

CANADA / JUDGMENT

Ross v. Canada

2001 FCT 1396

COURT

Federal Court

DECIDED

17 December 2001

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Ross v. Canada Court (s) Database Federal Court Decisions Date 2001-12-17 Neutral citation 2001 FCT 1396 File numbers T-241-00 Notes Digest Decision Content Date: 20011217 Docket: T-241-00 Neutral citation: 2001 FCT 1396 Ottawa, Ontario, this Monday, December 17th, 2001 Present: The Honourable Mr. Justice Kelen BETWEEN: ARTHUR ROSS Applicant and HER MAJESTY THE QUEEN Respondent REASONS FOR ORDER AND ORDER

- [1] This is an application under section 18.1 of the Federal Court Act, R.S.C. 1985, c.F-7, for judicial review of a penitentiary disciplinary hearing decision, dated July 28, 1999, made with respect to the applicant. The applicant was found guilty of a "minor" disciplinary offence and fined \$25 for making papier mâché model airplanes and jewellery without the appropriate "hobby permit".
- [2] The applicant seeks to set aside five decisions, which are in fact one decision; 1 - a disciplinary offence decision made by A. Rancourt dated July 28, 1999 under section 43 of the Corrections and Conditional Release Act, 1992, S.C. c.20 (the "Act"); 2 - a grievance complaint decision dated September 30, 1999, under section 90 of the Act. The grievance was that the applicant did not have a fair hearing of his disciplinary offence; 3 - a decision dated October 19, 1999 on the first appeal from the grievance decision; 4 - a decision dated December 8, 1999 on the second appeal from the grievance decision; 5 - a decision dated January 14, 2000 on the third appeal from the grievance decision.
- [3] The third appeal decision from the grievance is the final decision.

FACTS

- [4] At the material time, the applicant was an inmate at the Grande Cache Institution, Grande Cache, Alberta. He is presently at another Institution. On March 10, 1999 the inmate was charged with a "minor" disciplinary offence, to wit: making papier mâché model airplanes and jewellery without the appropriate "hobby permits" as required by the penitentiary "Hobby Craft Handbook". THE CHARGE
- [5] The applicant was charged pursuant to subsection 40(r) of the Act with wilfully disobeying a written rule. Subsection 40(r) of the Act provides: Disciplinary offences

40. An inmate commits a disciplinary offence who ...
- (r) wilfully disobeys a written rule governing the conduct of inmates; The "written rule" in question refers to the written permits granted to the applicant which permitted a certain number of hobby crafts. THE DISCIPLINARY HEARING
- [6] A disciplinary hearing was held on July 28, 1999, by Correctional Supervisor Mr. A. Rancourt pursuant to section 42 of the Act. At the hearing the applicant admitted that he had exceeded the number of model airplanes according to the permits which he had been issued. He was found guilty and fined \$25. Mr. Rancourt announced the fine before allowing the applicant to speak to the sentence. At page 19 of the transcript of the hearing, the applicant asks: Applicant: Am I not allowed to speak to the charge? Mr. Rancourt: You can speak to the charge. A: Do you wanna relay the charge? R: Do you have a rebuttal to it? A: It will be dealt with. R: In Federal Court? End of hearing The applicant chose not to speak further.
- [7] The Act provides for a disciplinary system in sections 38 through 44. Section 42 provides that an inmate charged with a disciplinary offence shall be given written notice of the charge and that the notice must state whether the charge is minor or serious. In this case, the applicant was provided with the Inmate Offence Report and Notification of Charge dated May 4, 1999. The document indicated that the charge was "minor".
- [8] Section 43 provides that there shall be a hearing in accordance with the prescribed procedure for a fair hearing and that 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. In this case there was a hearing. There is a 19-page transcript of the hearing in the Applicants' Record.
- [9] Correctional Supervisor A. Rancourt conducted the hearing on July 28, 1999. The applicant spoke at the hearing and questioned the two witnesses from the penitentiary, Acting Unit Manager D. Stifle, and Senior Admissions and Discharge Officer Rick Bentley. The applicant requested that the Warden and one other person be present as witnesses. Mr. Rancourt decided that the two witnesses were the relevant witnesses to the events. Accordingly, the Warden did not appear as a witness. The affidavit of D. Stifle, the project officer responsible for the hobby area, deposed that he was responsible for charging the applicant with a disciplinary offence. This deponent advised Mr. Rancourt, the officer presiding at the disciplinary hearing, that the other witnesses requested by the applicant had no bearing on the charge as I supervise the Hobby Area during the relevant times and provided direction to the staff [...]. I informed Mr. Rancourt that the Warden was simply acting on information I provided to him, which information had been provided to me by line staff. Therefore, the Warden had delegated me with the responsibility to investigate and review this matter to its conclusion. THE GRIEVANCE PROCESS
- [10] The applicant filed a grievance under section 40 of the Act, on the grounds that Mr. Rancourt prevented the applicant from having a fair hearing. The decision on the grievance was appealed three times by the applicant, at the first level, the second level, and then the third

level of the grievance appeal process in place at the Grand Cache Institution. The decision at the third level, dated January 17, 2000, upheld the applicant's grievance in part, agreeing with the applicant that there was a procedural error of the hearing. The decision stated: The previous levels recognized that you should have been given the opportunity to speak to your sanction before it was imposed instead of after it had been imposed. In light of this procedural error, the complaint and first level upheld your grievance in part. Our investigation, however, has revealed that, in accordance with the Commissioner's Directive 580, you were given ample opportunity to make representations and question your two witnesses. Further [...] your hearing was taped in full and, as such, all of your arguments of defence, as well as your admission of guilt, are included on the tape... RULES FOR HOBBY PERMITS

- [11] The Grande Cache Institution Hobby Room Rules and Regulations provide that "Hobbies will be authorized via a hobby permit" and that "inmates shall be guided by instructions outlined in the Inmate Handbook regarding hobbies". At the hearing, the applicant admitted that he had placed ten papier mâché airplanes, two airplane hangars, one beaded necklace, and one pair of beaded earrings in a box addressed as privileged correspondence to his lawyer with the intent that the lawyer would sell these items. The applicant had hobby permits for six airplanes, and no hobby permit for the hangars or the jewellery. The applicant knew that it was against the Rules to mail hobby craft except with permission, and that it was against the Rules to send hobby craft in the confidential and privileged mail to a lawyer.
- MISCELLANEOUS COMMENTARY FROM THE APPLICANT
- [12] The applicant does not agree with the rules of the penitentiary limiting the number of hobby craft, or requiring that a hobby craft permit be applied for and issued in accordance with the penitentiary rules.
- [13] The applicant had previously sent hobby crafts to his lawyer in the same fashion, presumably without being detected.
- [14] The applicant advised the Court at the hearing that he has filed 385 grievances over the past four years, of which 185 have been upheld, that he has other applications waiting to be heard by this Court, and that he will be taking this case to the Federal Court of Appeal and to the Supreme Court of Canada. APPLICANT'S SUBMISSIONS
- [15] The applicant requests that the disciplinary decision and the grievance level decisions be quashed, that the findings be expunged from the applicant's prison record, and that the seized hobby craft items be returned to the applicant.
- [16] The grounds for the application are that he was denied a fair hearing on the disciplinary offence, for the reasons that: 1 - no written rule was presented in the evidence at the hearing for the applicant to make full answer and defence to; 2 - the applicant was not allowed to call requested witnesses (including the Warden of the institution); 3 - "no written list of the testimony presented at the hearing was ever disclosed to the applicant prior to the hearing"[sic]; 4 - the applicant was not allowed to make his closing arguments; and 5 - the

applicant was not provided with an opportunity to speak to the sentence.

ANALYSIS

Fair Hearing

- [17] This application is based on the ground that the applicant did not have a fair hearing. Under section 18.1(4)(b) of the Federal Court Act, the Trial Division may set aside a decision if it is satisfied that the federal board or tribunal failed to observe a principle of natural justice or procedural fairness. In *Baker v. Canada (M.C.I.)* [1999], 2 S.C.R. 817, [1999] S.C.J. No. 39, the Supreme Court of Canada held that fairness is a variable standard which depends on the circumstances. L'Heureux-Dubé J., delivering the judgement of the Court, wrote at paragraphs 21 and 22: [...]Factors Affecting the Content of the Duty of Fairness The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances. As I wrote in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case". All of the circumstances must be considered in order to determine the content of the duty of procedural fairness: *Knight*, at pp. 682-83; *Cardinal*, *supra*, at p. 654; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, per Sopinka J. Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made 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. In the case at bar, the applicant was given a fair opportunity to know the case against him and to respond.
- [18] The applicant provided the Court with the Supreme Court of Canada decision in *Martineau v. Matsqui Institution Disciplinary Board* (1977), 74 D.L.R. (3d) 1, [1978] 1 S.C.R. 118. In this case involving prison discipline, the Court held that disciplinary proceedings must be conducted fairly and this common-law duty of fairness may be enforced by the Federal Court. In the case at bar, the applicant admitted that the written rules regarding hobby craft permits were well known to him and that he had breached these rules. The fact that the applicant was not allowed to call requested witnesses did not affect his right to a fair hearing because the two witnesses at the hearing were the relevant witnesses to the minor disciplinary offence. The applicant is not automatically entitled to call any witnesses at his disciplinary hearing unless the witness is necessary to testify about the incident, which he was not. The applicant was invited to make submissions regarding his sentence after the hearing officer had erroneously rendered the \$25 fine before asking if the applicant wished

to speak. Upon recognizing the error, the hearing officer invited the applicant to make submissions, but the applicant suggested that he would be taking the matter to the Federal Court.

- [19] At the third appeal level of the grievance, this error in procedure was acknowledged, but the grievance decision recognized that in all the circumstances the applicant did have the opportunity to know the case that was made against him and was given a full opportunity to respond so that this error did not affect the applicant's right to a fair hearing. I agree with the decision of the third appeal level of the grievance. The applicant ought to have been given an opportunity to speak to the \$25 fine before it was imposed, but as soon as that error was recognized by the hearing officer, the hearing officer offered the applicant an opportunity to speak. The clear implication was that the applicant had the opportunity to speak to the sentence before the final sentence would be imposed. The applicant chose not to make any further submissions.
- [20] In these circumstances, the duty of procedural fairness was met. The applicant had proper disclosure of the offence and a hearing. The applicant had the opportunity to question the two witnesses, and to make his position known to the tribunal before a final decision was rendered. In these circumstances, the applicant had a fair hearing. Given that the disciplinary offence was minor, that the fine was \$25, that the applicant had the opportunity to speak to sentence as soon as the hearing officer realized that the applicant wished to speak to the sentence before the sentence was finalized, and given that the applicant declined this opportunity, I am satisfied that the applicant had a fair hearing and was not prejudiced. For this reason, I would dismiss this application.
- [21] In any event, any breaches of procedural fairness are not fatal where the resulting decision would have been the same had the breaches not occurred. In *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, [1994] S.C.J. No. 14, Iacobucci J., delivering the judgement of the Supreme Court of Canada, wrote at paragraph 53: In *Administrative Law* (6th ed. 1988), at p. 535, Professor Wade discusses the notion that fair procedure should come first, and that the demerits of bad cases should not ordinarily lead courts to ignore breaches of natural justice or fairness. But then he also states: A distinction might perhaps be made according to the nature of the decision. In the case of a tribunal which must decide according to law, it may be justifiable to disregard a breach of natural justice where the demerits of the claim are such that it would in any case be hopeless. In the case at bar, the resulting decision would have been the same had the breaches of procedural fairness not occurred. For this reason as well, I would dismiss this application. JUDICIAL INTERFERENCE OUGHT TO BE EXERCISED WITH DISCRETION AND RESTRAINT
- [22] The Supreme Court of Canada has stated in *Martineau* (supra.) that the availability of judicial review is subject to the exercise of judicial discretion bearing in mind the requirements of prison discipline. In that case, the disciplinary offence was categorized as "serious". The Supreme Court of Canada held that it is important that judicial review be

granted only in cases of serious injustice; Pigeon J. at p. 360. In disciplinary offence proceedings respecting a prison inmate, the requirements of judicial procedure are not to be brought in and, consequently, these are not decisions which may be reviewed by the Federal Court of Appeal under s. 28 of the Federal Court Act, a remedy which is in the nature of a right of appeal. However, this does not mean that the duty of fairness may not be enforced by the Trial Division through the exercise of the discretionary remedies mentioned in s. 18 of the Federal Court Act. The order issued by Mahoney J. dealt only with the jurisdiction of the Trial Division, not with the actual availability of the relief in the circumstances of the case. This is subject to the exercise of judicial discretion and in this respect it will be essential that the requirements of prison discipline be borne in mind, just as it is essential that the requirements of the effective administration of criminal justice be borne in mind when dealing with applications for certiorari before trial. It is specially important that the remedy be granted only in cases of serious injustice and that proper care be taken to prevent such proceedings from being used to delay deserved punishment so long that it is made ineffective, if not altogether avoided.

- [23] Mr. Justice Dixon (as he then was) held at p. 379: It should be emphasized that it is not every breach of prison rules of procedure which will bring intervention by the Courts. The very nature of a prison institution requires officers to make "on the spot" disciplinary decisions and the power of judicial review must be exercised with restraint. Interference will not be justified in the case of trivial or merely technical incidents. The question is not whether there has been a breach of the prison rules, but whether there has been a breach of the duty to act fairly in all the circumstances.
- [24] Accordingly, the Supreme Court of Canada has directed that judicial review of prison matters be exercised with caution and that the Court not interfere in "trivial or merely technical incidents". The Court ought only interfere in serious matters.
- [25] Accordingly, aside from the reasons stated above, I would dismiss this application for the reasons expressed by the Supreme Court of Canada in the Martineau case. Not every breach of prison rules of procedure or discipline warrants the intervention by the Court. Judicial review under section 18 is discretionary, and the Court ought to exercise its discretion with restraint. Interference will not be justified in cases of trivial or merely technical incidents. In this case, a minor disciplinary offence involving a \$25 fine as a sanction for making model airplanes without a hobby permit is trivial.
- [26] Moreover, the allegation that the applicant did not have a fair hearing was based on "technicalities". As soon as the procedural error was raised, the hearing officer invited the applicant to make submissions which the applicant declined. This was a technical breach of the duty to act fairly, in view of the fact that it was corrected immediately.

CONCLUSION

- [27] For the reasons set out herein, the application for judicial review will be dismissed. ORDER

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1. THIS COURT ORDERS that the application for judicial review is dismissed. "Michael A. Kelen" Judge OTTAWA, ONTARIO December 17, 2001
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Prepared on 29 October 2026 · Esheria