

Federal Court



Cour fédérale

**Date: 20160525**

**Docket: T-234-15**

**Citation: 2016 FC 578**

**Ottawa, Ontario, May 25, 2016**

**PRESENT: The Honourable Madam Justice Heneghan**

**BETWEEN:**

**JAIME HERRERA-MORALES**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

**REASONS FOR JUDGMENT**

**I. INTRODUCTION**

[1] These Reasons are issued pursuant to the Judgment issued on May 20, 2016 and the Amended Judgment issued on May 24, 2016.

[2] Mr. Jaime Herrera-Morales (the “Applicant”) seeks judicial review pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (“Federal Courts Act”) of a decision of the

Chief Human Resources Officer of the Royal Canadian Mounted Police (the “RCMP”) in his capacity as a Probationary Review Officer (the “Officer”). In his decision, dated January 15, 2015, the Officer dismissed the Applicant’s appeal of the Appropriate Officer’s (the “AO”) decision to discharge him for unsuitability.

[3] As a remedy, the Applicant seeks an order reinstating him as a member of the RCMP, or in the alternative, an order quashing the Officer’s decision and referring the matter back to the AO for redetermination.

## II. THE PARTIES

[4] The Applicant was a constable in the RCMP. He was recruited on November 23, 2010 and enlisted on May 16, 2011.

[5] Pursuant to Rule 303(2) of the *Federal Courts Rules*, SOR/98-106 (the “Rules”), the Respondent to this application is the Attorney General of Canada (the “Respondent”).

## III. THE EVIDENCE

[6] Both the Applicant and Respondent rely upon the materials contained in the Certified Tribunal Record.

IV. FACTS

[7] The following facts are taken from the Certified Tribunal Record.

[8] The Applicant immigrated to Canada from Peru as a teenager in 1997. He was recruited by the RCMP as part of a campaign to encourage the hiring of visible minorities.

[9] The Applicant commenced the Cadet Training Program in November 2010 and completed the program on May 16, 2011, after which he became a probationary Regular Member of the RCMP. The Applicant continued his training through the RCMP Field Coaching Program beginning May 18, 2011.

[10] Cst. Wall was appointed as the Applicant's Field Coach. The Applicant was the first probationary member to be coached by Cst. Wall. On August 16, 2011, Cst. Wall requested that the Applicant be transferred to another district and assigned to a new Field Coach. On August 30, 2011, Constable Schuck was assigned as Field Coach to the Applicant.

[11] During the Field Coaching Program, the Applicant was involved in a number of incidents that formed the basis of the decision to discharge him. They are outlined below.

[12] The Field Coaching Program required the completion of a number of assignments. The Applicant completed Module A on July 22, 2011 but was unable to answer several questions.

When the Applicant asked for assistance, Cst. Wall provided him with the Coach's answer key. The Applicant copied four answers and submitted the work as his own.

[13] Cst. Wall partially completed a Two Months Assessment Report about the Applicant on July 22, 2011. He received a "professional" rating in all competencies. However, Cst. Wall noted that the Applicant only met the minimum requirements in some areas. The report also stated that there are concerns with the Applicant's ability to communicate effectively.

[14] On July 23, 2011, the Applicant seized bear spray and a bank card as exhibits but failed to document and log the evidence. The Applicant later denied that he was responsible for the exhibits.

[15] The Applicant was assigned to a missing persons file and asked to obtain a statement from the mother of the missing person. The Applicant failed to obtain relevant information and lied to another member about his questioning of the mother.

[16] On August 31, 2011, the Applicant attended a motor vehicle accident involving a stolen vehicle. The Applicant told Cst. Schuck he had never recovered a stolen vehicle although this was found to be untrue.

[17] Cst. Schuck raised concerns, in an email dated September 3, 2011 to the Field Coaching Coordinator, about the Applicant's capacity to understand English and inquired about the possibility of English testing. The Field Coaching Coordinator echoed this concern in a four-

month assessment report dated October 4, 2011. No English language testing or training was ever provided to the Applicant.

[18] In completing Module B, the Applicant found a copy of the Coach's answer key and copied the majority of answers. He submitted the Module B assignment on September 16, 2011.

[19] A third assignment required the Applicant to prepare a summary of a community organization. The Applicant copied the summary of the community organization's operations from its website.

[20] The Tribunal Record contains a partially completed Four Months Assessment Report dated September 25, 2010 and October 4, 2011. The Applicant received an "unacceptable" rating for "Core Values of the RCMP". In three of the other seven competencies, the Applicant was ranked as "needs improvement".

[21] On October 13, 2011, the AO removed the Applicant from operational duties and commenced a Code of Conduct investigation pursuant to Part IV of the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10 (the "Act"), relating to the Module B assignment and untruthful statements relative to notes on a file. In the course of this Code of Conduct investigation, the Applicant and several of his supervisors, including Cst. Wall and Cst. Schuck, were interviewed. This investigation concluded on November 30, 2011, and found that the three alleged breaches of the Code of Conduct had occurred.

[22] On October 17, 2011, the Applicant was asked to provide particulars of a file, which he claimed to have in a notebook. It was later discovered that the Applicant did not have the notes. The member involved, Cst. Naipaul, stated that the Applicant lied about the notebook containing particulars. The Applicant denied that he lied.

[23] On December 28, 29 and 30, 2011, while on administrative duties, the Applicant repeatedly accessed a police database, PRIME, for personal use. He passed on the information he obtained from the database to a civilian friend.

[24] On February 7, 2012, Assistant Commissioner MacRae forwarded the results of the first Code of Conduct investigation to Inspector Sullivan, Officer in Charge of Professional Standards. Assistant Commissioner MacRae found that the investigation revealed performance and suitability concerns. He recommended that formal discipline be taken in relation to the Code of Conduct breaches as well as the Applicant's termination on the basis of unsuitability pursuant to Part V of the Act.

[25] On February 8, 2012, the AO initiated a second Code of Conduct investigation relative to the accessing of a police database, PRIME, for personal use. The Applicant was suspended from duty on April 13, 2012.

[26] On May 3, 2012, the AO began formal disciplinary action under Part IV of the Act. Subsection 43(1) of the Act provides that a hearing will be initiated when informal disciplinary

action would be insufficient if the alleged contravention of the Code of Code was established. A hearing under Part IV was never held.

[27] On December 20, 2012, the AO signed a Notice of Intention to Discharge pursuant to Part V of the Act, on the ground of unsuitability. The AO identified twelve incidents which, in his opinion, constituted a failure by the Applicant to perform his duties.

[28] The Applicant submitted a written response on March 29, 2013. He raised several objections including that his performance had been unfairly evaluated; that he had not been provided with reasonable assistance, guidance, and supervision (“RAGS”); and that he had suffered discrimination. The Applicant also challenged the commencement of concurrent discipline and performance proceedings under Parts IV and V of the Act.

[29] The Applicant was represented by legal counsel during the Part V termination process.

[30] The AO issued a Decision to Discharge, pursuant to section 45.19(9) of the Act, on August 22, 2013, on the ground of unsuitability, that is the Applicant had repeatedly failed to perform his duties in a manner required by his position.

[31] In his decision, the AO decided that he would not consider four of the incidents raised in the Notice of Intention to Discharge. Those incidents were discounted because, in the AO’s opinion, while they reflected a failure to perform his duties, they did not involve the integrity or honesty of the Applicant.

[32] The Applicant appealed that decision on the grounds that the AO no longer had jurisdiction, that unsuitability had not been established, and that he had been discriminated against.

V. DECISION UNDER REVIEW

[33] The Officer confirmed the AO decision on January 15, 2015. In his written decision, the Officer outlined the relevant facts, the Notice of Intention to Discharge and the Decision to Discharge, as well as the Applicant's submissions.

[34] The Officer found that the AO was entitled to complete the probationary member discharge process despite the fact that the Applicant was not a probationary member as of May 16, 2013. The Officer held that the definition "probationary member", a member who has less than two years of service, should to be interpreted as meaning two years of active service.

[35] The Officer said that performance should be interpreted "in the broader context of our core values of honesty and integrity".

[36] He stated that, contrary to the Applicant's submissions, Part IV and Part V proceedings could proceed simultaneously and there was no reason why facts established through the Code of Conduct investigations could not support a Part V performance discharge.

[37] The Officer found that language and discrimination issues did not play a major role in the AO's decision.



[38] Ultimately, the Officer agreed with the decision of the AO that each of the following incidents demonstrated unsuitability: the copying of Module A, the copying of Module B, the community profile exercise and the unauthorized access of PRIME. The Officer found that the Applicant failed to perform to his duties despite being provided with RAGS.

## VI. ISSUES

[39] This application for judicial review raises a number of issues.

[40] First, what is the applicable standard of review.

[41] Second, did the Officer breach procedural fairness by determining the Applicant could be discharged under Part V of the Act.

[42] Third, did the Officer err in determining that the AO had jurisdiction to discharge the Applicant as a probationary member.

[43] Fourth, did the Officer err by failing to consider his language difficulties, and did that failure amount to discrimination against the Applicant.

[44] Fifth, did any failure to consider the Applicant's language difficulties amount to a failure to provide adequate reasons.

[45] Next, did the Officer misapprehend the evidence.

[46] Finally, if the application for judicial review is granted, should the relief sought by the Applicant, that is an order for reinstatement, be granted.

## VII. RELEVANT LEGISLATION

[47] The Act and the *RCMP Regulations, 1988*, SOR/88-361 (the “Regulations”) have been amended since the Officer rendered his decision. Both parties rely upon the Act and the Regulations in effect at the time the Officer made his decision.

[48] Sections 18, 37, 38, and 45.18(1) of the Act are relevant to this proceeding and provide as follows:

18. It is the duty of members who are peace officers, subject to the orders of the Commissioner,

(a) to perform all duties that are assigned to peace officers in relation to the preservation of the peace, the prevention of crime and of offences against the laws of Canada and the laws in force in any province in which they may be employed, and the apprehension of criminals and offenders and others who may be lawfully taken into custody;

(b) to execute all warrants, and perform all duties and services in relation thereto, that may, under this Act or the laws of Canada or the laws in force in any province, be lawfully

18. Sous réserve des ordres du commissaire, les membres qui ont qualité d’agent de la paix sont tenus :

a) de remplir toutes les fonctions des agents de la paix en ce qui concerne le maintien de la paix, la prévention du crime et des infractions aux lois fédérales et à celles en vigueur dans la province où ils peuvent être employés, ainsi que l’arrestation des criminels, des contrevenants et des autres personnes pouvant être légalement mises sous garde;

b) d’exécuter tous les mandats — ainsi que les obligations et services s’y rattachant — qui peuvent, aux termes de la présente loi, des autres lois fédérales ou de celles en

executed and performed by peace officers;

vigueur dans une province, légalement l'être par des agents de la paix;

(c) to perform all duties that may be lawfully performed by peace officers in relation to the escort and conveyance of convicts and other persons in custody to or from any courts, places of punishment or confinement, asylums or other places; and

c) de remplir toutes les fonctions qui peuvent être légalement exercées par des agents de la paix en matière d'escorte ou de transfèrement de condamnés, ou d'autres personnes sous garde, à destination ou à partir de quelque lieu que ce soit : tribunal, asile, lieu de punition ou de détention, ou autre;

(d) to perform such other duties and functions as are prescribed by the Governor in Council or the Commissioner.

d) d'exercer les autres attributions déterminées par le gouverneur en conseil ou le commissaire.

37. It is incumbent on every member

37. Il incombe à chaque membre:

(a) to respect the rights of all persons;

a) de respecter les droits de toutes personnes;

(b) to maintain the integrity of the law, law enforcement and the administration of justice;

b) de maintenir l'intégrité du droit et de son application ainsi que de l'administration de la justice;

(c) to perform the member's duties promptly, impartially and diligently, in accordance with the law and without abusing the member's authority;

c) de remplir ses fonctions avec promptitude, impartialité et diligence, conformément au droit et sans abuser de son autorité;

(d) to avoid any actual, apparent or potential conflict of interests;

d) d'éviter tout conflit d'intérêt réel, apparent ou possible;

(e) to ensure that any improper or unlawful conduct of any member is not concealed or

e) de veiller à ce que l'inconduite des membres ne soit pas cachée ou ne se répète

permitted to continue;

pas;

(f) to be incorruptible, never accepting or seeking special privilege in the performance of the member's duties or otherwise placing the member under any obligation that may prejudice the proper performance of the member's duties;

j) d'être incorruptible, de ne pas rechercher ni accepter des avantages particuliers dans l'exercice de ses fonctions et de ne jamais contracter une obligation qui puisse entraver l'exécution de ses fonctions;

(g) to act at all times in a courteous, respectful and honourable manner; and

g) de se conduire en tout temps d'une façon courtoise, respectueuse et honorable;

(h) to maintain the honour of the Force and its principles and purposes.

h) de maintenir l'honneur de la Gendarmerie, ses principes et ses objets.

38. The Governor in Council may make regulations, to be known as the Code of Conduct, governing the conduct of members.

38. Le gouverneur en conseil peut prendre des règlements, appelés code de déontologie, pour régir la conduite des membres.

45.18 (1) Any officer may be recommended for discharge or demotion and any other member may be discharged or demoted on the ground, in this Part referred to as the "ground of unsuitability", that the officer or member has repeatedly failed to perform the officer's or member's duties under this Act in a manner fitted to the requirements of the officer's or member's position, notwithstanding that the officer or member has been given reasonable assistance, guidance and supervision in an attempt to improve the performance of those duties.

45.18 (1) Le renvoi OU la rétrogradation d'un officier peut être recommandé, ou tout autre membre peut être renvoyé OU rétrogradé, pour le motif, appelé dans la présente partie « motif d'inaptitude », qu'il a omis, à plusieurs reprises, d'exercer de façon satisfaisante les fonctions que lui impose la présente loi, en dépit de l'aide, des conseils et de la surveillance qui lui ont été prodigués pour l'aider à s'amender.

[49] Sections 38 to 58.7 of the Regulations constitute the Code of Conduct. Sections 39(1) and 45 of the Regulations are relevant to this proceeding and are reproduced below:

39. (1) A member shall not engage in any disgraceful or disorderly act or conduct that could bring discredit on the Force.

39. (1) Le membre ne peut agir ni se comporter d'une façon scandaleuse ou désordonnée qui jetterait le discrédit sur la Gendarmerie.

45. A member shall not knowingly or wilfully make a false, misleading or inaccurate statement or report to any member who is superior in rank or who has authority over that member pertaining to

45. Le membre ne peut sciemment ou volontairement faire une déclaration ou un rapport faux, trompeur ou inexact à un membre qui lui est supérieur en grade ou qui a autorité sur lui, relativement :

(a) the performance of that member's duties;

a) à l'exercice de ses fonctions;

(b) any investigation;

b) à une enquête;

(c) any conduct concerning that member, or any other member;

c) à sa conduite ou à celle d'un autre membre;

(d) the operation of the Force; or

d) au fonctionnement de la Gendarmerie;

(e) the administration of the Force.

e) à l'administration de la Gendarmerie.

VIII. SUBMISSIONS

A. *Applicant's Submissions*

(1) What is the applicable standard of review?

[50] The Applicant submits the standard of review on the issue of procedural fairness is correctness. In determining if the Officer based his decision on erroneous findings of fact, the standard is reasonableness; see the decision in *Elhatton v. Canada (Attorney General)*, 2014 FC 67 at paragraphs 32-35.

(2) Did the Officer breach procedural fairness by determining the Applicant could be discharged under Part V of the Act?

[51] The Applicant argues the Officer breached procedural fairness by finding that he could be discharged under Part V of the Act. He submits Parliament's intention was to have Code of Conduct contraventions dealt with under Part IV. He argues Part V does not refer to the Code of Conduct, rather it addresses repeated performance failures.

[52] The Applicant further submits that the RCMP cannot deprive probationary members of the benefits afforded under the Part IV hearing process by charactering a disciplinary discharge as a discharge for unsuitability; see the decision in *Jacmain v. Attorney General (Canada)*, [1978] 2 S.C.R. 15.

[53] If disciplined pursuant to the Part IV of the Act, the Applicant would have been entitled to a hearing before a three-member board, with at least one law school graduate among the board members. Discipline pursuant to Part IV would have also provided the Applicant with the opportunity to present evidence, cross-examine witnesses and make representations at the hearing; the benefit of a one year limitation period to conduct the Part IV hearing after the alleged contravention of the Code of Conduct became known to the AO; and a broader scope of disciplinary action.

[54] As well, the Applicant claims he was entitled to an oral hearing since the Code of Conduct allegations involved serious issues of credibility and integrity; see *Singh v. Canada (Minister of Employment & Immigration)*, [1985] 1 S.C.R. 177.

[55] The Applicant points out that the grounds for his discharge, that is plagiarism, deceit and failure to comply with RCMP policy, are disciplinary in nature; see *Saskatoon (City) Police Assn. v. Saskatoon (City) Police Commissioners*, 2004 SKCA 3.

[56] The Applicant also argues that he had a legitimate expectation that the AO would proceed under Part IV.

- (3) Did the Officer err in determining that the AO had jurisdiction to discharge the Applicant as a probationary member?

[57] The Applicant further submits that the Officer erred in finding that the AO had jurisdiction to discharge him as a probationary member. Pursuant to section 45.19(11) of the Act,

a probationary member is defined as a member with less than two years of service. Although the Notice of Intention to Discharge was issued December 20, 2011, the AO's decision was not made until August 22, 2013. The Applicant was not a probationary member at that time.

- (4) Did the Officer err by failing to consider his language difficulties, and did that failure amount to discrimination against the Applicant?

[58] In the alternative, the Applicant submits that the Officer erred by failing to consider his language difficulties, which were known to the RCMP.

[59] Under Part V, a member may only be discharged for failing to perform his duties if the member receives RAGS in an attempt to improve performance; see section 45.18 of the Act. The Applicant argues that to the extent that RAGS were provided to him, their effectiveness was undermined by his difficulty in understanding English. He also submits that the performance failures related to honesty and integrity were caused by language issues.

[60] The Applicant also argues that the RCMP breached the duty to accommodate. Language is a defining characteristic of national or ethnic origin and should be protected under that ground; see *Liu v. Everlink Services Inc.*, 2014 HRTO 202 at paragraph 9. He submits there is a *prima facie* case of discrimination in the present circumstances, as he possesses a characteristic protected under the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the "Canadian Human Rights Act"), he suffered adverse treatment and it is reasonable to infer that the protected characteristic played a role in the adverse treatment; see *Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204 at paragraph 18.



[61] The Applicant relies upon the decision in *Khiamal v. Canada (Human Rights Commission)*, 2009 FC 495 at paragraph 61 to support his submissions that if his difficulty understanding English played a role in the concern about his honesty and integrity, that is sufficient to amount to discrimination.

- (5) Did any failure to consider the Applicant's language difficulties amount to a failure to provide adequate reasons?

[62] The Applicant further submits that the Officer breached procedural fairness by failing to provide adequate reasons for his finding that language did not play a role in the incidents. In this regard, he relies upon subsection 5(3) of the *Commissioner's Standing Orders (Probationary Members)* and the decision in *VIA Rail Canada Inc. v. Canada (National Transportation Agency)* (2000), 193 D.L.R. (4th) 357.

- (6) Did the Officer misapprehend the evidence?

[63] The Applicant submits that the Officer and AO relied upon generalized and unreliable evidence which resulted in erroneous findings of fact. He points to the fact that the Officer relied upon a memorandum dated six months after the Applicant completed Modules A and B, as proof that the Applicant was aware cutting and pasting answers was not permitted.

[64] The Applicant also argues the Officer relied upon common experience and usual practice rather than specific instructions to conclude that the Applicant was aware cheating was

prohibited. He also submits that the Officer misconstrued his testimony during the Code of Conduct investigations by failing to consider his language difficulties.

- (7) If the application for judicial review is granted, should the relief sought by the Applicant, that is an order for reinstatement, be granted?

[65] Finally, the Applicant in his Memorandum of Fact and Law sought an order for his reinstatement. In oral submissions, Counsel for the Applicant said that if the decision under review were quashed and an order for reinstatement were denied, the practical effect is that the Applicant would remain a member of the RCMP.

B. *The Respondent's Submissions*

- (1) What is the applicable standard of review?

[66] The Respondent submits that issues of procedural fairness are reviewed on a correctness standard; see the decision in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] 3 S.C.R. 654. She argues that the Officer's decision should be reviewed on the standard of reasonableness; see the decision in *Canada (Attorney General) v. Boogaard*, 2015 FCA 150.

- (2) Did the Officer breach procedural fairness by determining the Applicant could be discharged under Part V of the Act?

[67] The Respondent submits that there is nothing in the Act prohibiting concurrent proceedings under Parts IV and V.

[68] The Respondent argues that the RCMP is entitled to discharge a member for unsuitability if it failed to have him discharged on other grounds; see *Girardeau v. Canada (Attorney General)* (1997), 127 F.T.R. 20. Further, she submits that facts obtained through the disciplinary investigation may be relevant to a performance discharge; see *Jacmain, supra; Canada (Attorney General) v. Penner*, [1989] 3 F.C. 429. Concerns over the Applicant's suitability that arise from his misconduct are legitimate.

- (3) Did the Officer err in determining that the AO had jurisdiction to discharge the Applicant as a probationary member?

[69] In response to the Applicant's submissions that he was not a probationary member, the Respondent submits that there is no requirement that a process begun under Part V be completed before the end of a member's probationary period.

- (4) Did the Officer err by failing to consider his language difficulties, and did that failure amount to discrimination against the Applicant?

[70] The Respondent submits that the Applicant did not challenge the AO's determination, that it was not his role to determine if discrimination occurred, before the Officer. In light of this failure, the argument that the Officer failed to consider accommodation lacks merit.

[71] The Respondent argues that the Applicant has failed to establish an evidentiary basis to support his argument that the RCMP failed to accommodate his language difficulties and further, that he was dismissed on account of those difficulties; see *Lui, supra* at paragraphs 9, 87-90. The

Respondent argues that there is no nexus between the Applicant's language difficulties and the reasons for his dismissal.

- (5) Did any failure to consider the Applicant's language difficulties amount to a failure to provide adequate reasons?

[72] The Respondent submits that no breach of procedural fairness resulted from the failure to provide adequate reasons. She argues that the alleged inadequacy of the reasons is not an independent ground for review, but must be considered as part of the reasonableness analysis; see the decision in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708 at paragraph 14.

- (6) Did the Officer misapprehend the evidence?

[73] The Respondent contends that the Officer's consideration of the evidence was reasonable. She argues that a reviewing court should focus upon the decision as a whole and not engage in the "microscopic review" proposed by the Applicant.

[74] The Respondent submits that the evidence in the record demonstrates that the Applicant proved himself unsuitable to be a RCMP member. She argues that the Applicant's statements during the Code of Conduct investigations demonstrate that he understood the consequences of his actions but took the "easy way out".

- (7) If the application for judicial review is granted, should the relief sought by the Applicant, that is an order for reinstatement, be granted?

[75] Finally, the Respondent argues that the relief of an order of reinstatement as a member of the RCMP should not be granted. First, the relief was not set out in the Notice of Application and is not “necessarily ancillary” to the relief sought in the Notice of Application. As such, the relief sought is non-compliant with Rule 301(d) of the Rules. Second, the Respondent submits this Court does not have the authority to appoint members of the RCMP and this is not an appropriate case for a directed verdict.

## IX. DISCUSSION

- A. *Did the Officer breach procedural fairness by determining the Applicant could be discharged under Part V of the Act?*

[76] The standard of review for issues of procedural fairness is correctness; see the decision in *Pizarro v. Canada (Attorney General)*, 2010 FC 20.

[77] I agree with the Respondent that nothing in the Act prohibits concurrent proceedings under Parts IV and V. However, at the same time, the Act does not allow the RCMP to improperly use unsuitability findings as a disguise for disciplinary sanctions.

[78] Parts IV and V of the Act address different procedures. Part IV of the Act, together with the Code of Conduct set out in the Regulations, establish the behavioural standards for members

of the RCMP and a procedure to sanction misconduct. Part V of the Act specifies the procedure for the discharge and demotion resulting from a member's unsuitability.

[79] In *Jacmain, supra*, Justice Pigeon, in considering the jurisdiction of an adjudicator under the *Public Service Staff Relations Act*, R.S.C. 1970, c. P-35, said the following about the use of termination for unsuitability, "I cannot agree that the employer can deprive an employee of the benefit of the grievance procedure by labelling a disciplinary discharge a rejection".

[80] In *Penner, supra* the Federal Court of Appeal criticized the characterization of a disciplinary sanction as a discharge for unsuitability:

It is clear that five of the nine judges who rendered this *Jacmain* judgment expressed the opinion that an adjudicator seized of a grievance by an employee rejected on probation is entitled to look into the matter to ascertain whether the case is really what it appears to be. That would be an application of the principle that form should not take precedence over substance. A camouflage to deprive a person of a protection given by statute is hardly tolerable. In fact, we there approach the most fundamental legal requirement for any form of activity to be defended at law, which is good faith.

...

[81] Procedural fairness is a flexible principle, the content of which is to be decided in the specific context of each case; see the decision in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at pages 682-684. In my opinion, the improper deprivation of procedures provided for in Part IV of the Act raises issues of procedural fairness.

[82] In my opinion, the Applicant's discharge for unsuitability was a disguised disciplinary discharge. Only two of the grounds for discharge listed by the Officer relate to failure to perform his duties, that is the missing persons incident and the exhibits incident. The remaining grounds are incidents that demonstrate dishonesty and a lack of integrity, which are breaches of section 37(g) of the Act and section 45 of the Regulations. These breaches should be disciplined under Part IV.

[83] I note that the AO discounted four of the twelve incidents listed in the Notice of Intention to Discharge from consideration in his Decision to Discharge. The AO explicitly stated that although each of the four incidents reflects a failure to perform his duties, they did not involve the Applicant's honesty or integrity. There was no reason to discount these incidents unless the motivation for discharge was breaches of the Code of Conduct.

[84] I agree with the Applicant's submissions that he had a legitimate expectation that his misconduct would be disciplined under Part IV of the Act. The doctrine of legitimate expectations relates only to procedural rights, not to a particular result; see the decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

[85] The Applicant had a legitimate expectation arising from section 43(1) of the Act which provides that the AO "shall initiate a hearing" if formal disciplinary action is taken. The AO instituted formal disciplinary action against the Applicant on May 3, 2012 but failed to initiate a hearing.

[86] The titles support the Applicant's submissions about his legitimate expectation. The title of Part IV of the Act is "Discipline". Part V of the Act is entitled "Discharge and Demotion".

[87] Part IV provides for procedural protections not provided for under Part V of the Act. The Applicant had a legitimate expectation that those procedures would be available to him. The Applicant was denied the procedures available under Part IV of the Act by the AO's decision to proceed with his termination under Part V. Denial of statutory protections through the characterization disciplinary discharge as a discharge for unsuitability cannot be tolerated.

[88] In my opinion, the Officer erred in finding that unsuitability includes more than performance. Section 45.18(1) of the Act defines "ground of unsuitability" as the repeated failure to perform the member's duties under this Act in a manner fitted to the requirements of the member's position.

[89] I am satisfied that the Officer breached the duty of procedural fairness owed to the Applicant by proceeding with his discharge under Part V of the Act, and this application for judicial review will be allowed.

[90] The Applicant has raised a number of other issues with the Officer's decision. Although my conclusion on the issue of procedural fairness is sufficient to dispose of this application, I will briefly address the other arguments raised by the parties.



B. *Other Arguments*

- (1) Did the Officer err in determining that the AO had jurisdiction to discharge the Applicant as a probationary member?

[91] The Act does not require that Part V proceedings commenced when a member is a probationary member must be concluded prior to the end of that member's probationary period. In my opinion, the Officer correctly found that the AO had jurisdiction to discharge the Applicant as a probationary member.

- (2) Did the Officer err by failing to consider his language difficulties, and did that failure amount to discrimination against the Applicant?

[92] The Officer found that while issues of language and discrimination "surfaced" in this case, they did not play a significant role.

[93] Under Part V of the Act, a member may only be discharged for failing to perform his duties if the member receives RAGS in an attempt to improve performance. The Officer did not consider whether the Applicant's difficulty understanding English prevented him from understanding the RAGS.

[94] Since Cst. Wall, Cst. Schuck and Mr. Hall raised concerns that the Applicant did not comprehend instructions, it was unreasonable for the Officer to not consider whether the Applicant was provided with RAGS. Assistance, which may have been reasonable for a native

English speaker, may not be reasonable given the Applicant's comprehension issues with the English language.

[95] In my opinion, it was unreasonable for the Officer to not explain why he was satisfied that RAGS provided to the Applicant were adequate.

[96] I am not persuaded by the Applicant's submissions that he was discriminated against on the basis of language. He has not provided sufficient evidence to show that he was dismissed on a ground protected under the Canadian Human Rights Act.

(3) Did the Officer misapprehend the evidence?

[97] It is not the role of a reviewing court to re-weigh evidence that was before the decision maker; see the decision in *Khosa v. Canada (Minister of Citizenship and Immigration)*, [2009] 1 S.C.R. 339 at paragraph 61. Given the factual nature of the inquiry into the Applicant's suitability for his position as a member of the RCMP, the Officer's consideration of the evidence here was reasonable.

## X. CONCLUSION

[98] In my opinion, the Applicant has shown that the Officer committed a reviewable error, that is the breach of procedural fairness that arose from the Officer's decision that the Applicant could be discharged under Part V of the Act.

XI. REMEDY

[99] In his Memorandum of Fact and Law, the Applicant seeks an order reinstating him as a member of the RCMP.

[100] The Respondent opposes this relief. However, she acknowledged that the practical effect of quashing the Officer's decision is that the Applicant is not discharged from the RCMP.

[101] The remedies available upon judicial review are described by subsection 18.1(3) of the Federal Courts Act. That provision provides as follows:

(3) On an application for judicial review, the Federal Court may

(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

[102] The remedy of reinstatement is not available in this proceeding; see the decision in *Ross v. Mohawk Council of Kanesatake* (2003), 232 F.T.R. 238. Pursuant to section 7(1)(a) of the Act, the power to appoint members to the RCMP resides with the Commissioner of the RCMP. The reinstatement of a dismissed member of the RCMP is beyond the jurisdiction of this Court.

[103] In the result, the application for judicial review is allowed with costs to the Applicant, the Officer's decision is quashed and the matter is remitted for redetermination in accordance with the applicable law.

“E. Heneghan”  
\_\_\_\_\_  
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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