Haug argues that Penitentiary staff failed to process other similar requests or took inordinate time to do so. An application for judicial review, however, is focused on the decision challenged. An applicant cannot rely on facts that were not in evidence before the administrative decision-maker. Here, Mr. Haug's grievance pertained to two specific telephone clearance requests. In the context of this application for judicial review, he cannot ask the Court to express an opinion regarding other requests, effectively skipping the grievance process.

III. Disposition

[27] As the decision regarding Mr. Haug's grievance is reasonable, the application for judicial review will be dismissed.

[28] Mr. Haug asserts that a grievor who applies for judicial review cannot be ordered to pay costs, because section 91 of the Act states that access to the grievance procedure shall be "without negative consequences/*sans crainte de représailles*." According to Mr. Haug, an application for judicial review is a continuation of the grievance process and an award of costs against the inmate would be a prohibited "negative consequence." I cannot agree with this submission. Judicial review is fundamentally separate from the administrative process: *Vavilov*, at paragraph 24. Moreover, costs are not a "negative consequence" nor "*représailles*" (literally, retaliation) in any meaningful sense. Costs awards are meant to indemnify the prevailing party for its expenses, provide incentives for the more efficient use of judicial resources and, in some circumstances, facilitate access to justice: *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 at paragraphs 19–30, [2003] 3 SCR 371. In the pursuit of these goals, unsuccessful inmates have not infrequently been ordered to pay costs in applications for judicial review involving the Act.

[29] The Attorney General seeks costs in the amount of $1500. Given all the circumstances, including the low wages that inmates earn, I am of the view that an amount of $500 is just and reasonable.

JUDGMENT in file T-735-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. The applicant is condemned to pay costs to the respondent in the amount of $500, inclusive of taxes and disbursements.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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