Federal Court  Cour fédérale

Date: 20190508

Docket: T-632-18

Citation: 2019 FC 608

Ottawa, Ontario, May 8, 2019

PRESENT: Mr. Justice Boswell

BETWEEN:

SHAWN LEMAY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Shawn Lemay, is a member of the Royal Canadian Mounted Police [RCMP]. A harassment complaint filed against him in August 2015 ultimately resulted in a decision of a conduct appeal adjudicator dated March 9, 2018 finding he had contravened section 2.1 of the *Code of Conduct of the Royal Canadian Mounted Police*, a schedule to the *Royal Canadian Mounted Police Regulations*, 2014, SOR/2014-281 [the *Code of Conduct*]. He has applied for judicial review of the adjudicator's decision pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, and requests an order quashing the decision.

I. Background

[2] The Applicant holds the rank of Staff Sergeant and has been a member of the RCMP for nearly 28 years. In August 2014, he transferred from a contract policing division and joined the Atlantic Division District office as the non-commissioned officer in charge of Administration and Management Services. At the time of the transfer, the District office was undergoing significant restructuring.

[3] On August 21, 2015 one of the six individuals the Applicant supervised filed a harassment complaint against him, alleging he had engaged in a pattern of behaviour that had caused her to feel disrespected, embarrassed, demeaned, excluded, worthless, and stressed, contrary to section 2.1 of the *Code of Conduct*. In mid-October 2015, two investigators obtained statements from 18 employees, including the complainant and the Applicant, and by mid-January 2016 a final investigation report [the Report] was completed.

[4] In early June 2016, a conduct authority concluded there was harassment. The conduct authority failed, though, to serve the Applicant with a notice of conduct meeting and to hold a conduct meeting. Two weeks later, the Applicant filed a statement of appeal to the Office for the Coordination of Grievances and Appeals [OCGA], challenging the conduct authority's findings in relation to the harassment complaint. About six weeks later, the new Commanding Officer at the District office [the CO] advised the Applicant that a procedural error had been identified, in that he had not benefited from a conduct meeting with the conduct authority prior to the decision being rendered. The CO informed the Applicant he intended to act as the conduct authority and

correct the procedural error by rendering a second decision. The CO served a notice of conduct meeting on the Applicant in early December and this meeting was held later in December 2016.

[5] Prior to a decision being rendered on the Applicant's appeal to the OCGA, the CO issued a new conduct decision on December 28, 2016 in which it was determined that, while the Applicant had breached the *Code of Conduct*, no conduct measures were imposed because subsection 42(2) of the *Royal Canadian Mounted Police Act*, RSC 1985, c R-I0 [the *RCMP Act*], stipulates that conduct measures shall not be imposed after the expiry of one year from the time of the contravention.

[6] The Commissioner of the RCMP allowed the Applicant's appeal against the first conduct decision on January 5, 2017 and directed that the matter be remitted to the conduct authority for a new decision. The next day the Applicant filed an appeal against the second conduct decision, disputing the conduct authority's power to render a second decision prior to a final decision being rendered on the appeal relating to the same matter. The Commissioner appointed a delegate to serve as a conduct appeal adjudicator in respect of the Applicant's appeal.

[7] The conduct appeal adjudicator [the Adjudicator] found that the conduct authority did not have authority to issue the second decision prior to conclusion of the appeal process; for this reason, the decision rendered on December 28, 2016 was found to be invalid. Pursuant to paragraph 45.16(2)(b) of the *RCMP Act*, the Adjudicator rendered a new decision based on a *de novo* review of the record and found that the Applicant had contravened section 2.1 of the *Code of Conduct*.

[8] In the course of his review, the Adjudicator divided the harassment complaint into eight allegations: namely, that (1) the Applicant overreacts when he is upset, (2) he sent the complainant too many text messages, (3) he made inordinate demands of the complainant during off-duty time, (4) he reduced the complainant's responsibilities, (5) he micromanaged the complainant, (6) the complainant was required to make excuses for his behaviour, (7) he routinely ignored the complainant, and (8) he gave the complainant a "week of silent treatment.". The Adjudicator concluded that the first seven allegations were either not made out or did not constitute harassment.

[9] In assessing the eighth allegation, the Adjudicator began by noting that in December 2014 the Applicant had responded to a personal issue affecting the District Commander [DC] at his house. The complainant insisted on picking up the Applicant, and on the drive back the Applicant directed the complainant not to discuss the issue with the DC (even though the complainant already knew what was going on from someone else).

[10] Four days later, the DC told the Applicant that the complainant had been in his office discussing the incident. On hearing this, the Applicant reported that he felt disappointed and "burned" by the fact that the complainant tried to "play fix-it" with the DC despite his clear instruction not to. The Applicant stated that the DC advised him to handle the complainant's failure to follow his direction. The Applicant told the DC he required a day or two to find the right words to express the complainant's disregard for his direction not to get involved.

[11] The complainant claimed it was the DC who asked her to come into his office to discuss the personal matter. The complainant stated that after the December 9, 2014 meeting with the DC, the Applicant did not speak with her for a couple of days. She then sent an email to the Applicant informing him that she was coming to work feeling anxious and sick and requested he tell her what she had done wrong. Although the Applicant acknowledged receipt of the complainant's email, he did not provide a substantive reply and ignored her for a week.

[12] On December 17, 2014 the Applicant, the complainant and the DC travelled together for work related duties. During this trip the Applicant made sure to include the complainant in conversations with the DC. When they were alone the complainant asked the Applicant why he had refused to speak to her and why his behaviour to her had suddenly changed. It was then that the Applicant informed the complainant he did not like the fact that she had met with the DC. The complainant told the Applicant that his failure to explain this earlier had caused her to suffer all week.

[13] The Adjudicator found that, while the Applicant may not have meant for his actions to have a significant impact on the complainant, "the objective standard for harassment does not assess the intention behind the behaviour." The Adjudicator further found that a reasonable person in the complainant's position would have been offended or harmed by the Applicant's refusal to discuss why he was upset with her for an entire week. The Adjudicator concluded by stating that the Applicant's continued failure to respond to the complainant's request to address why he was angry with her was "harmful and disrespectful", and that his behaviour established

that he had failed to treat the complainant with respect and courtesy, contrary to section 2.1 of the *Code of Conduct*.

II. Analysis

A. *Standard of Review*

[14] Decisions of the Commissioner or a delegate of the Commissioner are entitled to a high degree of deference and are reviewed on the standard of reasonableness (*Kalkat v Canada (Attorney General)*, 2017 FC 794 at para 52).

[15] The reasonableness standard tasks the Court with reviewing an administrative decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determining "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick, 2008 SCC 9* at para 47). Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board*), 2011 SCC 62 at para16).

[16] The standard of review for an allegation of procedural unfairness is correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79). The Court must determine whether the process followed in arriving at the decision under review achieved the level of fairness required by the circumstances of the matter (*Suresh v Canada (Minister of Citizenship and Immigration)*, 2002

SCC 1 at para 115). The analytical framework is not so much one of correctness or reasonableness but, rather, one of fairness and fundamental justice.

[17] An issue of procedural fairness "requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation" (*Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 at para 74). As the Federal Court of Appeal recently observed: "even though there is awkwardness in the use of the terminology, this reviewing exercise is 'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied" (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54). A procedure which is unfair will be neither reasonable nor correct, while a fair procedure will be both reasonable and correct.

B. *Was the Adjudicator's decision procedurally fair?*

(1) The Parties' Submissions

[18] According to the Applicant, it was outside of the scope of the Adjudicator's authority to conduct a *de novo* review and his only option was to send the decision back to a new conduct authority. A conduct appeal adjudicator does not, the Applicant says, and never had, the power to conduct a *de novo* review. The Applicant notes that, prior to the changes to the *Commissioner's Standing Orders (Grievances and Appeals)* [*Standing Orders*] in 2014, Level II grievance adjudicators in the RCMP grievance process considered that they had the authority to conduct a *de novo* review of the decision rendered at Level I, and that conduct appeals were never

conducted *de novo*. Once the Adjudicator found the second conduct authority's decision was procedurally unfair, the Applicant maintains that the Adjudicator could not cure the breach of procedural fairness.

[19] According to the Respondent, an appeal *de novo* is one where the original decision is ignored in all respects, except possibly for purposes of cross-examination. In the Respondent's view, since paragraph 45.16(2) of the *RCMP Act* does not authorize a conduct appeal adjudicator to refer a matter back to a conduct authority for redetermination, it follows that this provision necessarily empowers an adjudicator to cure breaches of procedural fairness. The Respondent contends that this paragraph authorizes a conduct appeal adjudicator to make the finding that, in the adjudicator's opinion, a conduct authority should have made.

(2) There was no procedural unfairness

[20] I disagree with the Applicant that conduct appeal adjudicators do not have the authority to conduct a *de novo* review based on the record. As the Court observed in *McBain v Canada (Attorney General)*, 2016 FC 829 at para 46, "in certain circumstances, administrative appellate tribunals have been found to have the power to cure procedural lapses or unfairness arising in a subordinate adjudication." In my view, paragraph 45.16(2)(b) of the *RCMP Act* clearly empowers a conduct appeal adjudicator to make the decision that, in the adjudicator's opinion, a conduct authority should have made.

[21] The scope of this power is informed by provisions such as subsection 33(1) of the *Standing Orders*, which provides that: "the Commissioner, when rendering a decision as to the

disposition of the appeal, must consider whether the decision that is the subject of the appeal contravenes the principles of procedural fairness, is based on an error of law or is clearly unreasonable".

[22] The Applicant complains that the Adjudicator's decision was tainted and procedurally unfair because the second conduct authority did not provide him with full disclosure, did not allow him to provide full submissions, and rendered a decision before the appeal was decided. This complaint is answered, in my view, by the fact that the Adjudicator disclosed to the Applicant all material that had been before the second conduct authority. The Applicant made detailed written submissions to the Adjudicator on two occasions and it is evident that the Adjudicator took these submissions into account in his decision. Any procedural unfairness associated with the conduct authority's decisions was rectified by the Adjudicator's decision and the manner in which it was rendered.

C. *Was it reasonable for the Adjudicator to find the Applicant's conduct constituted harassment?*

[23] The Respondent takes issue with the use of the Applicant's affidavit evidence. In the Respondent's view, the Applicant's claim that the Adjudicator's finding of harassment is unreasonable, is based mostly on affidavit evidence from the Applicant which was not before the Adjudicator. None of this evidence falls within any of the recognized exceptions for its admission in a judicial review application and, the Respondent says, should therefore be ignored.

[24] I agree with the Respondent in this regard. The Applicant's affidavit at times provides particulars which were not covered in the material before the Adjudicator. These have been ignored by the Court in its review of the Adjudicator's decision.

(1) The Parties' Submissions

[25] The Applicant says, putting the complaint at its highest, an eight-day delay in speaking with a subordinate about why he was upset with the complainant is not harassment. The Applicant argues that this finding trivializes harassment. In the Applicant's view, it was unreasonable for the Adjudicator to conclude that eight days of conflict avoidance constituted harassment. According to the Applicant, this sets too high a standard for RCMP members' conduct.

[26] In the Respondent's view, the finding of harassment was reasonable when viewed holistically in the context of the Adjudicator's findings that:

- the Applicant's and complainant's roles required them to work closely together;
- the Applicant was upset with the complainant over a work-related matter and refused to speak to her;
- the Applicant was not just being quiet, he was visibly upset with the complainant;
- the Applicant's behaviour was intentional, in that he knew it was upsetting the complainant;
- the Applicant never exhibited similar behaviour towards his superiors; and
- the complainant's evidence was uncontroverted that she told the Applicant his unwillingness to discuss his concerns was causing her harm.

(2) The Adjudicator's Harassment Finding was reasonable

[27] The Applicant's argument is essentially that a reasonable person would find that not responding to an individual after the necessity of a response was highlighted cannot constitute harassment. In the Applicant's view, an eight-day delay in speaking with the complainant was not harassment.

[28] The Government of Canada's *Policy on Harassment Prevention and Resolution* defines harassment as follows:

> **harassment (harcèlement)**
>
> improper conduct by an individual, that is directed at and offensive to another individual in the workplace, including at any event or any location related to work, and that the individual knew or ought reasonably to have known would cause offence or harm. It comprises objectionable act(s), comment(s) or display(s) that demean, belittle, or cause personal humiliation or embarrassment, and any act of intimidation or threat. It also includes harassment within the meaning of the *Canadian Human Rights Act* (i.e. based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and pardoned conviction).
>
> **Harcèlement (harassment)**
>
> comportement inopportun et offensant, d'un individu envers un autre individu en milieu de travail, y compris pendant toute activité ou dans tout lieu associé au travail, et dont l'auteur savait ou aurait raisonnablement dû savoir qu'un tel comportement pouvait offenser ou causer préjudice. Il comprend tout acte, propos ou exhibition qui diminue, rabaisse, humilie ou embarrasse une personne, ou tout acte d'intimidation ou de menace. Il comprend également le harcèlement au sens de la *Loi canadienne sur les droits de la personne* (c.-à-d. en raison de la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, la déficience ou l'état de personne graciée).

[29] This definition was referenced in the Report concerning the complaint against the Applicant.

[30] The Applicant's explanations for his treatment of the complainant and the description of events surrounding the complaint were stated in the Report and included the following:

- The Applicant would never be happy if someone said they were hurting - he challenges the complainant's assertion that he said "good" when the complainant told him her stomach was hurting.
- He was disappointed and felt that the complainant had "burnt" him when she went in and spoke to the DC regarding a personal matter. He sensed that it was not about work, but in fact about a personal matter that he had asked her not to speak to the DC about, nor to say a word about it. He indicated that he felt like lashing out, but he did not want to upset the complainant. He was quiet as he was trying to find a way to deal with it.
- He asserts he does not feel he is the "ignoring" type.
- When he wears ear buds or head phones it is to cut out distractions - to create white noise - to allow him to focus - it had nothing to do with ignoring people. In fact, he ordered "ear defenders" for everyone and they came right before Christmas.
- He wants the complainant to know that his nature is not to ignore people. If he was quiet, it was his way of dealing with his own issues.

- He never expected the complainant to carpool, pick up vehicles, or do other things for him. She volunteered to do these things - he describes her as "over accommodating".

[31] The Adjudicator clearly mentioned the Applicant's views and version of events in his decision but chose to rely on some aspects of the complainant's version, notably that she alerted the Applicant that his lack of explanation for his negative behaviour was causing her harm.

[32] In certain factual circumstances one employee giving another the "silent treatment" has been found to rise to the level of harassment meriting sanction. For example, in *Loyer v Treasury Board (Correctional Service)*, 2004 PSSRB 16 at paras 21 and 32, the Public Service Staff Relations Board dismissed an employee's grievance in respect of a co-worker's complaint that the employee had given her the silent treatment due to the personal conflict between them.

[33] In *Hertz Canada Limited v Canadian Office and Professional Employees' Union, Local 378*, [2011] BCCA No 77, 106 CLAS 67, a British Columbian arbitrator dealt with a grievance where two employees had stopped speaking with another. The arbitrator observed:

> 20 …Mr. Yohanis' evidence [was] that the grievors isolated him by refusing to talk to him. In this respect, his evidence was more consistent. In his words, "they stopped talking to me". … In my view, this is evidence of harassment. The silent treatment is a form of mistreatment with a long history; it is expressed by the peculiar idiom "to send someone to Coventry". … Since the [harassment] policy explicitly states that harassment "includes psychological harassment", there is no doubt that the silent treatment does constitute harassment. …

[34] In *North Bay Regional Health Centre v Ontario Nurses' Assn.*, [2015] OLAA No 171 at paras 108 and 114, one element of a grievor's harassment of another employee involved his refusal to have any communication with the other employee; the arbitrator found that this conduct, in combination with other actions, constituted harassment.

[35] Although the Applicant takes issue with the Adjudicator's use of the term "silent treatment" because he recognized that there was some communication between the parties during the period of silent treatment, this is not, in my view, a ground to find the decision unreasonable. The evidence before the Adjudicator showed a distinct change in the nature of the conversations between the complainant and the Applicant after she disregarded the Applicant's direction to her not to discuss the incident involving the DC.

[36] In this case, it was reasonable for the Adjudicator to find that the lack of communication about why the Applicant was angry with the complainant constituted harassment, especially in view of other factors such as the relationship between the Applicant and the complainant, the close interaction between them due to the nature of their roles, and the differential treatment between the Applicant and the complainant in the presence of superiors.

III. Conclusion

[37] The Applicant's application for judicial review is dismissed. The Adjudicator's decision is transparent, intelligible and justifiable, and falls well within the range of possible, acceptable outcomes.

[38] Each party sought costs in respect of this application. The Respondent has been successful and, therefore, is entitled to costs.

[39] The parties have agreed that costs should be fixed in the amount of $2,500.00, plus disbursements as agreed or, in the absence of agreement, as assessed by an assessment officer. The Applicant shall pay the costs and disbursements to the Respondent within 30 days of the date of this judgment.

JUDGMENT in T-632-18

THIS COURT'S JUDGMENT is that: the application for judicial review is dismissed; and the Applicant shall pay to the Respondent costs in the amount of $2,500.00, plus disbursements as agreed or, in the absence of agreement, as assessed by an assessment officer, within 30 days of the date of this judgment.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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