

Federal Court



Cour fédérale

Date: 20191125

Docket: T-1802-18

Citation: 2019 FC 1503

Ottawa, Ontario, November 25, 2019

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

JASON ZAK

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The present Application concerns a decision that terminates the Applicant's aspiration to remain as a member of the RCMP. For the reasons described below, the decision is reasonable.

[2] The Applicant was a probationary member of the RCMP who graduated from the RCMP's Training Academy on June 26, 2015. He was noted to be a good cadet, although he was noted to be curt and unsympathetic to other cadets (Certified Tribunal Record or CTR at p. 198). His first assignment was to a very demanding posting in Northern Saskatchewan. From the beginning he experienced a serious challenge to succeeding in the posting. He endured a lack of

concern from his superiors which resulted in serious conflict. He endured but, ultimately, his job performance failed to meet the force's expectations. This failure ultimately resulted in his rejection as a recruit. The decision-making leading to that outcome is the subject matter of the present judicial review application.

[3] The following is a synopsis of the Applicant's experience.

[4] Upon graduating from the RCMP Training Academy, the Applicant was appointed as a member of the RCMP pursuant to s. 9.3 of the *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10 (*RCMP Act*) for the probationary period of two years set out in the *Commissioner's Standing Orders (Employment Requirements)*, SOR/2014-292.

[5] The Applicant was first deployed for two months as a security officer on Parliament Hill. The Applicant was then posted to a small detachment in Deschambault Lake in northern Saskatchewan (DL Detachment), where he began his Field Coaching Program on August 31, 2015. During the first two months of the Field Coaching Program, conflict arose between the Applicant and his Field Coach. His original Field Coach was replaced with a second Field Coach, who remained with the Applicant for the rest of the Program. The Program had to be extended by four months, because the Field Coaches failed to complete and deliver required documents, and because the Applicant failed to complete a required project which involved numbering the houses in the community in partnership with the Chief and Band Council.

[6] In May 2016, the DL Detachment began to experience resource shortages: the Detachment Commander was transferred out of the detachment; a constable went on long-term medical leave; and a second constable was transferred out in September. Between May to

October 2016, members of the “F” Division Relief Team and neighbouring detachments filled vacancies at the investigator level, and other members were called upon to assist by performing various tasks such as file reviews. The Detachment Commander was replaced in October 2016, and one of the constable vacancies was filled in November 2016.

[7] In June 2016, the Applicant was advised that his career in the RCMP was in jeopardy due to management’s concerns with various aspects of his performance and attitude. The jeopardy resulted in action.

I. The Course of the RCMP’s Decision Making

A. *The Administrative Recommendation*

[8] On February 8, 2017, a *Recommendation for Discharge* was received by the Applicant. On February 15, 2017, a *Notice of Intention to Discharge a Probationary Member* was served on the Applicant. The Applicant presented a written submission on March 13, 2017. On March 15, 2017, a *Notice of New Information* relating to complaints received from the local Crown Attorney was served on the Applicant. The Applicant responded to the new information on March 22, 2017.

B. *The Management Level I Decision*

[9] Pursuant to s. 13 of the *Commissioner’s Standing Orders (Employment Requirements)*, an Officer of the “F” Division was delegated the necessary power to make a decision with respect to the recommendation to discharge the Applicant. By the Officer’s decision dated April 13, 2017,

the Applicant was discharged from the RCMP in a *Notice of Discharge* pursuant to s. 9.4(1) of the *RCMP Act* for the following reasons:

With regards to overall performance of your duties, although there were issues identified and acknowledged with your first trainer, there were many efforts in assisting you to improve and to help you to be successful. As stated, this included mentorship and assistance from different employees who were seasoned and competent members. This assistance encompassed verbal and written feedback, one on one mentoring, meetings, the production of developmental plans, and constant and regular follow up. It would be difficult to assert that what was required from you was not clear or that you were not told. Despite this assistance, you failed to demonstrate that you could perform the duties of a front line investigator in a consistent manner. Although there were times when your work was thorough and in line with what was expected, there were many occasions that you failed to do this. Ultimately, this failure has reflected negatively on your suitability to be a front line member of the RCMP as the onus remains on you to consistently demonstrate your suitability.

With regards to Ability to Meet Work Requirements, including those associated with workload, despite the fact that you worked in a busy detachment, you failed to demonstrate an ability to manage your work in a consistent manner. In this regard you were provided with direction and support on what to work on in order to develop the basic investigative skills required of a general duty member. You chose in many cases not to follow that direction or to ignore the support provided. In some cases you chose to work on the duties and activities that you felt were more important, despite being given direction that was contrary to this by your Detachment Commander. You identified that you were not provided with time management training however you did not explain how this would have assisted you more than the specific guidance and direction you were provided to assist you in managing your workload. There remains an obligation on your part to identify where you require assistance which you did not do. Overall you failed to consistently demonstrate an ability to perform the required duties and to manage the workload in a manner that was expected of you.

With regards to Ability to Adhere to Established Policies, Procedures, Practices and the Code of Conduct, you failed to consistently demonstrate an acceptable level of knowledge of what is required of a member of the RCMP. This included powers of a peace officer within the Criminal Code including arrest, detention,

and seizure. This also included the required knowledge surrounding basic investigative steps and documentation of files. There were a number of incidents that you were involved in that were concerning and could be considered breaches of the RCMP Code of Conduct.

With regards to Adherence to the Values of the Force, you did not always display these values in your words or actions, or with your interactions with the public, with co-workers or with other stakeholders.

With regards to Attitude Towards Duties, you at times portrayed a negative attitude towards your duties. You have been provided with significant oversight and supervision. This has included a number of different employees in a number of different forums. This was meant to assist you in developing your skills and abilities as a general duty member. There are times when you weren't receptive to this assistance and you responded with a negative attitude, by using offensive language, and by disregarding the direction provided to you. The progression from verbal counselling to written documentation by a variety of supervisors was reasonable to allow you to understand how to correct the deficiency and yet it remained an issue of concern.

With regards to Compatibility with Colleagues or Clients, despite the feedback from the references that you provided who indicated that they enjoyed and appreciated working with you, there is evidence that suggests that this was not the case with the other employees at Deschambault Lake Detachment. You had difficulty being a team player and getting along with other employees. Your behaviours were categorized as being condescending, and you did not display the level of professionalism and respect that is expected from a member of the RCMP. I am aware of the harassment complaints you have submitted. I have not relied on this knowledge, nor did I use any information pertaining to it, in coming to my decision. I relied solely on the relevant material provided to me, as disclosed to you, and all representations you have provided to me during the notice period.

At times you also did not demonstrate the level of professionalism expected in your dealings with the public and with other stakeholders. New information pertaining to your dealings with the Crown prosecutors office was brought to my attention within the allowed period under [s.16 of the *Commissioner's Standing Orders (Employment Requirements)*] prior to any decision being made. I considered this to be relevant to the global assessment of your suitability to remain a member. It was therefore required to be

provided to you for review and comment so you could know the case to meet and be given an opportunity to respond which you did. To not provide you with this information after being seized with it would not have been procedurally fair. As a result, you failed to demonstrate in a consistent manner your compatibility with colleagues and clients.

With regards to Reliability you have demonstrated on [sic] a consistent manner that you are willing to take on added responsibilities and additional shifts. This has greatly assisted the Detachment in managing through a period of resource shortages over the past summer and fall months. This is an important requirement of the job and you consistently met this requirement from the time you arrived at Deschambault Lake.

When this information is considered in its totality, I am left to conclude, on the balance of probabilities, based on the documentation provided that you have failed to consistently demonstrate your suitability to remain as a member of the RCMP despite being provided the reasonable opportunity, support, guidance, and direction to do so.

Final decision: The probationary member is discharged, effective date: 2017-04-13.

[Emphasis added]

(CTR at pp. 013 to 016)

[10] As a result, on April 20, 2017 the Applicant filed an appeal of the decision with the Office for the Coordination of Grievances and Appeals, seeking reinstatement to the RCMP to a different detachment. An Adjudicator was delegated the Commissioner's authority to dispose of the appeal.

C. The Adjudicator's Level II Decision

[11] The Applicant's appeal was required to be conducted in accordance with the *Commissioner's Standing Orders (Grievances and Appeals)*, SOR/2014-289 (*Commissioner's Standing Orders*). The following are features:

Conduct of Appeal

44 (1) An adjudicator must render their decision in respect of an appeal or any matter arising in the context of the appeal as informally and expeditiously as the principles of procedural fairness permit.

[. . .]

Adjudicator's decision

47 (1) An adjudicator may dispose of an appeal by rendering a decision

(a) dismissing the appeal and confirming the decision being appealed; or

(b) allowing the appeal and

(i) remitting the matter, with directions for rendering a new decision to the decision maker who rendered the decision being appealed or to another decision maker, or

(ii) directing any appropriate redress.

[. . .]

Étude diligente

44 (1) L'arbitre rend une décision sur l'appel ou sur toute question s'y rattachant avec célérité et sans formalisme en tenant compte des principes d'équité procédurale.

[. . .]

Décision de l'arbitre

47 (1) L'arbitre qui dispose d'un appel peut rendre une décision :

a) le rejetant et confirmant la décision portée en appel;

b) l'accueillant et :

(i) renvoyant l'affaire au décideur qui a rendu la décision ou à un autre décideur, avec des directives en vue d'une nouvelle décision,

(ii) ordonnant la réparation qui s'impose.

[. . .]

Considerations

(3) An adjudicator, when rendering the decision, 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.

[Emphasis added]

Considérations

(3) Lorsqu’il rend la décision, l’arbitre évalue si la décision qui fait l’objet de l’appel contrevient aux principes d’équité procédurale, est entachée d’une erreur de droit ou est manifestement déraisonnable.

[Non souligné dans l’original]

[12] The Adjudicator delivered an 84-page decision in which the following reasons are provided for rejecting the Applicant’s appeal. In the reasons, the Level I Officer is referred to as “the Respondent”:

As I have been directed by the Supreme Court, my task in this portion of my analysis is to determine whether the reasons provided by the Respondent for the Appellant’s discharge adequately explain the basis of his decision, in light of the evidence. As can be seen in my analysis in the previous sections, I have thoroughly reviewed the nearly 1000 pages that make up the Record, including all four of the Appellant’s submissions. I find that the reasons provided by the Respondent in the *Record of Decision* meet this test.

Subsection 17(1) of the *CSO (Employment Requirements)* provides two possible decisions (outcomes) the Respondent could have made in this case. These include the retention of the Appellant, which could have been subject to terms and conditions, or his discharge. So, the range of acceptable outcomes would lie between retention without terms and conditions through to discharge. The evidence must support the outcome reached.

Generally, I found the Respondent’s approach to the material to be well balanced. The Record of Decision is consistent throughout in that, under each heading, the Respondent spoke to both the material in the recommendation for discharge and the submissions and material presented by the Appellant. Under the heading of “Reliability”, the Respondent noted that there were no issues relative to this area of assessment. He also pointed out positive aspects of the Appellant’s performance, which he did throughout the document.

Throughout the decision, the Respondent repeatedly stated that there are examples in the material to support the statement that he had made rather than set out the specific example(s) in the body of the decision. He was not obliged to regurgitate each and every supporting example in the Record of Decision. Simply indicating that evidence to support his statements exists in the material before him was an efficient way of presenting his reasons for his decision. The Appellant was provided the material upon which the Respondent's decision was based and should have been reasonably able to identify examples to which the Respondent was referring, regardless of whether or not he agrees with the facts of the situation presented. I certainly had no difficulty in linking particular pieces of the material or accounts of various incidents to the categories used by the Respondent to evaluate the Appellant's suitability. The material is replete with examples of identified shortcomings, many of which would fit into several categories.

In the circumstances, the Respondent is entitled to a significant degree of deference. The discharge of the Appellant was within the range of acceptable outcomes. The Respondent's reasons are intelligible and transparent, and are heavily supported by the evidence. In reaching his decision, the Respondent was obliged to consider the Appellant's submissions. The Record of Decision clearly reflects that he did just that. He was not obliged to adopt them. Given the foregoing, I cannot find that the Respondent's decision to discharge the Appellant was clearly unreasonable.

CONCLUSION

The Appellant has not demonstrated on a balance of probabilities that the Respondent's decision to discharge him as a probationary member was made in contravention of the principles of procedural fairness, was based on an error in law or was clearly unreasonable. The Respondent's decision to discharge the Appellant is confirmed. The appeal is dismissed.

[Emphasis added]

(CTR at pp. 274-275, paras. 265-270)

II. The Current Judicial Review Application

[13] Pursuant to s. 18.1 of the *Federal Courts Act*, the objective of the present judicial review is to determine whether the Level II decision is reasonable according to the standard set by the Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47:

A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[Emphasis added]

III. The Applicant's Objections to the Adjudicator's Decision

[14] In support of an argument that the Adjudicator's decision is unreasonable, five arguments were advanced on behalf of the Applicant. I do not agree with each of the arguments.

A. *Reasonable Apprehension of Bias*

[15] The Applicant submits that the Adjudicator's former position as an RCMP Superintendent raises questions about his impartiality but also admits that this fact alone is insufficient to establish the existence of a reasonable apprehension of bias. Nevertheless, as the argument goes, such a finding should be made considering the Adjudicator's "painstaking 84-page analysis" that "sought out every possible justification for the Discharge Decision" and attempted to "back-fill" the reasons of the Level I Adjudicator. I reject this argument because no evidence-based analysis was presented to support the allegations.

B. *Erroneous Approach*

[16] In the Amended Notice of Application, the Applicant requests that the following declaration be made:

[T]he Conduct Adjudicator, as an RCMP Commissioner's delegate, wrongfully declined to exercise his jurisdiction on an appeal by limiting the Applicant's appeal of the Level I Decision to a standard of "patent unreasonableness".

[17] It appears that the Applicant is of the opinion that the appeal was expected to be conducted on a *de novo* basis which would allow the Adjudicator to make a "new" determination on the basis of the evidence on the appeal record. The Applicant takes the position that the Adjudicator wrongly approached the appeal as a judicial review in which the standard of "patent unreasonableness" was applied.

[18] In declining to make the requested declaration, I have a primary observation. There is no provision in the *Commissioner's Standing Orders* to support the Applicant's opinion that a *de novo* approach may be applied. The Adjudicator did not decline to exercise his jurisdiction to decide the appeal. To the contrary, he exercised the jurisdiction that was provided.

[19] As described at paragraph 11 of these reasons, s. 47(3) is clear on the approach to take and the task to meet. The provision does not authorize a *de novo* appeal; it is directive: the appeal is to be conducted in the manner of a judicial review to determine whether the Level I decision was rendered in error of law, is in breach of a duty of fairness, or is clearly unreasonable. The Adjudicator followed that direction. In the result, none of the conditions were found to exist.

[20] As a secondary observation, there is no evidence to support the argument that the Adjudicator applied the patent unreasonableness standard. As expressed at the end of the

Adjudicator's decision quoted at paragraph 12 of these reasons, the only standard that was applied is that which was directed:

Given the foregoing, I cannot find that the Respondent's decision to discharge the Appellant was clearly unreasonable.

[21] Thus, I find no error in the Adjudicator's decision on the issue of standard of review. In my opinion, the Adjudicator's approach was the correct approach.

C. *Support, Guidance, and Direction*

[22] The Applicant submits that the Adjudicator failed to adequately address the RCMP's failures to provide a fair opportunity for him to demonstrate his suitability in accordance with s. 3.1.1 of the *Administration Manual, Chapter 27A (Probationary Employees) (Administration Manual)* which deals with support, guidance, and direction for probationary members.

[23] The Adjudicator did address s. 3.1.1 of the *Administration Manual*; however, in the result, it is readily apparent that the wealth of evidence on the record of the Applicant's behaviour resulting in his dismissal was an overriding factor in the Adjudicator's decision to dismiss the Applicant's appeal on a finding that the Level I decision was not clearly unreasonable. I find no evidence of failure on the Adjudicator's part.

D. *Failure to Consider Inadequate Level I Reasons on Transfer*

[24] The Applicant also submits to this Court that the Adjudicator failed to consider the inadequacy of the Level I decision-maker's reasons on the transfer request made at the Level I stage.

[25] However, the Applicant did not clearly advance this argument to the Adjudicator.

[26] In his Notice of Appeal to the Adjudicator, the Applicant framed the transfer issue as a pre-discharge issue: “No reasons provided to show...why he was not moved to a different detachment during his probationary evaluation” [emphasis added] (CTR at p. 018). In his written submissions to the Adjudicator, the Applicant framed the transfer issue as a form of redress: “Cst. Zak requests relief from this tribunal in the form of reinstatement with the RCMP, with the condition that the reinstatement not be at the detachment in Deschambault Lake, Saskatchewan or the surrounding area” (CTR at 068).

[27] Therefore I find there was no reviewable error on this issue.

E. *Failure to Consider Redress*

[28] As just described, the argument was advanced to the Adjudicator that the Applicant should be allowed to proceed as a probationary member of the RCMP but with a transfer to a different Detachment. In the present review, it was argued that the Adjudicator’s failure to seriously address this argument constitutes a reviewable error.

[29] As quoted in paragraph 11 of these reasons, the Adjudicator had the unique authority to direct an “appropriate redress” but only if the Applicant’s appeal was allowed. Because the appeal was dismissed, the Adjudicator had no jurisdiction to engage the redress argument advanced.

IV. Conclusion on Judicial Review

[30] In rendering the Level I decision the Officer found that the Applicant failed to consistently demonstrate his suitability to remain as a member of the RCMP, and, as a result, the Officer came to the decision to discharge the Applicant. On appeal the Adjudicator decided that

the Officer's decision was not clearly unreasonable. On judicial review of this conclusion, I find that it is an acceptable outcome which is defensible in respect of the facts and law. Therefore, I find the Adjudicator's decision is reasonable.

JUDGMENT IN T-1802-18

THIS COURT'S JUDGMENT is that for the reasons provided the present application is dismissed.

I make no order as to costs.

"Douglas R. Campbell"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1802-18

STYLE OF CAUSE: JASON ZAK v THE ATTORNEY GENERAL OF CANADA

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