Federal Court  Cour fédérale

Date: 20170831

Dockets: T-2005-16
T-2098-16

Citation: 2017 FC 794

Ottawa, Ontario, August 31, 2017

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

BALJIT SINGH KALKAT

Applicant

and

ATTORNEY GENERAL OF CANADA, THE MINISTER OF PUBLIC SAFETY, ON BEHALF OF THE ROYAL CANADIAN MOUNTED POLICE AND THE COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE

Respondents

JUDGMENT AND REASONS

I. Introduction

[1] There are two applications for judicial review, pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 and Part V of the *Federal Courts Rules*, SOR/98-106, of decisions

made by the statutory delegate of the Commissioner (the "Delegate") of the Royal Canadian Mounted Police ("RCMP") regarding (a) a temporary reassignment order (the "TRO Decision") (file T-2098-16) and (b) the Applicant's contravention of the Code of Conduct of the RCMP [Code of Conduct] (*Royal Canadian Mounted Police Regulations*, 2014, SOR/2014-281 [*RCMP Regs*] and conduct measures (the "CCM Decision") (file T-2005-16).

II. Background

[2] The facts leading up to the two applications for judicial review are essentially the same.

[3] The Applicant, Baljit Singh Kalkat, is a sworn member of the RCMP, with twenty years of service, all of which have been served within the RCMP's "E" Division. For approximately the last nine years, he has been assigned to the "E" Division National Security Program ("EINSET").

[4] In January 2013, the Applicant was assigned to the position of Team Leader for Team 2 within EINSET. Team 2 consists of ten members: eight members of the RCMP, one Civilian Analyst, and one Civilian Investigator. Senior members of the EINSET team include Inspector Leather, the Officer in Charge of EINSET Projects, and Inspector Corcoran, the Officer in Charge of EINSET Operations. Superintendent Bond is the Assistant Criminal Operations Officer – National Security, in "E" Division.

[5] In November 2014, the Applicant was seconded to a special national security project. Although he did not work directly on the projects assigned to Team 2, he continued to work from

his office in EINSET and he was responsible for approving overtime and leaves of absence for Team 2 members.

[6] On May 21, 2015, the Applicant was asked to attend a meeting with Insps. Leather and Corcoran (the "May 21 Meeting"). During this meeting, the Applicant was informed that Insps. Leather and Corcoran had received several complaints from members of Team 2, regarding his management style. Specifically, the Applicant was told that Constable Melvin, Corporal Amine, and an unnamed Civilian Analyst had lodged complaints. Further, the Applicant was informed that, upon the completion of his secondment, he was going to be removed from his position as Leader of Team 2 and reassigned.

[7] At the May 21 Meeting, the Applicant agreed to participate in a mediation process to address the concerns that the complainants had raised. Insp. Leather specifically named Const. Melvin and Cpl. Amine and directed the Applicant to refrain from speaking with them. On May 22, 2015, Insp. Leather sent the Applicant and five blind copied members of Team 2 an email, advising that the Applicant had been made aware of the supervisory concerns, advising that the Applicant was not to discuss these matters with the blind copied recipients, and asking that he be contacted if the Applicant contacted any of the blind copied recipients (the "First May 22 Email"). Blind copied to the email were Cpl. Amine, Const. Melvin, Michelle Cameron ("CM Cameron"), Cpl. McLaughlin, and Vivian Fong. Later that same day, Insp. Leather sent the Applicant a personal email, directing him to "refrain from speaking with anyone mentioned to [him]" during the May 21 Meeting (the "Second May 22 Email").

[8] On July 7, 2015, the mediator advised the Applicant that mediation was not a viable dispute resolution mechanism. On July 22, 2015, the Applicant and CM Cameron, the only Civilian Analyst on Team 2, had a discussion about the alleged complaints in the Applicant's office. Insps. Leather and Corcoran became aware of this conversation in early September 2015.

[9] Upon learning that the Applicant had potentially breached the Code of Conduct by speaking to CM Cameron, Insp. Corcoran prepared a briefing note, seeking approval for a Code of Conduct Investigation into the matter (the "Conduct Investigation"). Superintendent Bond, as the designated conduct authority (the "Conduct Authority" or "Supt. Bond"), authorized the investigation.

[10] The briefing note provided the following background and contained Supt. Bond's decision that temporary reassignment was appropriate:

- On May 21, 2015, Insps. Leather and Corcoran met with the Applicant to discuss concerns about his management style, which were raised by subordinate members of his team. Mediation was discussed, and Insp. Leather directed the Applicant not to speak to anyone from his team about the complaints.
- On May 22, 2015, Insp. Leather sent an email to the Applicant directing him not to speak to his team.
- After meeting with team members, the mediator decided that the matter was not appropriate for informal conflict management.
- On September 2, 2015, Insp. Leather advised Insp. Corcoran that he learned that the Applicant had spoken with CM Cameron.

- On September 3, 2015, Insp. Corcoran spoke to CM Cameron and she confirmed that the Applicant questioned her about the complaints made about him. CM Cameron found the Applicant accusatory and was uncomfortable with his actions.
- Consideration is given to temporarily moving the Applicant within EINSET with no supervisory responsibilities.

[11] The Applicant was advised of the Conduct Investigation and served with a Temporary Reassignment Order ("TRO"), on September 9, 2015. The TRO reassigned the Applicant to EINSET Team 4, dealing with Air India. On September 11, 2015, the Applicant was deemed "unfit for duty" by his family physician and was immediately placed on a medical leave of absence. The Applicant has been, and continues to be, on this medical leave of absence.

[12] By November 23, 2015, the Code of Conduct Investigator, Sargent Dion, Workplace Standards, Federal Serious Organized Crime, completed his investigation report with respect to the Applicant's alleged breach of the Code of Conduct. On December 3, 2015, the Applicant provided a written submission to Supt. Bond.

[13] On December 11, 2015, Supt. Bond issued his decision with respect to the Code of Conduct Investigation (the "CI Decision"), which concluded that the evidence established, on a balance of probabilities, that the Applicant had contravened section 3.3 of the Code of Conduct by speaking to CM Cameron, thereby disobeying Insp. Leather's clear, lawful order. Supt. Bond imposed two conduct measures: (1) the loss of eight days of annual leave; and (2) enrollment in RCMP Management Development Training, to be completed within one year.

[14] On December 21, 2015, the Applicant submitted a Statement of Appeal to the RCMP – Office of Coordination of Grievance and Appeals ("OCGA") appealing the CI Decision. Further written submissions were tendered by the Applicant on February 25, 2016.

[15] On August 19, 2016, the Delegate rendered the TRO Decision, to which minor corrections were made on September 26, 2016. The Delegate upheld the issuance of the TRO.

[16] On September 16, 2016, the Delegate rendered the CCM Decision, upholding Supt. Bond's finding that the Applicant contravened the Code of Conduct. However, he found a breach of procedural fairness and, therefore, varied the conduct measures, reducing the loss of annual leave to five days.

A. *The TRO Decision*

[17] The Delegate found that the conduct process ended on December 9, 2015. As such, he found that the Applicant's request for the TRO to be rescinded was moot. Further, he found that it would be pointless to allow the Applicant's appeal, which would remit the matter to another decision-maker. Therefore, he found that the only relief available to the Applicant would be appropriate redress, should Supt. Bond have reassigned him based on an error of law, contravention of the principles of procedural fairness, or a clearly unreasonable finding, per sections 38(b) and 47(3) of the *Commissioner's Standing Orders (Grievances and Appeals)*, SOR/2014-289 [CSOGA].

[18] The Delegate held that due to of the lower level of procedural fairness arising in the context of a temporary, non-disciplinary, non-punitive, essentially managerial procedure, Supt. Bond was not required to consider information or representations from the Applicant before initiating the Conduct Investigation and considering the TRO. As a result, the Delegate concluded that there was no breach of procedural fairness. The Delegate also found that Supt. Bond had considered the required factors identified in sections 5.3.3.1 to 5.3.3.4 of the RCMP Administration Manual, whether any risks identified in the alleged misconduct would be addressed by alternative duties, and the public interest.

[19] Additionally, the Delegate found that there was no error in law in the manner which Supt. Bond came to impose the TRO and that the contents of the TRO were not based in any error in law.

[20] The Delegate noted that standard of review for an appeal of the Conduct Authority's decision is prescribed by section 47(3) of the CSOGA as based on "an error of law or is clearly unreasonable". He held that in the absence of this legislated standard, the standard of review would be either "reasonableness" or "correctness" and—noting the decision *Pacific Newspaper Group Inc v Communications, Energy and Paperworkers Union of Canada*, Local 2000, 2014 BCCA 496 [*Pacific*], which held that the patently unreasonable standard still existed where it was legislated—determined that this legislated standard of "clearly unreasonable" was at a higher level on the deference spectrum than reasonableness, equivalent to the "patently unreasonable" standard.

[21] In finding that the "patently unreasonable" standard applied, the Delegate held that his review of Supt. Bond's findings were restricted similarly to how the Appeal Tribunal was restricted in *British Columbia* (*Workers' Compensation Appeal Tribunal) v Fraser Health Authority*, 2016 SCC 25 at paragraph 30 [*Fraser Health*]:

> That finding is therefore entitled to deference unless Fraser Health demonstrates that it is patently unreasonable—that is, that "the evidence, viewed reasonably, is incapable of supporting a tribunal's findings of fact"… patent unreasonableness is not established where the reviewing court considers the evidence merely to be insufficient… Simply put, this standard precludes curial reweighing of evidence, or rejecting the inferences drawn by the fact-finder from that evidence, or substituting the reviewing court's preferred inferences for those drawn by the fact finder.

[22] The Delegate applied the "patently unreasonable" standard and found that Supt. Bond's decision to issue the TRO was not patently unreasonable because the TRO was an administrative step governed by RCMP policy and Supt. Bond complied with the requirements of that policy in initiating the Conduct Investigation.

B. *The CCM Decision*

[23] The Delegate stated that to establish a ground of appeal, as described in section 33(1) of the CSOGA, the Applicant had to establish that the finding of a contravention of the Code of Conduct was based on an error of law, contravention of the principles of procedural fairness, or was clearly unreasonable. He noted that, in the TRO Decision, he had previously found that the standard "clearly unreasonable" was equivalent to the "patently unreasonable" standard.

[24] The Delegate found that there was no merit to the Applicant's challenge of the CI Decision on the grounds of bias or impartiality. Further, the Delegate concluded that, between the May 21 Meeting and the Second May 22 Email, the determination by Supt. Bond that Insp. Leather had given the Applicant a clear direction not to talk with CM Cameron about the complaints was within the range of reasonable outcomes and not clearly or patently unreasonable. As such, Supt. Bond's finding that the Applicant had disobeyed a lawful direction was not clearly or patently unreasonable.

[25] Supt. Bond did not accept the Applicant's alternative arguments that Insp. Leather's direction not to contact the individuals discussed in the May 21 Meeting lapsed on July 7, 2015, after the notification that mediation would not be going forward. Nor did Supt. Bond accept the argument that the Applicant was justified in acting as he did because the allegations of inappropriate management were hurting his career and he was concerned that they would affect his eligibility for promotion. The Delegate found that these were not patently unreasonable conclusions. Further, in finding that the Applicant had no lawful excuse for disobeying Insp. Leather's directions, the Delegate held that the situation at hand was distinct from that in *Stone v SDS Kerr Beavers Dental*, [2006] OJ No 2532.

[26] Additionally, the Delegate concluded that there was no palpable or overriding error in how Supt. Bond treated the evidence available to him or in his assessment of the credibility of Insps. Leather and Corcoran. Moreover, the Delegate determined that the CI Decision did not rely solely on Insp. Leather's notebook entry, regarding the May 21 Meeting, which was impugned by the Applicant as being non-contemporaneous, and that other evidence was in the

record to support the Supt. Bond's findings. The Delegate also noted that Supt. Bond acknowledged the Applicant's argument that there was "no clear and cogent evidence that would prove, on a balance of probabilities, that a clear order was given" and, after weighing the evidence and applying the elements necessary for finding a contravention of section 3.3 of the Code of Conduct, came to the conclusion that a contravention had occurred.

[27] Finally, the Delegate held that Supt. Bond erred when he considered the appropriate conduct measures to implement, placing significant weight on information that was not disclosed to the Applicant: a performance log issued by Insp. Leather concerning the Applicant's managerial performance deficiencies (the "Log"). The Delegate concluded that Supt. Bond erred in treating the Log and the Applicant's refusal to provide a voluntary statement as significant aggravating factors. As such, the Delegate allowed the appeal with respect to conduct measures and determined that a forfeiture of five days of annual leave and the mandatory training were suitable and proportionate.

C. *Preliminary Matters*

[28] The Respondent asserts that pursuant to Rule 303(1) of the *Federal Courts Rules*, the only proper responding party to this judicial review is the Attorney General of Canada.

[29] Rule 303 states:

303 (1) Subject to subsection (2), an applicant shall name as a respondent every person	303 (1) Sous réserve du paragraphe (2), le demandeur désigne à titre de défendeur :
(a) directly affected by the order sought in the application, other than a tribunal in respect of	a) toute personne directement touchée par l'ordonnance recherchée, autre que l'office

which the application is brought; or	fédéral visé par la demande;
(b) required to be named as a party under an Act of Parliament pursuant to which the application is brought.	b) toute autre personne qui doit être désignée à titre de partie aux termes de la loi fédérale ou de ses textes d'application qui prévoient ou autorisent la présentation de la demande.
(2) Where in an application for judicial review there are no persons that can be named under subsection (1), the applicant shall name the Attorney General of Canada as a respondent.	(2) Dans une demande de contrôle judiciaire, si aucun défendeur n'est désigné en application du paragraphe (1), le demandeur désigne le procureur général du Canada à ce titre.
…	…

[30] I agree with the Respondent. As such, the style of cause shall be amended so that only the Attorney General of Canada is a named Respondent.

III. Issues

[31] The issues in T-2098-16 are:

A. Is the application for judicial review timely?
B. What is the correct standard of review?
C. Did the Delegate err in law by applying the "patently unreasonable" standard of review?
D. Did the Delegate err in fact and in law by concluding that neither Supt. Bond's decision to issue the TRO nor the provisions of the TRO were patently unreasonable?

[32] The issues in T-2005-16 are:

A. Is the application for judicial review timely?
B. What is the correct standard of review?
C. Did the Delegate err in law by applying the "patently unreasonable" standard of review?
D. Did the Delegate err in fact and law by concluding that Supt. Bond's finding that the Applicant had received a clear order was not "patently unreasonable"?
E. Did the Delegate err in fact and law by concluding that the manner in which Supt. Bond assessed the evidence, applied the civil standard of proof, and identified and applied the elements necessary for finding a contravention of the Code of Conduct was not "patently unreasonable"?

F. Did the Delegate err in fact and law by concluding that it was not "patently unreasonable" for Supt. Bond to find that the Applicant had failed to comply with a lawful order?
G. Did the Delegate err by imposing a conduct measure of forfeiture of five days of annual leave in please of the conduct measure imposed by Supt. Bond?

[33] The Parties agree that the application for judicial review was timely.

[34] I also find that the Delegate did not err in fact or law in his review of Supt. Bond's findings that the TRO was appropriate, the contents of the TRO were lawful, that Insp. Leather gave a clear order, and the Applicant failed to comply with Insp. Leather's order. I also conclude that the Delegate's imposition of five days forfeited annual leave and remedial training is reasonable.

[35] Therefore, this application is dismissed.

IV. Standard of Review

[36] Regarding the standard of review by this Court, I find that the appropriate standard is that of reasonableness for questions of fact, mixed fact and law, and law when it relates to the interpretation of the Delegate's home or a closely related statute. For any other question of law, the standard is correctness.

[37] I find that it was reasonable for the Delegate to conclude that the standard of "clearly unreasonable", as used in section 33(1) of the CSOGA, is contextually equivalent to the standard

of "patently unreasonable", as such, the Delegate was correct to give Supt. Bond a wide margin of deference on all of his findings of fact and mixed fact and law.

V. Analysis

[38] The first three issues are the same between T-2098-16 and T-2005-16, and will be addressed together.

A. *Is the application for judicial review timely?*

[39] The Applicant contends that because the TRO Decision and the CCM Decision were sent to the Applicant's work email, which he could not access while on medical leave, and not to the Applicant's counsel, the Court should find that the TRO Decision was not first communicated to the Applicant until November 8, 2016, and the CCM Decision was not first communicated to the Applicant until October 19, 2016.

[40] The Respondent concedes that both judicial review applications were filed on time.

B. *What is the correct standard of review?*

[41] The Applicant submits that the jurisprudence has determined neither the standard of review applicable to the Conduct Authority's decision nor the standard of review applicable to the Delegate's decision under the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10 [*RCMP Act*], given that the *RCMP Act* was recently extensively amended and new legislation

was recently enacted relating to conduct investigations and appeals: the *Enhancing Royal Canadian Mounted Police Accountability Act*, SC 2013, c 18; the *RCMP Regs*; and the CSOGA.

[42] The Applicant argues that there is a weak privative clause in the *RCMP Act*, suggesting that the *RCMP Act* does not require either the Delegate or the Federal Court to give deference to the decision of the Conduct Authority. The Applicant acknowledges that the Commissioner has particular expertise and specialized knowledge regarding the realities of policing and what is required to maintain the integrity and professionalism of the RCMP. However, because there is no legislative requirement that requires the Commissioner to delegate his or her adjudication authority to someone with particular expertise in the issues raised on appeal, the Applicant asserts that neither the Conduct Authority nor the Delegate have greater expertise relative to the Court regarding these matters.

[43] The Applicant also acknowledges that the Court has previously held that the *RCMP Act* implements a process which recognizes the need for the RCMP to control its own disciplinary matters. As such, some deference is owed to the Commissioner and the Commissioner's delegates. Taking everything together, the Applicant asserts that on questions of fact, and mixed fact and law, the Court should grant limited deference, reviewing the Delegate's decisions on the standard of reasonableness. However, on questions of law, the Court should apply the correctness standard.

[44] The Respondent agrees that questions of fact, and mixed fact and law should be reviewed on a reasonableness standard. However, the Respondent disagrees that the standard of review of

a Commissioner's or a Commissioner's delegate's decision has not been established by previous jurisprudence, stating that the standard has been established as reasonableness with a broad margin of discretion. Further, the Respondent argues that the Delegate's interpretation of his home statues, including the CSOGA and the *RCMP Administration Manual*, should be given deference and reviewed on a reasonableness standard.

[45] In *Canada (Attorney General) v Boogaard*, 2015 FCA 150 [*Boogaard*], the Federal Court of Appeal ("FCA") held that section 5 of the *RCMP Act*, which outlines the functions and delegation powers of the Commissioner, should be interpreted as granting the Commissioner a broad margin of discretion over his decisions. In particular, the FCA stated (*Boogaard* at para 42):

> The statutory words—'control and management of the Force and all matters connected therewith'—are very broad indeed. They are unqualified and not made subject to any other sections in the Act. The power and the responsibility is bestowed upon the Commissioner personally, and no one else.

[46] The FCA mused that it was possible that rulings on issues by administrative decision-makers under the *RCMP Act*, could constrain the Commissioner's power, but came to no definitive finding on that issue. They concluded that the Commissioner's decisions were, therefore, reviewable on a standard of reasonableness and, at least in the context of promotions, entitled to a very broad margin on review (*Boogaard* at paras 33 and 53).

[47] Although the case at hand is not in the context of promotions, I find that disciplinary decisions under section 5(1) of the *RCMP Act* exist in much the same policy and governance context as promotions, given that disciplinary decisions take into account issues such as the

objectives of the police force, the values and culture of the organization, and the public interest, all considerations which require the "Commissioner [to] draw upon his knowledge, experience and expertise concerning the needs of the police force [and] the management of the police force…" (*Boogaard* at para 46).

[48] Since *Boogaard* was issued subsequent to the statutory changes of concern to the Applicant, I find the FCA's finding on the standard of review is applicable to this case.

[49] Regarding the interpretation of law relating to the *RCMP Act* and its associated regulations by the Delegate, the Supreme Court of Canada stated, in *McLean v BC (Securities Commission)*, 2013 SCC 67 at paragraph 21 [*McLean*], that "this Court [has] held that an administrative decision-maker's interpretation of its home or closely connected statutes 'should be presumed to be a question of statutory interpretation subject to deference on judicial review'" (citation omitted). The Supreme Court went on to state that this presumption of reasonableness will be rebutted if: (i) both the administrative tribunal and the courts have concurrent jurisdiction at first interest; (ii) the question raised is a "true" question of *vires* or jurisdiction; or (iii) the question is a general question of law that is both of central importance to the legal system and outside the adjudicator's specialized area of expertise (*McLean* at paras 23 to 26).

[50] It is clear that the *RCMP Act* and the CSOGA are home or closely connected statutes. Further, the *RCMP Administration Manual* is an internal RCMP policy.

[51] The Applicant argues that the Delegate has no particular expertise in the matters which come before him. I disagree. Section 5(2) of the *RCMP Act* clearly gives the Commissioner the power to "delegate to any member, subject to any terms and conditions that the Commissioner directs, any of the Commissioner's powers, duties or functions under this Act, except the power to delegate…" Implicit in this is the understanding that a delegate is chosen by the Commissioner because he or she is someone who the Commissioner determines has the qualities to step into the Commissioner's shoes and exercise the Commissioner's powers, duties, or functions under the *RCMP Act*. Therefore, a delegate is to be granted the Commissioner's broad discretion, when acting in his or her delegated capacity.

[52] Based on all of the above, I find that the standard of review regarding the Delegate's decision for questions of fact, and mixed fact and law is reasonableness. I also find that the standard of review for the Delegate's interpretation of law relating to a home or closely connected statute and RCMP policy manuals is reasonableness. Moreover, the Delegate's decisions are entitled a broad margin of deference on review.

[53] The reasonableness standard means that the Court will not set aside the decision of a decision-maker as long as it is in accordance with the principles of justification, transparency, and intelligibility (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

C. *Did the Delegate err in law by applying the "patently unreasonable" standard of review?*

[54] The Applicant submits that the Delegate erred in law by applying the patently unreasonableness standard.

[55] The Applicant asserts that under the *RCMP Act* and the *RCMP Regs* there is no clear intention by Parliament that the "patently unreasonable" standard is to be applied by a delegate adjudicating an appeal. The Applicant submits that, post-*Dunsmuir*, had Parliament intended the "patently unreasonable" standard to apply, there was ample opportunity for amendment of the *RCMP Act*, the *RCMP Regs*, and the CSOGA. The Applicant states that the FCA's statement at paragraph 50 of *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 [*Huruglica*], supports the position that the standard is reasonableness:

> To be clear, I am not saying that the standard of reasonableness will never apply in appeals to administrative appeal bodies. In fact, there are examples where the legislator clearly expresses an intention that such a standard be applied: see, for example, subsection 18(2) and section 33 of the *Commissioner's Standing Orders (Grievances and Appeals) Regulation*, SOR/2014-289, adopted pursuant to the *Royal Canadian Mounted Police Act*, R.S.C., 1985, c. R-10; subsection 147(5) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (see Appendix A). This last provision was reviewed and construed by this Court in *Cartier v. Canada (Attorney General)*, 2002 FCA 384 (CanLII) at paras. 6-9, [2003] 2 F.C.R. 317.

[56] The Respondent argues that the Delegate's authority flows from the statues and regulations, and that the CSOGA makes it clear that the Delegate must consider whether there has been a breach of procedural fairness, an error of law, or a clearly unreasonable conclusion. It submits that the inclusion of the adverb "clearly" signals that Parliament intended to confer on the Conduct Authority a higher degree of deference with respect to findings of fact and mixed fact and law. The Respondent asserts that it was reasonable for the Delegate to find that this higher degree of deference is equivalent to the degree of deference accorded pursuant to the patently unreasonable standard.

[57] Further, the Respondent contends that the Delegate's equation of "clearly unreasonable" and "patently unreasonable" is supported by the French version of the provision (see, for example section 33(1) of the CSOGA), where the equivalent phrase to "clearly unreasonable" is "manifestement déraisonnable". In the French version of *Dunsmuir,* "manifestement déraisonnable" is translated to patently unreasonable (see, for example, *Dunsmuir* at para 37). The patent unreasonableness standard provides that a decision is patently unreasonable if it is "openly, evidently, [or] clearly" wrong (*Canada (Director of Investigation and Research) v Southam Inc*, [1997] 1 SCR 748 at para 57).

[58] Section 45.11(3) of the *RCMP Act* states:

(3) A member who is the subject of a conduct authority's decision may, within the time provided for in the rules, appeal the decision to the Commissioner in respect of	(3) Tout membre dont la conduite fait l'objet d'une décision de l'autorité disciplinaire peut, dans les délais prévus dans les règles, faire appel de la décision devant le commissaire :
(a) any finding that an allegation of a contravention of a provision of the Code of Conduct by the member is established; or	a) soit en ce qui concerne la conclusion selon laquelle est établie une contravention alléguée à une disposition du code de déontologie;
(b) any conduct measure imposed in consequence of a finding that an allegation referred to in paragraph (a) is established.	b) soit en ce qui concerne toute mesure disciplinaire imposée après la conclusion visée à l'alinéa a).

[59] Section 33(1) of the CSOGA states :

33 (1) 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.	33 (1) Lorsqu'il rend une décision sur la disposition d'un appel, le commissaire 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.

[60] As I determined above, the appropriate standard of review of the Delegate's interpretation of both the *RCMP Act* and the CSOGA is reasonableness, because it is the decision-maker's home or closely related statute. Further, it is important to note *Huruglica* was concerned with whether it was appropriate to import the standard from a judicial review of an administrative decision or an appellate court's review into the framework for the Refugee Appeals Division's review of a Refugee Protection Division decision. Therefore, the FCA was not, as the Applicant implies, commenting on the appropriateness of a patent unreasonableness standard. Moreover, *Huruglica*, at paragraph 49, states:

> When the legislator designs a multilevel administrative framework, it is for the legislator to account for considerations such as how to best use the resources of the executive and whether it is necessary to limit the number, length and cost of administrative appeals. As will be discussed, the legislative evolution and history of the [legislation] shed light on the policy reasons that guided the creation of the RAD and the role it was intended to fulfil. These policy considerations are unique to the RPD and the RAD. Thus, one should not simply assume that what was deemed to be the best policy for appellate courts also applies to specific administrative appeal bodies.

[61] In my opinion, *Huruglica* teaches that it is important to consider the standard of review applicable to the Delegate's review of the Conduct Authority within the context of the *RCMP Act*, its associated regulations, and the policy reasons that guided the creation of the Commissioner's role. As discussed above, the role of the Commissioner is to "control and [manage] the Force and all matters connected with the Force" (*RCMP Act*, section 5(1)), and the Commissioner is to be afforded broad discretion in exercising his or her duties.

[62] Therefore, given the express language that the decision must be "clearly unreasonable" and the French translation of the term, I conclude that the Delegate did not err. Interpreting the

"clearly unreasonable" standard as being equivalent to the "patently unreasonable" standard is reasonable in the context of the legislative and policy scheme. This means that the Delegate must defer to a finding of the Conduct Authority where he finds the evidence merely to be insufficient to support the finding (*Fraser Health* at para 30).

[63] There may well be a need for revision of the existing standard of review to a different threshold, but that is a matter for new legislation, not for this Court.

D. *Did the Delegate err in fact and in law by concluding that neither Supt. Bond's decision to issue the TRO nor the provisions of the TRO were patently unreasonable?*

[64] The Applicant asserts that Supt. Bond had no legal basis to issue the TRO, because the Applicant had not breached the order given by Insp. Leather during the May 21 Meeting. He argues that Insp. Leather never identified the Civilian Analyst who had made the complaint and, therefore, could not have directed the Applicant not to talk to CM Cameron. Additionally, the Applicant argues that Insp. Leather has provided numerous contradictory statements regarding the direction he gave to the Applicant during the May 21 Meeting, showing that he is not a credible witness. In the alternative, the Applicant argues that the evidence before the Delegate was that the purpose of Insp. Leather's direction was to ensure that the mediation process was not "derailed" or undermined; therefore, it had lapsed by the time the Applicant spoke to CM Cameron.

[65] The Respondent submits that Supt. Bond's decision to issue the TRO was based upon section 5 of the *RCMP Administration Manual*, Chapter XII.1, which states that a conduct

authority may take "administrative steps to protect the integrity of the RCMP and its processes, pending the outcome of the Code of Conduct investigation such as [] temporary reassignment". The Respondent argues that this section states that the policy around temporary reassignment does not require that a Code of Conduct contravention has been established before the TRO is ordered.

[66] Additionally, the Respondent asserts that Supt. Bond had legitimate concerns about the Applicant supervising subordinate members who had complained about and/or were uncomfortable with his management style, and that it was not patently unreasonable for the Delegate to find that the TRO was an appropriate means of protecting the integrity of the Conduct Investigation.

[67] In the TRO Decision, the Delegate notes that the Applicant's written submissions were supplemented by evidence that was not before Supt. Bond, when he made the decision to issue the TRO. The Delegate acknowledged that this new evidence showed that there had been no previous concerns expressed and recorded about the Applicant's management style. However, the Delegate held that issuing the TRO was not irrational given the information presented to Supt. Bond—i.e., that there had been a briefing note issued regarding the Applicant's disobeying a lawful order—and the need to maintain the integrity of the Conduct Investigation. Further, the Delegate concluded that the decision to issue the TRO and the provisions in the TRO were within the range of reasonable outcomes and did not breach the principles of procedural fairness.

[68] Section 5 of the *RCMP Administration Manual* clearly states that TROs can be used as an "administrative [step] to protect the integrity of the RCMP and its processes". The Delegate also noted that Supt. Bond, after being presented with the facts in the briefing note, was empowered by the *RCMP Act* to start the Conduct Investigation and by RCMP policy to protect the process by issuing the TRO.

[69] Regarding the Applicant's arguments concerning the validity of Insp. Leather's direction, and the allegations that Insp. Leather was not a credible witness, the Delegate held that it was not appropriate to make a determination in the TRO Decision, given that an appeal of the CI Decision was pending.

[70] The issuance of a TRO is an administrative step that can be used in the course of conduct investigations. Whether or not a TRO was appropriate in this case, is a question of fact. The Delegate found that there was no evidence that either the issuance of the TRO or the contents of the TRO was openly, evidently, or clearly unreasonable. Based on the evidence on the record and the TRO Decision, I find that the Delegate's finding that Supt. Bond acted lawfully and appropriately is reasonable.

E. *Did the Delegate err in fact and law by concluding that Supt. Bond's finding that the Applicant had received a clear order was not "patently unreasonable"?*

[71] The Applicant argues that the Delegate erred in both fact and law in concluding that Supt. Bond's finding that there was clear and cogent evidence of a direction not to speak to CM Cameron was not patently unreasonable. The Applicant contends that during the May 21

Meeting he was only told not to speak to Cpl. Amine and Const. Melvin, and that CM Cameron was not mentioned by name and, therefore, could not be included in the group of "anyone who was mentioned to [him] yesterday" from the Second May 22 Email. Further, the Applicant asserts that there is no clear and cogent evidence supporting Insp. Leather's assertion that he ordered the Applicant to refrain from speaking to anyone on Team 2 about the issue.

[72] The Applicant submits that Insp. Leather's credibility was not properly assessed by Supt. Bond and that the Delegate failed to consider whether Supt. Bond applied the correct test in determining the credibility of a witness. The Applicant states that the discrepancy between Insp. Leather's written notes and his statements, and the potentially non-contemporaneous nature of his note regarding the May 21 Meeting are evidence that Insp. Leather is not credible. The Applicant argues that, given Supt. Bond's reliance on Insp. Leather's evidence, it was an error for the Delegate to conclude that Supt. Bond's decision was not patently unreasonable.

[73] The Respondent submits that the evidentiary record supports the finding that Insp. Leather gave a direct order to the Applicant not to speak to members of Team 2. The Respondent notes that both Insp. Leather and the Applicant agree that Insp. Leather advised the Applicant that the complaints had come from Cpl. Amine, Const. Melvin, and an unnamed Civilian Analyst. There was only one Civilian Analyst on Team 2, CM Cameron. Therefore, the Respondent contends that Insp. Leather's direction that the Applicant not speak with "anyone who was mentioned to [him] yesterday" was at the very least a clear direction not to speak with CM Cameron.

[74] Moreover, the Respondent contends that the Second May 22 Email, which included instructions to the Applicant to not speak to anyone mentioned at the meeting except for Cpl. McLaughlin and Sgt. Stevely, supports Supt. Bond's finding that the Applicant was instructed not to contact other members of Team 2 besides Cpl. Amine and Const. Melvin, since the reference to Cpl. McLaughlin and Sgt. Stevely would not be necessary otherwise. The Respondent also asserts that the Delegate did not err by deferring to Supt. Bond's findings regarding the credibility of Insp. Leather's evidence.

[75] Whether or not there was a clear direction given by Insp. Leather is a question of fact. As such, the Delegate reviewed Supt. Bond's finding on the standard of patent unreasonableness, or in other words, the standard of clearly unreasonable. Therefore, it was open for the Delegate to find that the CI Decision was not patently unreasonable, if there was merely a lack of clear evidence supporting Supt. Bond's conclusions.

[76] As stated in paragraph 59 of the CCM Decision, the Delegate noted the Applicant's arguments regarding the lack of clear and cogent evidence. However, in assessing the evidentiary record assembled by Supt. Bond, the Delegate held that there was evidence to support Supt. Bond's finding. The Delegate reviewed the fact that Supt. Bond considered: (i) that CM Cameron was the only Civilian Analyst on Team 2 and was mentioned in the meeting, despite not being named; (ii) that there would have been no reason to carve out an exception involving Cpl. McLaughlin and Sgt. Stevely, if the direction had only been to refrain from speaking to Cpl. Amine and Const. Melvin; and (iii) the contemporaneous note made by Insp. Leather at 2:06 pm, on May 22, 2015, wherein Insp. Leather indicates that he advised the Applicant by email not to

speak to anyone mentioned in the May 21 Meeting, including Civilian Member X (i.e., CM Cameron).

[77] Further, the Delegate considered the evidence regarding the Applicant's allegations that Insp. Leather was not a credible witness and appropriately held that he was not in a position to make a decision as to the credibility of Insp. Leather (*Elhatton v Canada (Attorney General)*, 2013 FC 71 at paras 45 to 46 [*Elhatton*]). The Delegate found that there was no palpable or overriding error in Supt. Bond's credibility assessment and did not intervene (*Elhatton* at para 47, citing *FH v McDougall*, 2008 SCC 53 at paras 72 to 73). The Delegate also correctly noted that he was not to reweigh the evidence before Supt. Bond. Thus, I find that the Delegate's conclusion, regarding Supt. Bond's finding that there was a clear order given by Insp. Leather, is reasonable.

F. *Did the Delegate err in fact and law by concluding that the manner in which Supt. Bond assessed the evidence, applied the civil standard of proof, and identified and applied the elements necessary for finding a contravention of the Code of Conduct was not "patently unreasonable"?*

[78] The Applicant in his memorandum of fact and law does not address this issue in detail. Regardless, I find that this issue is merely a combination and a restatement of issues E and G from T-2005-16, as listed above in the Issues section. As such, this issue will not be addressed separately.

G. *Did the Delegate err in fact and law by concluding that it was not "patently unreasonable" for Supt. Bond to find that the Applicant had failed to comply with a lawful order?*

[79] The Applicant submits that he did follow the order given to him: to refrain from speaking to Cpl. Amine and Const. Melvin. Alternatively, the Applicant contends that the direction had lapsed by the time he spoke with CM Cameron, because the mediation was not going forward. In the further alternative, the Applicant states that his discussion with CM Cameron was for the purpose of informing himself about the complaints and that this was justifiable since he had not been properly informed regarding the complaints by Insps. Leather and Corcoran.

[80] As a final alternative, the Applicant argues that he had a lawful excuse for disobeying the direction of Insp. Leather, namely, the inappropriate manner in which Insps. Leather and Corcoran handed the alleged concerns about the Applicant's management style—i.e., Insps. Leather and Corcoran placed the Applicant's career and reputation on the line by having him temporarily reassigned, and by circulating an email to his peers and subordinates advising them that a complaint had been made. The Applicant asserts that he had already been denied a promotion by Insp. Corcoran because of these allegations. Lastly, the Applicant states that the Delegate's use of the Log to distinguish this case from the case *Stone v SDS Kerr Beavers Dental*, [2006] OJ No 2532, was a breach of procedural fairness because the Log was not disclosed to the Applicant.

[81] The Respondent states that it was reasonable for the Delegate to conclude that the evidence supported the finding that Insp. Leather's order remained in effect even when the prospect of mediation ended, as there was no clear resolution regarding the complaints. Additionally, the Respondent argues that the evidence shows that it was reasonable for the Delegate to uphold Supt. Bond's decision that the Applicant was not justified in talking to CM

Cameron to inform himself, because the Applicant knew that he could have approached Insps. Leather and Corcoran, Cpl. McLaughlin, or Sgt. Stevely with his concerns, but instead chose to speak specifically to the only Civilian Analyst on Team 2. Moreover, the Respondent submits that it was reasonable for the Delegate to find that the Applicant's concerns over the actions Insps. Leather and Corcoran, and matters relating to job assignments and promotions were not justifiable defenses to disobeying a direct order.

[82] I have already found that it is reasonable for the Delegate to have upheld Supt. Bond's finding that there was a clear direction from Insp. Leather.

[83] Regarding whether the direction lapsed, the Delegate noted that Supt. Bond did not accept the Applicant's assertion on this point, because there had not been either a resolution of the complaints process or a challenge to the direction. The Delegate reviewed Supt. Bond's consideration of the evidence regarding the purpose of the direction and the state of the conflict resolution after mediation failed, and found that Supt. Bond did not err in fact or law. The Delegate also held that it was incumbent on the Applicant to discuss the direction with Insp. Leather and gain confirmation that the direction was no longer in effect. Therefore, the fact that there is a lack of evidence clearly showing that the direction was still in effect past July 7, 2015 is not a sufficient basis for the Delegate to find Supt. Bond's erred. I find that the Delegate's conclusion on this point to be reasonable.

[84] The Code of Conduct, section 3.3, states "members give and carry out lawful orders and direction". Supt. Bond held that the Applicant's concerns regarding Insps. Leather and Corcoran,

and worry about his reputation and future promotions were not lawful excuses for disobeying a lawful direction, thereby contravening the Code of Conduct. The Delegate, who has expertise in RCMP policy and the responsibility to ensure that the RCMP is managed appropriately, agreed with Supt. Bond's determination.

[85] In his written submissions, the Applicant cites various cases to support his allegations that Insps. Leather and Corcoran did not meet the legal standard for how employers should address performance deficiencies in both unionized and non-unionized employees. I find that these cases, while of interest, do not undermine the threshold of establishing a patently unreasonable basis for the decision on this issue. Such a basis is not present here. While I might disagree with the manner in which the Applicant was treated and have sympathy for his lack of a fulsome explanation for his performance concerns, I am not to reweigh the evidence nor apply a different standard of review.

[86] Moreover, whether or not Insps. Leather and Corcoran were appropriately handling the Applicant's alleged performance deficiencies is a separate and distinct issue from whether the Applicant was justified in disobeying a lawful order. As the Delegate noted, there is an internal grievance procedure outlined in Part III of the *RCMP Act*, which was available to the Applicant as a means of addressing these concerns. As such, the Delegate's finding that this alternative argument lacks merit is reasonable.

[87] The Delegate recognized that there was a procedural fairness issue with regards to the Log. The Delegate's decision regarding Supt. Bond's breach of procedural fairness does not

expressly consider whether the breach had an impact on Supt. Bond's finding that the Applicant was not justified in disobeying Insp. Leather's direction. However, it is clear that the Delegate determined that the Log and Supt. Bond's use of the Log related to the conduct measures imposed, not to the issue of whether the Applicant had justification for disobeying a direct order. Therefore, there is no flaw in the Delegate's reasons that amounts to an error in law (*Newfoundland and Labrador Nurses Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62).

[88] I am sympathetic to the Applicant's concerns about his reputation and potential future promotions. However, I find that the Delegate's review of Supt. Bond's decision was reasonable and that no error in law was made.

H. *Did the Delegate err by imposing a conduct measure of forfeiture of five days of annual leave in place of the conduct measure imposed by Supt. Bond?*

[89] The Applicant submits that the Delegate erred in fact and law by failing to accord sufficient weight to the mitigating factors and by placing significant weight on the aggravating factors in this case.

[90] The Respondent argues that the Delegate took appropriate notice of Supt. Bond's breach of the Applicant's right to procedural fairness, allowed the appeal regarding the conduct measures and imposed another, reasonable set of conduct measures.

[91] The determination of appropriate conduct measures is fact specific and policy driven. As such, it is an analysis that is best done by the expert decision-maker. Moreover, this Court will not undertake to reweigh evidence. The CCM Decision shows that the Delegate considered both the mitigating and aggravating factors. The conduct measures imposed are in line with the conduct measures that are available to be imposed pursuant to sections 3 and 4 of the *Commissioner's Standing Orders (Conduct)*, SOR/2014-291. Moreover, the Delegate has clearly explained why he chose the conduct measures imposed upon the Applicant.

[92] I find that the conduct measures imposed by the Delegate are reasonable.

VI. Costs

[93] Neither party made submissions as to costs. In my view, the facts of these cases do not warrant an award of cost.

JUDGMENT in T-2005-16 and T-2098-16

THIS COURT'S JUDGMENT is that:

1. The style of cause is hereby amended to name only the "Attorney General of Canada" as a Respondent;

2. The Applicant's applications in each of Court files T-2005-16 and T-2098-16, are dismissed;

3. Neither party made submissions as to costs. In my view, the facts of these cases do not warrant an award of cost.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2005-16 AND T-2098-16
STYLE OF CAUSE:	BALJIT SINGH KALKAT v ATTORNEY GENERAL OF CANADA EL AL
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
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JUDGMENT AND REASONS:	MANSON J.
DATED:	AUGUST 31, 2017

APPEARANCES:

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