Federal Court  Cour fédérale

Date: 20131108

Docket: T-1851-08

Citation: 2013 FC 1131

Ottawa, Ontario, November 8, 2013

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

ALI TAHMOURPOUR

Complainant

and

CANADIAN HUMAN RIGHTS COMMISSION

Commission

and

ROYAL CANADIAN MOUNTED POLICE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal of an order made by Prothonotary Mireille Tabib pursuant to Rule 51 of the *Federal Court Rules*, SOR/98-106 [the Rules]. Prothonotary Tabib dismissed the Appellant's [Complainant] motion for an order compelling Royal Canadian Mounted Police [RCMP] Commissioner Bob Paulson and Inspector Monique Beauchamp to show cause why they should not

be found in contempt of Court with respect to an April 16, 2008 Order [the Order] made by the Canadian Human Rights Tribunal [the Tribunal] concerning the Appellant.

I. Issues

[1] The issues raised in this appeal are as follows:

A. Has the Appellant proven a *prima facie* case that Commissioner Paulson and Inspector Beauchamp failed to uphold the Order?

i. Is contempt available on the facts of this case?

ii. Has a *prima facie* breach of the Order been proven?

[2] For the reasons that follow, I dismiss the Appellant's appeal.

II. Background

[3] The Appellant is a Canadian citizen of Iranian origin and the Muslim faith. In 1999, while enrolled as a cadet at the RCMP Training Academy [Depot], he was the victim of systemic discrimination. His training contract was terminated in October, 1999, and he was subsequently denied re-enrolment.

[4] The Appellant launched a complaint with the Canadian Human Rights Commission [the Commission], alleging violations of section 7 and 14 of the *Canadian Human Rights Act*, RSC 1985, c H-6.

[5] After a lengthy investigation by the Commission, the Tribunal held on April 16, 2008, that the Appellant was a victim of systemic discrimination and ordered various remedies.

[6] Relevant to this appeal are two remedies included in the Order:

i. Unless otherwise agreed upon, the Respondent [RCMP] shall offer Mr. Tahmourpour an opportunity to re-enroll in the next available RCMP Cadet Training Program at Depot;

ii. If Mr. Tahmourpour accepts the offer of re-enrolment, the Respondent shall undertake a fair assessment of his skills at the outset of the training program to determine the areas in which training is needed.

[7] Negotiations ensued between the parties as to how the Order was to be implemented. Following an application for judicial review of the Order initiated by the RCMP in the Federal Court on October 6, 2009, the Tribunal's decision was quashed and negotiations ceased. On July 19, 2010, the Federal Court of Appeal reinstated the Tribunal's decision and negotiations regarding the Order's implementation recommenced.

[8] Over the next several months, negotiations stalled and the Appellant filed a contempt motion on May 1, 2011. The parties subsequently resolved most outstanding issues from the Order and the Appellant discontinued his contempt motion.

[9] On January 19, 2012, the Appellant signed a Cadet Training Program Agreement [the Agreement]. A term of the Agreement is that:

> …the Royal Canadian Mounted Police reserves the right at its discretion and at any time to revoke this offer or terminate your training, including, without limitation
>
> (…)
>
> If you fail to meet or abide by any requirements, regulations, policy, procedure or conditions set out in the Cadet Training Handbook, or by the Commanding Officer at the Training Academy.
>
> If your behaviour or performance brings to light a mental or emotional (psychological) condition that would interfere with your carrying out the tasks and requirements of a General Duty Constable

[10] On February 21, 2012, the Appellant signed a letter which offered re-enrolment in training at Depot [the Letter]. As per the negotiations between the parties, certain training and screening requirements were omitted from the offer of re-enrolment. However, the following requirement remained:

> …However, you will not commence RCMP training at Depot Division, Regina, Saskatchewan until we have received a signed copy of this letter acknowledging agreement and you have completed all of the following conditions successfully within the time frames indicated in the re-enrollment package. Specifically, you must have both the medical and security clearances, which includes successfully completing the PARE…There may however be additional forms that may need to be completed as the clearances are being processed ie, for medical clearance there will be forms the doctor completing the evaluation will ask to be completed.

[11] The Appellant was referred to Inspector Beauchamp to arrange the completion of the requirements listed in the Letter. The Appellant was asked to obtain a valid applicant medical profile, which included a psychological assessment.

[12] The Appellant objected to this assessment, on the ground that he was a re-enrolled cadet, not an applicant. Inspector Beauchamp replied by confirming his status as a cadet, but stated that section 23.9 of the RCMP's Administration Manual applied to him as more than 12 months had elapsed since his original medical profile was issued in the 1990s. The Appellant replied by reiterating his concerns over being characterized as an applicant versus a re-enrolled cadet, but agreed that a medical profile was appropriate and agreed to submit to the psychological assessment.

[13] The Appellant was assessed by Dr. David Fischman on April 11, 2012, and April 24, 2012. Dr. Fischman advised that while he had concerns, he was unable to reach a conclusion on the Appellant's suitability as a general duty constable. The Appellant was referred to Dr. Dorothy Cotton and interviewed on May 29, 2012.

[14] Dr. Cotton concluded "Mr. Tahmourpour does not demonstrate any significant psychopathology. However, he displays areas of relative weakness (emotional stability and adaptability) and areas of very significant deficit (problem solving and communications)."

[15] On September 24, 2012, Inspector Beauchamp contacted the Appellant to advise him that his continued re-enrolment as a cadet with the RCMP was being terminated as a result of the medical assessments by Dr. Fischman and Dr. Cotton.

[16] The Appellant then launched a motion for an order compelling Commissioner Paulson and Inspector Beauchamp to appear before a judge and show cause as to why they should not be found

in contempt of Court for failing to comply with the Order, pursuant to Rule 466 and 467 of the Rules.

[17] On June 10, 2013, Prothonotary Tabib dismissed the motion on two grounds.

[18] Firstly, she noted that contempt cannot be ordered against the Crown. As such, the order would have to be against either Commissioner Paulson or Inspector Beauchamp, neither of whom had taken steps or failed to take steps that they were personally mandated to take and that were causative of a breach of the Order (*Telus Mobility v Telecommunications Workers Union*, 2002 FCT 656). In the absence of evidence of such personal involvement, the only justification for contempt would be through vicarious liability of the Crown via Commissioner Paulson. However, Canadian law does not allow for vicarious liability of Crown employees. As such, she found that a contempt motion was not available on the facts of this case.

[19] Secondly, Prothonotary Tabib found that neither paragraph (i) nor (ii) of the Tribunal's order was breached.

[20] With respect to paragraph (i), she found that the RCMP fulfilled its obligation to the Appellant because the terms of the Order specified he "be offered an opportunity to re-enrol," not that he "be re-enrolled." Accordingly, the terms of the Order were met when the agreed upon offer was submitted to the Appellant. In addition, through his correspondence with the RCMP, the Appellant had agreed that a psychological assessment was appropriate.

[21] With respect to paragraph (ii), Prothonotary Tabib found that to establish a breach, the Appellant would have to show either that the RCMP failed to provided the required assessment, or that the Appellant was prevented from attending the program by reason of the unjustified conduct of the RCMP. The Appellant admitted that he was required to meet the medical standard profile and that psychological health assessments could be required to assess his fitness. The Appellant was found not to have met these standards. Further, his subjective belief that the assessments were used as an excuse to prevent him from training at Depot for other reasons is insufficient to reach a conclusion that this part of the Order was breached.

III. Standard of Review

[22] The standard of review applicable to discretionary orders by prothonotaries was set out by the Federal Court of Appeal in *Canada v Aqua-Gem Investments*, [1993] FCJ No 103, affirmed by the Supreme Court of Canada in *ZI Pompey Industrie v ECU-Line NV*, 2003 SCC 27, and slightly reformulated by the Federal Court of Appeal in *Merck & Co v Apotex Inc*, 2003 FCA 488, at para 19:

> Discretionary orders of prothonotaries ought not to be disturbed on appeal to a judge unless:
> (a) the questions raised in the motion are vital to the final issue of the case,
> or
> (b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts.

[23] In my opinion, the Appellant's motion is vital to the final issue of the case, in that the finding of contempt under sections 466 and 467 of the Rules requires a show-cause hearing prior to

a finding of contempt, and is necessarily a vital step to that ultimate contempt decision. As such, I am considering this motion on a *de novo* basis.

IV. Analysis

A. *Has The Appellant Proven A Prima Facie Case That Commissioner Paulson And Inspector Beauchamp Failed To Uphold The Order?*

i) Is contempt available on the facts of this case?

[24] Recent jurisprudence suggests that contempt of court is not available against the Crown in Canadian law (*Ouellet v BM*, 2010 ABCA 240, at para 38 [*Ouellet*]). As Peter Hogg et al articulate in *Liability of the Crown, 4th ed.* (Toronto: Carswell, 2011) at 84 [*Hogg et al*], there are valid reasons for maintaining this position:

> Any attempt to enforce compliance would lead to a damaging confrontation between the judicial and executive branches of government which in the end the judicial branch is bound to lose…In the highly unusual situation where the crown did disobey, this could safely be assumed to be a decision reached by the executive upon the basis of some grave public-policy objection to the court order. In that situation the court should not try to override the executive judgment.

[25] Despite this, *Hogg et al* recommend that contempt against the Crown be available as a remedy, at 84-85:

> There is no doubt that the foregoing reasoning has force. On balance, however, we believe that the contempt order ought to be available to enforce orders against the Crown. Our first point is that public policy considerations will often have been taken into account by the court before the order was made against the Crown in the first place. For example, before the Crown is ordered to produce documents, the Court must consider any claim of public interest immunity for the documents. In the case of other kinds of orders, the issuing court normally has some discretion, and it is unlikely that they would be granted in the face of a strong public-police objection. Secondly, once an order has been finally made against the Crown, if the

> executive still refuses to comply, the citation for contempt will provide a new hearing and another opportunity to persuade a court that there are good and sufficient reasons for disobedience. There is no rule that requires a contempt order to be made whenever a court order is breached, and if a contempt order is made there is no mandatory penalty.

[26] This reasoning is persuasive. Furthermore, there is something fundamentally wrong with an approach to justice and the rule of law that accepts the archaic notion that the Crown can be immune from contempt of Court, as this remedy could otherwise unquestionably be found against all other persons in Canada. However, contempt proceedings against the Crown itself are not argued in this case. In fact, the Appellant agrees with the Respondent that the Crown cannot be held in contempt. Despite this, he contends that an official who is in charge of a government department and aware of a court order can be held personally responsible for the failure to comply with that order (*Ouellet* at paras 27-29, 38, 41; *M v Home Office*, [1993] UKHL 5 [*Home Office*]). The necessary degree of involvement may include actively aiding and abetting the breach or it may be purely passive (*Manufacturers Life Ins Co v Guaranteed Estate Bond Corp*, [2000] FCJ No 172, at para 9; *Telus Mobility v Telecommunications Workers Union*, 2002 FCT 656, at paras 14-16).

[27] However, unlike the decisions in *Ouellet* and *Home Office*, above, where the subjects of the contempt proceedings were named by the orders in question, neither Commissioner Paulson nor Inspector Beauchamp are parties to the Order. They are however both named in the Appellant's motion for the show cause order before Prothonotary Tabib, and the Appellant argues that both should be named parties to this Appeal. The Respondent argues that to hold them in contempt would serve to indirectly find the Crown in contempt or hold them vicariously liable, a finding not

available against Crown officials (*Bhatnager v Canada (Minister of Employment and Immigration)*, [1990] 2 SCR 217, at para 25).

[28] The Respondent's position raises troubling questions. It seems arbitrary and potentially unjust that, in the rare situation where Crown officials disobey or fail to comply with a court order in which they are not specifically identified, they enjoy functional immunity in contempt proceedings, simply by virtue of the fact that they are not named parties to the order in question. This would be the result, notwithstanding that they are Crown officials responsible for the obligations of the Crown described in a court order.

[29] Put another way, some Crown officials can be held accountable in contempt proceedings where others cannot, despite the same or similar levels of knowledge of and responsibility for ensuring compliance with a court order, simply because they are either named or are not named parties in the order in question.

[30] One of the core principles underlying the rule of law is that Crown officials are required to exercise their authority in accordance with the law. This principle extends to contempt of court proceedings (*Canada (CHRC) v Winnicki*, 2006 FC 350, at para 2 [*Winnicki*]). If a Crown official were able to avoid complying with a court order in the manner described above, it would undermine this fundamental principle in our legal system. As stated by Justice Sean Harrington in *Winnicki*, at para 2:

> Contempt of Court flows from our sense of the rule of law. No one is above the law, and no one is to flaunt Court orders. Public policy requires that Court orders be respected until such time as they are successfully appealed, stayed or set aside.

[31] There should be no invisible fence around or cloak of immunity on the Crown official with respect to a finding of possible contempt. Accordingly, I find that a finding of contempt may be available against a Crown official, even if not named as a party in a court order, where the Crown official subject to the contempt proceedings has knowledge of that order and either statutory or delegated responsibility to comply with that order, and disobeys or otherwise fails to comply with it.

[32] In this instance, section 5 of the *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10 gives Commissioner Paulson statutory responsibility for the control and management of the RCMP. Inspector Beauchamp was a delegate with responsibility for processing the Appellant's re-enrolment process pursuant to the terms of the Order. Both were aware of the Order. If a *prima facie* breach of the Order were proven, either or both of these officials should be called to account through a show-cause hearing as to why contempt is not justified.

ii) Has a *prima facie* breach of the Order been proven?

[33] The Appellant argues that when read together, paragraphs (i) and (ii) of the Order do not set out any conditions on his re-enrolment. Given this, there ought not to have been any conditions, including a psychological assessment, imposed on the Appellant.

[34] Further, the wording of the Cadet Training Agreement includes reference to psychological conditions that come to light as a result of "behaviour or performance." Given that the Appellant had not commenced training at Depot, the Appellant argues that it was impossible for a psychological assessment to take place based on his behaviour or performance.

[35] Finally, the Appellant argues that the psychological assessments, which were not available at the hearing before Prothonotary Tabib, ought to be admitted as new evidence pursuant to Rule 351. The Appellant bases this argument on the fact that this is a *de novo* proceeding, their initial unavailability was not attributable to the Appellant, and they are important to the resolution of this case (*BC Tel v Seabird Island Indian Band*, 2002 FCA 288, at paras 28-30). If accepted, the Appellant argues that these assessments show he does not suffer from any pathological disorder or disease, and that they were inappropriately used to test his suitability as a new applicant to the force, as opposed to assessing his behaviour or performance as an enrolled cadet.

[36] I agree that the assessments should be considered as new evidence for the reasons outlined by the Appellant.

[37] Determining whether there was a breach of the Order requires an examination of its terms. In this case, the terms of the Order are ambiguous, and necessitated a long period of negotiation as to how they were to be implemented. Ultimately, the terms were agreed to in the Agreement and the Letter, signed by the Appellant on January 19, 2012, and February 21, 2012, respectively. These terms included obtaining a valid medical profile and adhering to the requirements issued by the Commanding Officer. As part of the medical profile, a psychological assessment is appropriate and referred to in the RCMP's Administration Manual. Further, the Appellant agreed on April 20, 2012, that such an assessment was appropriate.

[38] While the assessments are appropriate to admit into evidence, they do not in my opinion help the Appellant's cause. They were conducted by two psychologists, one internal to the RCMP and one external. While they do not identify a specific medical condition, they appear to be thorough and show no signs of being written with a pre-determined purpose to exclude the Appellant from working with the RCMP. In particular, and contrary to the Appellant's contention, the assessments both explicitly and implicitly assess the Appellant for fitness as a general duty constable with the RCMP, not as an applicant.

[39] Given that these assessments were proper and conducted in accordance with the terms of the Order as agreed to by the Appellant, there is insufficient evidence to show that Commissioner Paulson and Inspector Beauchamp otherwise acted or failed to act in a manner not in compliance with the Order.

[40] I agree with Prothonotary Tabib there was no *prima facie* breach of the Tribunal's order by either Commissioner Paulson or Inspector Beauchamp.

[41] Given my judgment in this appeal, I do not find it necessary to amend the style of cause as requested by the Appellant.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Appellant's appeal is dismissed;

2. Costs to the Respondents.

"Michael D. Manson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1851-08
STYLE OF CAUSE:	Tahmourpour v. CHRC and RCMP
PLACE OF HEARING:	Ottawa, Ontario
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