Federal Court  Cour fédérale

Date: 20180205

Docket: T-560-17

Citation: 2018 FC 118

Ottawa, Ontario, February 5, 2018

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

BLAKE MCBRIDE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Sgt. McBride asks the Court to set aside the final decision rendered under the Royal Canadian Mounted Police [RCMP] grievance system by a level II adjudicator [Adjudicator] denying his grievance for Standby Level II pay during the years 1996-1999, when he was posted to Deer Island, New Brunswick. In his grievance, he described the effect of denying him standby pay:

> I have suffered a loss of payment in the amount of 19,592 hours of Standby Level II at the rate of 1 hour payment for every 8 hours of work. This means that I was entitled to 2449 hours of Regular pay

> at the straight time rate. This is almost a full years [*sic*] income that was lost as a result of not receiving this payment.

Background

[2] The facts giving rise to the grievance are undisputed. Sgt. McBride has served as a member of the RCMP since December 1992. From July 1996 to October 1999, he was posted to a one-person detachment at Deer Island, New Brunswick. Deer Island is accessible by a twenty-minute ferry ride which runs every half-hour between 6:30 am and 11pm each day. Accordingly, urgently required police assistance is available only through the RCMP officer posted to the island.

[3] Sgt. McBride met with the District Commander upon his arrival and the Adjudicator notes that he says that he was told as follows:

> He further advised in this meeting that I could work when I wanted to but I had to ensure that I covered the required amount of hours per week, 80 hours, and also I was unable to claim any overtime if I got called out, but I was able to adjust my shift to cover off the hours worked if I did get called out. <u>The expectation of the [District Commander] was that I was to be available to respond to calls whether I was on shift or not</u> and that I was to be issued a pager to ensure that I was "readily" available to take these calls when I was away from my residence or out on the island. [emphasis added]

[4] The RCMP called no evidence to counter Sgt. McBride's evidence as to his superior's stated expectation that he was to be available to respond to calls whether he was on shift or not. This, I observe, is exactly what is meant by being on standby. I further note that the grievance

did not relate to any claim for overtime pay; rather, it related only to pay for being on standby when stationed at Deer Island.

[5] The RCMP's policy on standby pay at the relevant time was contained in its Administration Manual, as follows:

> II.4.F STANDBY LEVEL II – VOLUNTARY ON CALL
>
> F.1.a There is a requirement to provide 24 hour community access to policing services for our clients.
>
> F.1.b. District/unit commanders who have responsibility for their overtime budgets have ultimate authority to approve compensation for Standby Level II.
>
> …
>
> F.1.d Standby Level II will be applicable at units where 24 hour shifts are not provided and a need exists to have members readily available to provide emergency policing services during the quiet hours to the public.
>
> 1. This does not include admin. support units.
>
> …
>
> F.1.g. Standby Level II hours are accrued at the rate of one hour for every eight hours at straight time and not to include actual overtime compensation (retroactive to 95-08-30).

[6] In February 2010, he learned that the member posted to Deer Island after his posting was being compensated at Standby Level II for his on call hours. Sgt. McBride immediately requested 2,449 hours of Standby Level II compensation.

[7] On November 3, 2011, Sgt. McBride's request was denied. He grieved that decision on November 29, 2011. The grievance was dismissed on September 28, 2015. Sgt. McBride then referred the grievance to Level II. The Adjudicator dismissed the grievance on March 28, 2017.

[8] The RCMP grievance and adjudication process at the relevant time was done internally; there was no independent third party adjudication: See *Canada (Attorney General) v Smith*, 2007 NBCA 58 at paras 3 and 5.

[9] The Adjudicator made two preliminary findings: (1) that the grievance was timely, and (2) that Sgt. McBride had standing to bring his grievance. Neither finding was challenged by the RCMP.

[10] The Adjudicator noted that as a level II adjudicator she would render a *de novo* decision and use the two-stage test set out in section 17 of the *Commissioner's Standing Orders (Grievances)* SOR/2003-181. She would (1) determine if the decision being grieved was consistent with applicable legislation and policies; and (2) if the decision was not consistent and caused prejudice, determine what corrective action was appropriate.

[11] I note that SOR/2003-181 has been repealed. The regulation that replaced SOR/2003-181 is meaningfully different, as a level II adjudicator does not engage in a *de novo* analysis, but rather considers whether the "decision at the initial level contravenes the principles of procedural fairness, is based on an error of law or is clearly unreasonable:" *Commissioner's Standing Orders (Grievances and Appeals)* SOR/2014-289, s 18(2). Neither party addressed whether the

Adjudicator was correct to rely on the repealed provisions. I assume that the Adjudicator did so because the initial grievance was made prior to the Regulation's repeal and replacement, even though the decisions made under the grievance process were made after the provision had been repealed.

[12] The Adjudicator stated the Sgt. McBride bore the onus of demonstrating on the balance of probabilities that the denial of his claim for Standby Level II pay was contrary to policy, and quoted large sections of the Administration Manual, which she subsequently referred to as "the policy." The Adjudicator concluded that the policy states that the only person who can authorize Standby Level II is the District Commander. She found that the District Commander did not follow the procedures required to authorize standby. She also found that Sgt. McBride did not have the authority to place himself on standby. She therefore concluded that regardless of whether Sgt. McBride considered himself to be available for duty 24/7, he had provided insufficient information to demonstrate that the District Commander required him to be on standby, and found that he established the contrary by stating he was never offered standby compensation.

[13] The Adjudicator stated that she was applying the 1998 policy. In fact the policy she relied on was the 1988 policy which had been repealed and replaced prior to Sgt. McBride's posting to Deer Island. Section II.9.H.1.b of the 1988 policy states that: "There will be no permanent standby locations." The Adjudicator found that Sgt. McBride's request for standby pay was, in essence, a request that his assignment be a permanent standby location, and that this would have been contrary to the policy.

[14] The policy which did apply to Sgt. McBride, the 1996 policy, provides in Section II.9.H.3.f: "Do not approve permanent standby." As was correctly observed by Sgt. McBride: "This is a requirement for Commanding Officers to follow, not Sgt. McBride." He submits that this error alone renders the decision unreasonable.

[15] Notwithstanding her finding that the District Commander did not explicitly create a permanent standby location, the Adjudicator did consider whether the District Commander created a model of policing that implicitly required Sgt. McBride to be on Standby Level II. She found that the only documentary evidence available was an October 31, 1995, memorandum by the District Commander which stated that Sgt. McBride had a tentative schedule allowing him to schedule his own shifts to meet the needs of the community. The Adjudicator found that Sgt. McBride's testimony indicated he was master of his domain as he could work when he wanted, and she noted that his notebooks showed he took advantage of this flexibility. She further found that if Sgt. McBride was not satisfied with the policing model, it was his prerogative to discuss alternate arrangements.

[16] The Adjudicator noted the only other communication was Sgt. McBridge's meeting with the District Commander on his transfer to Deer Island, which is recited above at paragraph 3. She found that while Sgt. McBride may have left the meeting with an understanding that he was always on standby, it was his responsibility to clarify what was expected of him and take appropriate action to ensure he was provided with every benefit. She found that "[i]t has long been established through Commissioner's decisions that members are responsible to know the policies that govern their specific duties and responsibilities." She found that Sgt. McBride had

offered no justification for why he was not aware of the policy and that by requesting Standby Level II pay after his service ended he was effectively denying the District Commander the opportunity to consider alternative arrangements.

[17] Sgt. McBride provided evidence that others in the identical or similar circumstances to his received Level II standby pay. The first was the successful grievance by Cpl. Nagy who worked at a single-member detachment at Campobello Island in New Brunswick from July 1998 to June 2001. The second was the successful grievance by the RCMP member who replaced Sgt. McBride at Deer Island. Sgt. McBride requested a copy of that grievance and response through the disclosure process, but was informed by the District Commander that the decision had been destroyed. Regardless, it was not disputed by the RCMP that Sgt. McBride's successor did receive the standby pay that Sgt. McBride now claims.

[18] The Adjudicator was dismissive of this evidence stating:

> [E]ach grievance is adjudicated on its own merit based on the evidence provided. The decision ultimately turns on whether the Grievor establishes that the impugned decision was consistent with the relevant legislation or applicable policies and not the outcome of a separate grievance.

[19] The Adjudicator provided a concise summary of her reasons at paragraphs 77-78 of her decision:

> In conclusion, although the Grievor may have considered himself to be on-call, I find that he failed to demonstrate that the District Commander had approved him for standby level II compensation. Given that policy requires such approval, the Grievor is not entitled to compensation

> Furthermore, I find that the Grievor had the onus to challenge the circumstances of his service delivery at the time of his tenure on Deer Island. … Lastly, I find the Respondent's denial of the Grievor's claim for retroactive compensation at the rate of standby level II for his service while posted to Deer Island was consistent with the policy of the day.

Issues

[20] Sgt. McBride submits that the decision under review is unreasonable because:

1. the Adjudicator unreasonably refused to consider previous similar grievances;
2. the Adjudicator unreasonably relied on an expired policy;
3. the Adjudicator unreasonably used circular logic; and
4. the Adjudicator's conclusions were inconsistent with established facts.

[21] The decision is to be reviewed using the reasonableness standard: See *Irvine v Canada (Attorney General)*, 2012 FC 1370 at para 27, aff'd 2013 FCA 286.

Analysis

1. The Prior Decisions on Comparable Facts

[22] Sgt. McBride provided the Adjudicator with two previous Level I Grievance Decisions, which he submitted were on all-fours with his circumstances on Deer Island. As noted earlier, we have the benefit only of the facts relating to Sgt. Nagy's grievance. However, given that the other grievance related to Sgt. McBride's replacement on Deer Island, if his or her circumstances differed from those of Sgt. McBride, the onus of proving that difference rested on the RCMP

because it was the RCMP which was responsible for having destroyed all paperwork dealing with the grievance.

[23] The circumstances of Sgt. Nagy do parallel Sgt. McBride's and are concisely summarized by his counsel at paragraph 20 of his memorandum, as follows:

> The first grievance was brought by Cpl. Nagy. Cpl. Nagy worked as a single-member detachment at Campobello Island in New Brunswick from July 1998 to June 2001. Campobello Island is very similar to Deer Island: both are in the Bay of Fundy; both have a permanent population of just under 1000 people; both are just under 50 kilometers in size; and both are served by a single-member detachment of the RCMP. Both Cpl. Nagy and Sgt. McBride were expected to be available for all calls during quiet hours because backup was not readily available (and would have to come by ferry or other boat). Both were not paid standby while they were working, but learned years later that their successors were paid standby pay. Both requested Level II standby pay, and both were denied by Staff Sergeant Larry McDonald, the same District Commander. Both grieved. Cpl. Nagy, however, was successful in his grievance.

[24] Sgt. McBride makes two submissions respecting these prior decisions. First, he relies on the decision of the Federal Court of Appeal in *Canada (Attorney General) v Bri-Chem Supply Ltd.,* 2016 FCA 257 [*Bri-Chem*] which held that a tribunal must pay respectful attention to earlier decisions and, if it chooses to depart from them, to provide an explanation as to why it does so. Sgt. McBride submits the Adjudicator did not distinguish the earlier grievances on the facts, or explain why those decisions were wrongly decided; rather, she ignored them, contrary to the requirements in *Bri-Chem*.

[25] Second, Sgt. McBride submits that it is a well-established principle of labour relations that management is required to enforce rules consistently across the workplace. He submits that

contrary to this principle, the Adjudicator is "proposing as a matter of principle that the standby pay policy should be applied inconsistently."

[26] I agree with the Respondent that the RCMP grievance process "works nothing like the quasi-judicial process considered in *Bri-Chem*" because there is not the same sort of hierarchical relationship. Grievance adjudicators under the RCMP policy are not overseen by a tribunal. Moreover, the grievor's submission that the principle of *stare decisis* dictates that his grievance receive the same treatment by the Adjudicator makes little sense because the two grievances he relies upon succeeded at the Level I stage, whereas his grievance is now at Level II. It would be contrary to logic that a higher authority is bound by decisions rendered at a lower level.

[27] Nonetheless, these two decisions do indicate that Sgt. McBride's grievance was dealt with differently at Level I than these other two; notwithstanding that the circumstances were materially identical. That, in my view, is a fact that ought to have been considered by the Adjudicator.

[28] If an employer can render contrary decisions when interpreting and applying its own policies on identical facts, the result is chaos, and the arbitrary application of policy means that there is no "policy" at all. In determining whether the decision is "consistent with … policy" under the former *Commissioner's Standing Orders (Grievances)* or is "clearly unreasonable" under the newer Regulation, this is a very relevant consideration, and the failure to recognize that renders the decision under review unreasonable.

[29] While it was open to the Adjudicator to make a ruling contrary to the two grievances that had been allowed by the RCMP; it was not open to her to do so without giving any consideration to those decisions or without any explanation why she differed in her interpretation of the policy, on identical or near identical facts.

[30] The Respondent submits that the "evidence in the record indicates that *stare decisis* is not currently applied by RCMP grievance adjudicators." While nothing turns on it, I observe that the Adjudicator in this case appears to have done just that in another context. She referred to previous Commissioner's decisions at paragraph 69 of her reasons stating that it "has long been established through Commissioner's decisions that members are responsible to know the policies that govern their specific duties and responsibilities". This suggests that the Adjudicator believed previous decisions were relevant and were to be followed by her and by members of the RCMP.

2. The Expired Policy

[31] It is not contested that the Adjudicator relied on a policy that was no longer in force. In so doing she formed the opinion that Sgt. McBride's request for standby pay was, in essence, a request that his assignment be a permanent standby location, which would have been contrary to the policy. Because she applied the wrong policy, the Adjudicator placed the burden on Sgt. McBride to take steps at the relevant time to establish whether or not he was on permanent standby. In fact, his burden was only to provide evidence, which he did, of the instructions given to him by his District Commander. If the District Commander instructed him to respond at all hours, then he was directed to be on standby. The fact that the District Commander may have

breached the policy is not germane to the grievance. This improper analysis of the burden results in a decision that is not reasonable, and most certainly in a decision that is not fair in light of the two identical grievances.

3. Circular Logic

[32] I cannot help but find that parts of the Adjudicator's reasons are unreasonably circular in nature. She repeatedly notes that Sgt. McBride was never offered standby compensation and that the District Commander did not "officially" authorize standby. She then uses this finding to conclude that he is therefore not entitled to standby. Paragraph 61 of the Adjudicator's decision is an example of this erroneous reasoning:

> Regardless of whether the Grievor considered himself to be available for duty 24/7, he has not provided sufficient information to demonstrate that the District Commander required him to be on standby. In fact, the contrary has been established as the Grievor states that he was never offered standby compensation, nor was it ever discussed with him.

[33] The first sentence speaks to the heart of the issue, whether Sgt. McBride provided evidence to establish he was required to be on standby. However, the second sentence conflates the offering of standby compensation with an entitlement to standby. This is not supported by the policy, in fact, it is directly contrary to the (superseded) 1988 policy the Adjudicator quotes at paragraph 59, which states "if a member is required to be on standby during off-duty hours, then he/she <u>will be compensated</u>" (emphasis added).

[34] As previously noted, in assessing whether Sgt. McBride was “required” to be on standby, the Adjudicator looks only to whether the District Commander had properly authorized standby (which clearly he had not, for otherwise Sgt. McBride would have received standby pay). But, the propriety of the actions of the District Commander is not determinative, nor even relevant to whether Sgt. McBride was required to be on standby. In my view, the uncontradicted evidence is that he had been so required, as shown by what he was told in his meeting with the District Commander when he arrived. To suggest otherwise would be tantamount to a finding that directions given orally by a superior officer are not binding and need not be obeyed.

[35] This reasoning is consistent with that of the Federal Court of Appeal in *Brooke v Royal Canadian Mounted Police*, [1993] FCJ No 240, 152 NR 231 at page 7:

> The considerations taken into account by the Respondent that led him to conclude that the Applicant was not on standby because the order putting him on standby was not authorized to be made by the superior officer who made it are entirely irrelevant to whether or not the Applicant had been ordered "to remain available and able to respond immediately to a duty requirement." The Respondent erred in law in basing his decision on those considerations. If the Respondent was correct in concluding that OIC SERT had no authority to order its members to standby - a matter on which we need not express an opinion - the result was not that they had not been ordered to standby but that the order was illegal. The recourse for that is not to deny compensation to those who had obeyed and had no right to question their orders before incurring the disadvantages which entitled them to compensation. We may safely leave it to the Respondent to decide what disciplinary action he might wish to recommend and to whom he would direct it.
>
> [footnote omitted]

4. Are the Conclusions Contrary to the Evidence?

[36] As noted earlier, I find that the Adjudicator's conclusions of material fact are contrary to the evidence before her. Specifically, the finding of the Level II Adjudicator that Sgt. McBride "has not provided sufficient information to demonstrate that the District Commander required him to be on standby" is inconsistent with the evidence. It is directly contrary to the uncontradicted evidence that the District Commander ordered Sgt. McBride to be "available to respond to calls whether I was on shift or not."

Conclusion

[37] For all of these reasons the decision under review is not reasonable and it must be set aside. The parties agreed that costs in this matter ought to be fixed at $5,000 and I find that to be a reasonable sum in light of the complexity of the application.

JUDGMENT in T-560-17

THIS COURT'S JUDGMENT IS that the application is allowed, the decision is set aside and the matter is to be referred to a different Level II Adjudicator for a decision in keeping with these Reasons, and costs are payable to the Applicant, fixed at $5,000.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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