Date: 20090914

File: 566-02-2008

Citation: 2009 PSLRB 111

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

JOHN TARALA

Grievor

and

DEPUTY HEAD
(Correctional Service of Canada)

Respondent

Indexed as
Tarala v. Deputy Head (Correctional Service of Canada)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Beth Bilson, adjudicator

For the Grievor: William Selnes, counsel

For the Respondent: Adrian Bieniasiewicz, counsel

Heard at Saskatoon, Saskatchewan,
April 21, 2009.
Written submissions dated May 1, 22 and 26, 2009

Individual grievance referred to adjudication

[1] John Tarala ("the grievor") was an employee of the Correctional Service of Canada ("the respondent"). He was suspended from his employment following incidents in March 2007 in which he allegedly assaulted an inmate at the Regional Psychiatric Centre (RPC) in Saskatoon, Saskatchewan. Following an investigation by the employer, the grievor was dismissed. He subsequently grieved the suspension and the termination. Inmate "S", the inmate allegedly assaulted by the grievor, was transferred to other institutions some weeks after the incidents and later took her own life.

[2] This decision concerns an application for the production of documents made on behalf of the grievor. Oral arguments concerning the application were heard on April 21, 2009. At that time, the adjudicator made an oral ruling for the production of a number of documents listed in the application. Counsel for the employer made no objection to the order concerning those documents. A written version of the oral order was issued on April 24, 2009.

[3] With respect to the remaining documents, the parties made written submissions. The documents remaining in dispute are the following:

1) A summary of the institutional history of inmate S from the time she was first incarcerated as a federal inmate to the time of her transfer from the RPC to Montreal.

2) The records of charges against inmate S under the *Corrections and Conditional Release Act* S.C. 1992, C.20, that are in the employer's possession.

3) The case management file for inmate S for all the time she was incarcerated as a federal inmate. It should be noted that the production order made on April 21, 2009 required the production of the case management file for her period of incarceration at the RPC.

4) The preventative security file for inmate S while she was in federal custody.

5) The discipline and disassociation file for inmate S while she was in federal custody.

6) The psychiatric file for inmate S while she was in federal custody.

[4] It should be noted that an application for the production of many of those documents was made before the Provincial Court of Saskatchewan in relation to criminal charges laid against the grievor based on the same incidents that were the grounds for his termination. I have had the advantage of reading the Provincial Court's decision.

Summary of the arguments

[5] Counsel for the grievor stated that, for the grievor to be able to present an adequate defence to the allegations on which the termination of his employment was based, it is necessary for him to have access to the widest possible range of documents that will shed light on the behavioural patterns of inmate S. On that point, counsel for the grievor pointed out that the employer relied on statements made by inmate S in the course of the investigation of the March 2007 incidents. Given the demise of inmate S and therefore the lack of opportunity to challenge the statements through cross-examination, the grievor must be given an alternative opportunity to test the credibility of those statements by presenting other documents about the history and character of inmate S.

[6] Counsel for the employer argued that documents sought in the application from the period after inmate S's departure from the RPC can have no relevance to these proceedings. The termination was based on the grievor's conduct in the context of inmate S's incarceration at the RPC, and any subsequent events concerning her cannot bear on the actions taken by the grievor in March 2007. He also argued that the privacy concerns of inmate S mitigate against ordering the production of the psychiatric records and that the other documents sought are sufficiently sensitive that the employer should not be required to disclose them unless they will clearly have some bearing on the merits of the grievance.

Reasons

[7] The issue of how to reconcile concerns about relevance, concerns about fairness to a person presenting a defence against allegations of wrongdoing and concerns about the privacy and dignity interests associated with certain kinds of information has been the subject of considerable discussion in the courts and in other tribunals when

determining the documents that must be produced. Under common law, the protection from scrutiny of certain kinds of information — such as medical, psychiatric or counselling records — is dealt with, under the rubric of "privilege," by applying the Wigmore principles discussed at some length in the decision of the Supreme Court of Canada in *M.(A) v. Ryan*, [1997] 1 S.C.R. 157. In that case, the Supreme Court accepted that the relationship in question between a patient and a psychiatrist justified concern about the protection of the information but focused on balancing the interest of the defendant in being able to present an adequate defence and the interest of the plaintiff and her psychiatrist in keeping sensitive information confidential. The Supreme Court suggested that this balance is essentially an exercise of ". . . common sense and good judgment" by the judge. The Supreme Court also drew a distinction between criminal proceedings like those in *R. v. O'Connor*, [1995] 4 S.C.R. 411, and civil proceedings like those in *Ryan*. The supreme Court indicated that, in the case of criminal charges, the interest in privacy or confidentiality would more often have to yield to the "search for truth," while in civil proceedings, privacy interests might be given a higher priority.

[8] In *O'Connor*, the Supreme Court devised a process that would provide a pragmatic approach to the balancing of interests. Under that approach, the court in question would first require the person asking for disclosure to demonstrate the "likely relevance" of the material being sought. The Supreme Court made it clear that the idea of "likely relevance" did not place as stringent an onus on the applicant for a production order as would an argument about whether the document should ultimately be admitted into evidence, although the applicant is required to show that there is ". . . a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify." An "issue at trial" might include an issue of credibility of a witness or the reliability of other evidence. In the case of the application for production in *O'Connor*, the Supreme Court recognized that the applicant laboured under the handicap of not having seen the documents.

[9] The second stage of the *O'Connor* process, once the judge is satisfied that the material is "likely relevant," is to order the production of the documents for examination by the court. If the court is satisfied after reviewing the documents that they should be produced to the applicant, then a further order would be made to that effect.

[10] A version of the *O'Connor* process was subsequently enshrined in amendments to the *Criminal Code*, R.S.C. 1985, c. C-46, ss. 278.1 to 278.91, which address issues about records in proceedings concerning sexual offences. Subsection 278.5(2) of the *Criminal Code* requires the court to take into account the following considerations:

> *a) the extent to which the record is necessary for the accused to make a full answer and defence;*
>
> *b) the probative value of the record;*
>
> *c) the nature and extent of the reasonable expectation of privacy with respect to the record;*
>
> *d) whether production of the record is based on a discriminatory belief or bias;*
>
> *e) the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates;*
>
> *f) society's interest in encouraging the reporting of sexual offences;*
>
> *g) society's interest in encouraging the obtaining of treatment by complainants of sexual offences; and*
>
> *h) the effect of the determination on the integrity of the trial process.*

[11] In Community Social Service Employers' Association v. Health Sciences Association of British Columbia (2002), 109 L.A.C. (4th) 289, the arbitrator considered the implications of Ryan, O'Connor and R. v. Mills, [1999] 3 S.C.R. 668, as well as the Criminal Code provisions, for arbitrating a grievance. The arbitrator concluded that the fact that the dispute arose in the workplace rather than in a criminal proceeding did not mean that the competing interests in disclosure — the right to make a full answer and defence balanced with privacy and equality — deserved any less caution or respect.

[12] In the grievor's case, the tension between those two interests is acute. Although these are not criminal proceedings, the implications of the termination of the grievor's employment are extremely serious for him, and he is entitled to make a vigorous challenge to the allegations of misconduct that have been made against him. On the other hand, the death of inmate S does not bring to an end the concerns about her dignity and privacy or obviate the employer's more general concerns about

maintaining the confidentiality of records concerning persons who are both inmates in a correctional institution and patients in a therapeutic relationship.

[13] I have concluded that the grievor has failed to show that documents from the period after inmate S was transferred from the RPC on or about April 12, 2007, are "likely relevant" to the issue of whether the grounds of his suspension and termination are well - founded. At the same time, I have concluded that documents from the period when inmate S was in federal custody before her arrival at the RPC may have some relevance to issues that may have some significance in this matter, including the credibility of inmate S's statements during the investigation and the propriety of the grievor's actions.

[14] With respect to the psychiatric records in particular, my conclusion differs somewhat from that of the Provincial Court of Saskatchewan. I have concluded that the grievor has met the test of likely relevance for those records in the sense that there is a possibility that they may be helpful in determining the credibility of the statements made by inmate S during the disciplinary investigation.

[15] These orders are "*O'Connor* orders," that is, I am ordering that the documents be produced to me in the first instance. On completing my review, I will make further orders as to whether any of or all the documents should be disclosed to the grievor and will attach any necessary conditions. It will , of course, be open to counsel for either party to raise at the hearing any issue concerning the relevance or admissibility of any of or all the documents presented as evidence.

[16] For all of the above reasons, I make the following order:

(The Order appears on the next page)

Order

[17] I order that the following documents be produced to me for my review:

1) Any summary of the institutional history of inmate S prepared by the employer before the transfer of inmate S from the RPC on or about April 12, 2007.

2) The records of any charges against inmate S under the *Corrections and Conditional Release Act* that are in the employer's possession pertaining to the period before her transfer from the RPC on or about April 12, 2007.

3) The case management file for inmate S for the time she was in federal custody before her arrival at the RPC.

4) The preventative security file for inmate S for the period she was in federal custody up to her transfer from the RPC on or about April 12, 2007.

5) The discipline and disassociative file for inmate S for the period she was in federal custody up to her transfer from the RPC on or about April 12, 2007.

6) Any psychiatric records concerning inmate S up to her transfer from the RPC on or about April 12, 2007.

September 14, 2009.

Beth Bilson,
adjudicator