Federal Court Cour fédérale

Date: 20240117

Docket: T-243-21

Citation: 2024 FC 61

Ottawa, Ontario, January 17, 2024

PRESENT: The Honourable Madam Justice Turley

BETWEEN:

DWIGHT CREELMAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS FOR JUDGMENT

I. Overview

[1] The Applicant, a self-represented inmate, seeks judicial review of an Offender Final Level Grievance Response dated December 13, 2020 [Decision] rendered by the Assistant Commissioner, Policy [Assistant Commissioner] of the Correctional Service of Canada [CSC]. The Assistant Commissioner upheld the Applicant's grievance in part, but denied the grievance as

it related to the Applicant's request for a waiver of the deduction of the administration costs associated with access to the Inmate Telephone System [ITS] provided by the CSC to inmates.

[2] For the reasons that follow, I am dismissing the application for judicial review. In denying the Applicant's grievance, the Assistant Commissioner reasonably interpreted the legislative authority for the ITS deduction under the *Corrections and Conditional Release Act*, SC 1992, c 20 [*CCRA*] and applied the regulatory requirements for granting a waiver under the *Corrections and Conditional Release Regulations*, SOR/92-620 [*CCRR*]. I find that the Assistant Commissioner provided intelligible, justified, and transparent reasons, and that the Decision was made in a procedurally fair manner.

II. Background

[3] The Applicant applied for a waiver of the bi-weekly ITS deduction in May 2015 and May 2016. Between August 2015 and June 2020, negative decisions were made on the waiver applications and the grievances that the Applicant had filed.

[4] In July 2020, the Applicant filed a judicial review application. The CSC decided to re-determine the Applicant's final level grievance concerning his waiver applications and invited the Applicant to provide additional submissions and information to support his grievance. In light of this, the Applicant discontinued that judicial review application.

[5] The Decision under review is the result of that re-determination. While the Assistant Commissioner upheld the Applicant's grievance and ordered corrective action concerning various

procedural issues, the grievance was dismissed in respect of the Applicant's request for waivers of the ITS deduction. More specifically, the Assistant Commissioner determined that the ITS deduction was authorized by legislation and consistent with relevant policy objectives. Furthermore, the Assistant Commissioner determined that the Applicant failed to demonstrate that the 8% ITS deduction unduly interfered with his ability to meet the objectives of his Correctional Plan and his basic needs, pursuant to subsection 104.1(7) of the *CCRR*, or that the deduction interfered with his ability to prepare for release.

III. Issues and Standard of Review

[6] As a preliminary matter, the Respondent sought leave to adduce new affidavit evidence pursuant to Rule 312(a) of the *Federal Courts Rules*, SOR/98-106 [*Rules*]. The new affidavit appends an updated version of the CSC Commissioner's Directive 860 entitled "Offender's Money" [CD 860] dated September 11, 2023. CD 860 sets out the CSC's administrative process of making deductions from an inmate's income. The prior version of CD 860, in force at the time the Assistant Commissioner made the Decision, specifically referred to the ITS deduction and fixed the amount for the ITS deduction that would normally be deducted from an offender's income. The updated version of CD 860 does not refer to an ITS deduction, meaning that there is no longer a deduction made towards paying for the ITS.

[7] The Respondent argued that the new evidence is relevant to whether the relief sought by the Applicant is moot, given that there is no longer an ITS deduction to waive. The Applicant did not object to the filing of the new evidence. At the hearing of the judicial review application, I granted the Respondent leave to file the affidavit evidence. Ultimately, given my disposition on

the merits of the application, I did not need to consider the new evidence or the arguments raised by the Respondent related to remedy and mootness.

[8] The Applicant raises two main issues in his judicial review application: (i) the validity of the Assistant Commissioner's denial of his grievance; and (ii) the fairness of the grievance process.

[9] The standard of review applicable to decisions by the CSC is reasonableness: *Ewert v Canada (Attorney General)*, 2018 FC 47 at para 15; *McMaster v Canada (Attorney General)*, 2017 FC 25 at para 21; *Skinner v Canada (Attorney General)*, 2016 FC 57 at para 21; *Fischer v Canada (Attorney General)*, 2013 FC 861 at para 22. A reasonable decision is "one that 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 para 85 [*Vavilov*]; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 8 [*Mason*].

[10] In denying the grievance, the Assistant Commissioner rejected the Applicant's challenge to the legal validity of the ITS deduction, finding that it was authorized by legislation. Applying the Supreme Court's decisions in *Vavilov* and *Mason*, the reasonableness standard of review also applies to the Assistant Commissioner's interpretation of the *CCRA*. An administrative decision-maker is not required to engage in a formalistic statutory interpretation exercise in every case, but their interpretation must be consistent with the text, context, and purpose of the provision: *Vavilov* at paras 119-120; *Mason* at para 69.

[11] Where breaches of procedural fairness are alleged, no standard of review is applied but the Court's reviewing exercise is "best reflected on a correctness standard": *Canadian Hardwood Plywood and Veneer Association v Canada (Attorney General)*, 2023 FCA 74 at para 57; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*CPR*]. When assessing whether procedural fairness was met, a reviewing court asks whether the "procedure was fair having regard to all of the circumstances": *CPR* at para 54.

[12] Finally, the Applicant sought to raise an issue that was not before the Assistant Commissioner, namely that the CSC never grants waivers of the ITS deduction: Applicant's Memorandum of Fact and Law at paras 56-65. However, an applicant is precluded from raising issues that were not before the decision-maker: *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at paras 86, 98. As a result, I did not consider any evidence or submissions related to this issue as it was not grieved by the Applicant and thus not considered by the Assistant Commissioner.

IV. Analysis

A. *The Assistant Commissioner reasonably denied the Applicant's grievance*

[13] A review of the Assistant Commissioner's Decision demonstrates that he engaged with and thoroughly canvassed all of the Applicant's submissions filed in support of his grievance. After careful consideration, the Assistant Commissioner reasonably dismissed the Applicant's grievance finding that: (i) the ITS deduction is authorized by legislation; (ii) the deduction is based on access

to telephone services, not usage; and (iii) the Applicant failed to demonstrate that a waiver is warranted in the circumstances of his case.

(1) The ITS deduction is authorized by legislation

[14] In his grievance, the Applicant challenged the CSC's legal authority for the ITS deduction, asserting that the *CCRA* makes no mention of "phones at all": Decision at p 4. In his notice of application, the Applicant again questions "whether the requirement to pay administrative costs cited in the *CCRR* is even legal as the *CCRA* neglects to mention that such is permitted": Notice of Application at p 6, para 6.

[15] After reviewing the relevant statutory and regulatory provisions, the Assistant Commissioner dismissed the Applicant's argument, finding that the ITS deduction is "authorized by the legislation": Decision at p 4. As set out below, that interpretation is not only reasonable, but is consistent with this Court's jurisprudence.

[16] Here, the Assistant Commissioner reasonably concluded that "section 78 of the *CCRA* is the authority for the CSC to make deductions": Decision at p 2. Specifically, subparagraph 78(2)(a) of the *CCRA* provides the CSC with the general authority to make deductions from an offender's income in accordance with regulations made under paragraph 96(z.2) and any Commissioner's Directive:

Deductions	**Retenues**
(2) Where an offender receives a payment referred to in subsection (1) or income from a prescribed source, the Service may	**(2)** Dans le cas où un délinquant reçoit la rétribution mentionnée au paragraphe (1) ou tire un revenu d'une source réglementaire, le Service peut :
(a) make deductions from that payment or income in accordance with regulations made under paragraph 96(z.2) and any Commissioner's Directive;	**a)** effectuer des retenues en conformité avec les règlements d'application de l'alinéa 96z.2) et les directives du commissaire;

[17] As further explained by the Assistant Commissioner, subsection 96(z.2) of the *CCRA* provides that regulations may be made prescribing the purposes for which deductions may be made, in accordance with paragraph 78(2)(a) and the amount of any such deduction:

Regulations	**Règlements**
96 The Governor in Council may make regulations […]	**96** Le gouverneur en conseil peut prendre des règlements […]
(z.2) prescribing the purposes for which deductions may be made pursuant to paragraph 78(2)(a) and prescribing the amount or maximum amount of any deduction, which regulations may authorize the Commissioner to fix the amount or maximum amount of any deduction by the Commissioner's Directive;	**(z.2)** précisant l'objet des retenues visées à l'alinéa 78(2)a) et en fixant le plafond ou le montant, ou permettant au commissaire de fixer ces derniers par directive;

[18] The Assistant Commissioner then determined that, in accordance with these provisions of the *CCRA*, paragraph 104.1(2)(b) of the *CCRR* specifically identifies the ITS deduction:

104.1(2) Deductions may be made under paragraph 78(2)(a) of the Act for the purpose of reimbursing her Majesty in right of Canada for	**104.1(2)** Les retenues peuvent être effectuées en vertu de l'alinéa 78(2)a) de la Loi à titre de remboursement à Sa Majesté du chef du Canada :
[…]	[…]
(b) the administrative costs associated with the access to telephone services provided to the offender by the Service.	**b)** des frais d'administration associés à l'accès aux services téléphoniques que fournit le Service au délinquant.

[19] Notably, in two recent cases, this Court held that section 78 of the *CCRA* expressly provides the authority to make regulations providing for deductions to inmates' pay: *Johnston v Canada (Attorney General)*, 2020 FC 352 at para 48; *Guérin v Canada (Attorney General)*, 2018 FC 94 at para 36 [*Guérin*]. Indeed in *Guérin*, Justice Roy found that section 78 was "worded by Parliament with exemplary precision": *Guérin* at para 46.

[20] Based on the foregoing, the Assistant Commissioner reasonably dismissed the Applicant's argument about the legality of the ITS deduction and determined that the deduction is "authorized by legislation": Decision at p 2.

(2) ITS deduction is for access, not usage

[21] In his grievance, the Applicant claimed that because he does not use the phone, there are no administrative costs for him to reimburse under subparagraph 104.1(2) of the *CCRR*. He further

argued that it was “unfair and arbitrary” for all inmates to pay 8% of their earnings regardless of their usage: Decision at p 4.

[22] The Assistant Commissioner acknowledged that the Applicant had not used the ITS for many years. However, he reasonably determined that the Applicant’s usage was irrelevant based on the stated purpose of the ITS deduction −access to telephone services −as set out in subparagraph 104.1(2)(b) of the *CCRR*:

> As noted in the Legislation – Payments and Deductions paragraph above, subsection 104.1(2) of the *CCRR* identifies the *purpose* of the deduction for reimbursing Her Majesty in right of Canada as b) the administrative costs associated with the *access* to telephone services provided to the offender by the Service [emphasis in original].
>
> Decision at p 4.

[23] In his Decision, the Assistant Commissioner also highlighted the CSC’s policy objective that “encourages offenders to maintain and develop family and community ties through telephone communication”, as set out in Commissioner’s Directive 085 entitled “Correspondence and Telephone Communication”: Decision at p 4.

[24] In my view, based on the above-noted legislative purpose and policy objective, the Assistant Commissioner reasonably rejected the Applicant’s argument about the unfairness and arbitrariness of the ITS deduction:

> However, as the purpose of the deduction for administrative costs is associated with the access to telephone services, it is a service made available to all offenders, whether or not they chose [*sic*] to use it, and, as a group, the service benefits all offenders. As the deduction for the administrative costs associated with the access to telephone services provided to the offender by the Service is authorized by

> legislation and is considered appropriate, this part of your grievance is **denied** [emphasis in original].
>
> Decision at p 4.

[25] Ultimately, a policy choice was made to deduct ITS costs from inmates' pay or income based on their access to the telephone system, rather than their usage. As a reviewing court, my task is to assess the reasonableness of the Assistant Commissioner's decision and not to assess the wisdom or soundness of any underlying public policy choices: *Re BC Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 SCR 486 at paras 14, 15, 21, 31, 119, 128; *Moresby Explorers Ltd v Canada (Attorney General)*, 2007 FCA 273 at para 24; *Fortune Dairy Products Limited v Canada (Attorney General)*, 2020 FC 540 at para 106; *Guérin* at paras 75, 133.

(3) No undue interference

[26] I further find that the Assistant Commissioner reasonably applied and considered the regulatory requirements for waiving the ITS deduction, as set out in subsection 104.1(7) of the *CCRR*.

[27] Contrary to the Applicant's argument, the relevant question is not whether "the applicant would benefit from having his ITS tax waived": Applicant's Memorandum of Fact and Law at para 53. Rather, subsection 104.1(7) of the *CCRR* requires that an offender establish that a deduction "will unduly interfere" with their ability to meet the objectives of their correctional plan, their basic needs, or their family or parental responsibilities:

(7) Where the institutional head determines, on the basis of information that is supplied by an offender, that a deduction or payment of an amount that is referred to in this section will unduly interfere with the ability of the offender to meet the objectives of the offender's correctional plan or to meet basic needs or family or parental responsibilities, the institutional head shall reduce or waive the deduction or payment to allow the offender to meet those objectives, needs or responsibilities. [Emphasis added]	**(7)** Lorsque le directeur du pénitencier détermine, selon les renseignements fournis par le délinquant, que des retenues ou des versements prévus dans le présent article réduiront excessivement la capacité du délinquant d'atteindre les objectifs de son plan correctionnel, de répondre à des besoins essentiels ou de faire face à des responsabilités familiales ou parentales, il réduit les retenues ou les remboursements ou y renonce pour permettre au délinquant d'atteindre ces objectifs, de répondre à ces besoins ou de faire face à ces responsabilités. [Je souligne]

[28] I agree with the Respondent that 'unduly' "expresses a notion of seriousness or significance": Respondent's Memorandum of Fact and Law at para 33. It is therefore a high threshold to meet. In my view, the Assistant Commissioner reasonably determined that the Applicant failed to discharge his onus of demonstrating that a waiver was warranted in his case.

(a) *No interference with basic needs*

[29] The Applicant claimed that the ITS deduction interfered with his basic needs as a diabetic. Generally, the Applicant alleged that his essential health needs related to diabetes were not being met by the CSC such that he has to incur expenses to meet those needs.

[30] After reviewing the Applicant's file, the Assistant Commissioner determined that many of the Applicant's concerns related to his diabetic diet had already been addressed at the national

level of the grievance process between 2016 and 2018. In that respect, the Assistant Commissioner's Decision sets out those concerns and then details how they have specifically been addressed: Decision at p 5.

[31] In my view, this is a reasonable approach given that the relevant inquiry under subsection 104.1(7) of the *CCRR* is forward-looking, namely whether a deduction "will" unduly interfere with the ability of the offender to meet their basic needs. If concerns have been addressed, then it cannot be said that they "will" cause undue interference.

[32] Furthermore, the Assistant Commissioner reviewed the Applicant's canteen purchases over a three-year time period between January 10, 2018 and December 10, 2020. This was also a reasonable approach. Given the Applicant's claim that he had to spend his own money to meet his diabetic needs, it was reasonable for the Assistant Commissioner to look at what those extra costs might be in order to validate the Applicant's claim for a waiver.

[33] Finally, the Applicant specifically alleged that, despite an exemption from health care to wear track pants, he has been forced to buy them himself. However, based on a review of the CSC's information, the Assistant Commissioner determined that there was no record that the Applicant had "purchased track pants since at least 2015" and that the Applicant was "provided a pair of track pants from the Service in October 2017": Decision at p 5. The Assistant Commissioner encouraged the Applicant to make the requisite request to the CSC for another pair: Decision at p 5.

(b) *No interference with preparing for day parole*

[34] The Assistant Commissioner considered the Applicant's assertion that he was approaching day parole and thus required more funds. In supplemental submissions filed on his grievance, the Applicant relied on paragraph 78(1)(b) of the *CCRA*, stating that the CSC "does nothing to provide financial assistance for my reintegration into society other than having me save $80 for release": Letter dated November 19, 2020, Certified Tribunal Record at p 21.

[35] Notwithstanding that interference with preparing for reintegration is not a stated ground for granting a waiver under subsection 104.1(7) of the *CCRR*, the Assistant Commissioner considered and assessed the Applicant's request for a waiver on this basis. The Assistant Commissioner referred to the relevant statutory and policy provisions that set out the CSC's responsibility for preparing offenders for their release: *CCRA*, s 5(c); CD 860 at paras 17-19; Decision at p 6.

[36] As the Assistant Commissioner explained, inmates have both a current and a savings account. The purpose of the latter is to assist with saving money for release. The Assistant Commissioner noted that, in accordance with paragraph 78(1)(b) of the *CCRA*, the Applicant had been receiving level A pay (the highest pay rate) since at least 2010. Furthermore, as of November 2020, the Applicant had $1,189 in his savings account: Decision at p 6.

[37] The Assistant Commissioner did not err in finding that the Applicant failed to demonstrate that the ITS deduction interfered with his ability to prepare for release or that the CSC had not

provided financial assistance for his reintegration, in accordance with the relevant legislative and policy provisions.

B. *The Assistant Commissioner's Decision was rendered in a procedurally fair manner*

[38] The Applicant argues that the entire grievance process lacked any procedural fairness: Applicant's Memorandum of Fact and Law at para 77. In particular, the Applicant emphasized the delays in responding to both his waiver applications and his grievances.

[39] The jurisprudence is clear that delay, in and of itself, is not a ground for a breach of procedural fairness: *Creelman v Canada (Attorney General)*, 2018 FC 507 at para 40; *MacDonald v Canada (Attorney General)*, 2017 FC 1028 at para 21. Rather, it must be established that any delay caused prejudice to an applicant, such as it impaired their ability to meaningfully participate in the grievance process: *Johnson v Canada (Attorney General)*, 2018 FC 582 at para 56. The Applicant has not established such prejudice. In fact, the Applicant was given the opportunity to provide updated submissions and information at the final level of the grievance process and did take advantage of this opportunity.

[40] While there is no question that the grievance process, up until the Assistant Commissioner's Decision, was plagued by delays and errors, the Assistant Commissioner upheld the Applicant's grievance on numerous procedural grounds and ordered that the Institutional Head of Warkworth Institution [Institutional Head] take corrective action. Notably, the Applicant's grievance was upheld with respect to failing to share a grievance decision in a timely manner,

failing to interview the Applicant during the initial grievance process, and failing to return the Applicant's original grievance submissions to him: Decision at pp 3, 7.

[41] In terms of corrective action, the Assistant Commissioner directed the Institutional Head to ensure that: (i) decisions for waiver applications are rendered in a timely manner and that a sufficient rationale is provided to support the decision; (ii) the decision is documented on the Applicant's file, in accordance with CD 860; and (iii) all staff are provided training on the complaint and grievance process, its requirements, and its importance, in accordance with Commissioner's Directive 081 entitled "Offender Final Grievance Response": Decision at p 8. Insofar as the Applicant's grievance was upheld on these procedural matters and corrective action was ordered, procedural fairness is a non-issue: *Creelman v Canada (Attorney General)*, 2020 FC 936 at para 30.

[42] Significantly, the Assistant Commissioner rendered the Decision under review in a timely manner. According to the Applicant, the Assistant Commissioner's final level grievance response was completed within 44 days: Applicant's Memorandum of Fact and Law at para 42.

[43] In light of the above, I am unable to find that the Applicant has established that his right to procedural fairness was breached.

C. *Costs*

[44] The Respondent requests nominal costs in the amount of $500 if the application is dismissed. Although the Applicant did not succeed in this application, I decline to exercise my discretion under Rule 400 of the *Rules* to award costs against him.

JUDGMENT in T-243-21

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed without costs.

"Anne M. Turley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-243-21
STYLE OF CAUSE:	DWIGHT CREELMAN v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	VIDECONFERENCE
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APPEARANCES:

Dwight Creelman	FOR THE APPLICANT ON HIS OWN BEHALF
Emily Atkinson	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT