Federal Court  Cour fédérale

Date: 20190531

Docket: T-1619-17

Citation: 2019 FC 770

Ottawa, Ontario, May 31, 2019

PRESENT: Mr. Justice Favel

BETWEEN:

CPL. IAN SMITH

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of Matter

[1] This is an application for judicial review under section 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7, of a decision of a Royal Canadian Mounted Police Chief Conduct Adjudicator [the Adjudicator] which upheld a Conduct Authority decision finding that the Applicant contravened a provision of the *Royal Canadian Mounted Police Regulations*, (SOR/2014-281). The Applicant received a written reprimand and lost two days' vacation.

[2] In his Notice of Application the Applicant seeks the following from the Court:

> 1. An order setting aside the decision of the Level II adjudicator dated September 14, 2017 and communicated to the Applicant on September 25, 2017, numbered ACMT2016-335388, and substituting, by order of this Honourable Court, a finding that Allegation I was not substantiated;
>
> 2. Costs of this Application; and
>
> 3. Such further and other relief that this Honourable Court considers just.

II. Background

[3] The Applicant, Cpl. Ian Smith, [Cpl. Smith], now an intelligence officer, has served as an RCMP member since 2011 and in 2015 he was assigned to the Outlaw Motorcycle Gangs Investigation Unit (OMGIU).

[4] Office space was procured for the three-person OMGIU in Calgary. Cpl. Smith took steps to secure the office space such as obtaining keys and ensuring limited access to the OMGIU.

[5] Cpl. Smith began a short leave on August 23, 2015 and, prior to leaving, he closed the blinds to his office and locked his office door. A safe for storage of confidential and protected information had also arrived prior to Cpl. Smith's leave. On August 25, 2015, RCMP supervisors Sergeant Leatherdale and Inspector Bennett entered the office space. Other members of the OMGIU were also away on this day. Cpl. Smith's office was accessible by the same key that was left in the door to a file room. The supervisors were able to access an array of protected documents in the office space and in Cpl. Smith's office.

[6] One of the issues involved how certain protected information was stored by Cpl. Smith. Confidential source files are maintained by the RCMP by certain codes. Protected "C" files contain information that may permit the identification of a source and are subject to higher security measures. Protected "B" files contain information relating to criminal activity but without information capable of permitting the identification of a source and are subject to comparatively lower degrees of security.

[7] A *Code of Conduct* investigation was initiated on September 2, 2015, into whether Cpl. Smith and other members of the OMGIU had failed to properly handle and secure protected information and therefore violated the *Code of Conduct*. Superintendent De Champlain [the Conduct Authority] examined the following allegation:

> On or about August 25th, 2015, at or near Calgary, Alberta, Corporal Ian Smith did fail to ensure that items were properly handled and secured in the unit workspace, including but not limited to materials that were of Protected "B" and Protected "C" category and exhibits that were not properly processed.
>
> It is therefore alleged that Corporal Ian Smith has contravened Section 4.2 of the RCMP Code of Conduct.
>
> *"Members are diligent in the performance of their duties and the carrying out of their responsibilities, including taking appropriate action to aid any person who is exposed to potential, imminent or actual danger."*
>
> [Emphasis in original.]

[8] Cpl. Smith requested that the Conduct Authority recuse himself due to a reasonable apprehension of bias resulting from the Conduct Authority's finding that another Corporal [Corporal 2] had violated the *Code of Conduct* arising from the same circumstances. The Conduct Authority declined to recuse himself.

[9] The Conduct Authority determined that the allegation was established and imposed a forfeiture of two days from Cpl. Smith's annual leave. Additionally, the Conduct Authority imposed a written reprimand. An additional allegation related to improperly storing a firearm was not established on a balance of probabilities. Cpl. Smith appealed the Conduct Authority Decision to the Adjudicator.

III. The Decision

[10] The Adjudicator considered Cpl. Smith's claims that the Conduct Authority decision "was based on breaches of procedural fairness, errors of law, and that it was clearly unreasonable". After summarizing the various submissions of Cpl. Smith, the Adjudicator dismissed the appeal.

[11] Based on subsection 33(1) of the *Commissioner's Standing Orders (Grievances and Appeals)* (SOR/2014-289) [Standing Orders], the Adjudicator established that Cpl. Smith would need to demonstrate that the decision represented a breach of procedural fairness, was based on an error of law, or was clearly unreasonable in order to be successful.

[12] According to the Adjudicator, there was no breach of procedural fairness due to bias because "it has not been established that a reasonably informed person could reasonably perceive bias on the part of the Respondent simply because he apparently found misconduct by Corporal 2 based on similar circumstances."

[13] Similarly, the Adjudicator determined that there was no breach of procedural fairness stemming from the Conduct Authority's prior involvement in managerial matters or receipt of information that would predispose him to a certain perspective. The Adjudicator found that the Conduct Authority's refusal to recuse himself did not create a reasonable apprehension of bias.

[14] The Adjudicator found that requiring Cpl. Smith to furnish evidence in response to the allegation did not constitute a breach of procedural fairness. According to the Adjudicator, Cpl. Smith was sufficiently aware of the case against him to be able to prepare to respond to the allegation.

[15] The Adjudicator determined that the search of Cpl. Smith's office was neither a breach of procedural fairness nor an error of law. The case law and the RCMP policies relied upon by Cpl. Smith were inapplicable to his argument that the search constituted a reviewable error.

[16] After summarizing the Conduct Authority's reasoning, the Adjudicator concluded that it was not an error of law to find that Cpl. Smith had failed to properly handle the protected documents in the circumstances.

[17] Before delving into the reasonableness of the Conduct Authority Decision, the Adjudicator reiterated that the statutory regime demands that a significant degree of deference be shown. The requirement that Cpl. Smith demonstrate that the Conduct Authority Decision is clearly unreasonable can be interpreted as a standard of patent unreasonableness according to the Adjudicator.

[18] The Adjudicator concluded that Cpl. Smith had not succeeded in demonstrating that the Conduct Authority Decision was a breach of procedural fairness, was clearly unreasonable, or was an error of law. The Adjudicator dismissed the appeal on September 14, 2017.

IV. Preliminary Issue- Introduction of New Evidence

[19] A preliminary matter which must be disposed of relates to the admissibility of new evidence that was not before the Adjudicator. Specifically, Cpl. Smith submitted an affidavit, which was sworn on December 7, 2017, almost three months after the Adjudicator's decision. In addition, after the hearing, in December 2018 the Applicant made a motion to introduce as new evidence an RCMP Communique on the topic of Protected "B" and "C" information.

[20] The Respondent argues that Cpl. Smith should not be allowed to submit new evidence. The Court agrees.

[21] As a general rule, evidence which could have been submitted to a decision-maker is inadmissible to the reviewing court (*'Namgis First Nation v. Canada (Fisheries and Oceans)*, 2019 FCA 149 at para 4; *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at para 13 [*Bernard*]; *Canada (Public Sector Integrity Commissioner) v Canada (Attorney General)*, 2014 FCA 270 at para 4).

[22] Although there are a number of exceptions to this general rule, the only one which could conceivably apply to the December 2017 affidavit is the procedural fairness exception. In *Bernard* at para 25, this exception allows the admission of new evidence which is "relevant to an

issue of natural justice, procedural fairness, improper purpose or fraud that could not have been placed before the administrative decision-maker and that does not interfere with the role of the administrative decision-maker as merits-decider."

[23] The affidavit contains no evidence related to any of the above issues that could not have been submitted to the Adjudicator. Instead, the December 2017 affidavit contains general information about the sequence of events leading to the investigation, the investigation process, and the Conduct Meeting. Accordingly, this exception to the general rule of inadmissibility does not apply.

[24] The RCMP Communique does not provide any new and relevant information that necessitates its admission as an exception to the general rule. The RCMP Communique is a reminder to handle Protected "B" properly and describes requirements for emailing such information. As for Protected "C" information the RCMP Communique simply discusses the requirements for sending that information to another person within Canada. The Court finds that the RCMP Communique neither serves the interests of justice nor assists the Court in determining whether the Adjudicator's decision was reasonable or whether it breached Cpl. Smith's procedural rights.

[25] Cpl. Smith's new evidence contained in the December 7, 2017 affidavit and the RCMP Communique will not be considered by the Court. The motion for the admission of the RCMP Communique is dismissed.

V. Issues

[26] The Applicant identifies the issues as follows:

(1) What is the applicable standard of review for the Level II Decision of the Chief Conduct Adjudicator?

(2) Did the Chief Conduct Adjudicator inappropriately apply the patent unreasonableness standard to Supt. De Champlain's Level I Decision when considering Cpl Smith's appeal?

(3) What level of procedural fairness was Cpl. Smith entitled to at the Conduct Meeting?

(4) Did the Chief Conduct Adjudicator fail to provide sufficient reasons for his decision?

(5) Did the Chief Conduct Adjudicator fail in his obligation to require Supt. De Champlain to provide sufficient reasons for the decision reached at Cpl. Smith's Conduct Meeting?

(6) Did the Chief Conduct Adjudicator err by failing to find that the context underlying Supt. De Champlain's decision gave rise to a reasonable apprehension of bias?

[27] The Court has reformulated the issues as follows:

1. What is the applicable standard of review?
2. Did the Adjudicator breach the duty of procedural fairness?
3. Was the Adjudicator's decision reasonable?

VI. Standard of Review

[28] The standard of review for the Adjudicator's interpretation of home statutes and RCMP policy manuals is reasonableness. The standard of review is also reasonableness for the Adjudicator's findings on questions of fact as well as questions of mixed fact and law (*Kalkat v Canada (Attorney General)*, 2017 FC 794 at para 52 [*Kalkat*]).

[29] When reviewing a decision on the standard of reasonableness, the Court's analysis is concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59). The Court should intervene only if the Decision was unreasonable and falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[30] The parties agree that the applicable standard of review for a question of procedural fairness is correctness. The Court agrees that the weight of the jurisprudence leads to the standard of 'correctness' being applied to the issue of procedural fairness (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Wang v Canada (Minister of Citizenship and Immigration)*, 2010 FC 799 at para 11). More recently, the Federal Court of Appeal has stated that when reviewing procedural fairness "a court assessing a procedural fairness argument is required to

ask whether the procedure was fair having regard to all of the circumstances" (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

VII. Applicant's Submissions

[31] According to the Applicant, the Adjudicator erred in deciding to use the standard of patent unreasonableness to review the Conduct Authority Decision. The Applicant submits that the Adjudicator relied on cases that no longer apply outside of the narrow legal window. The Applicant further submits that the Standing Orders cannot displace a fundamental principle of administrative law, namely, that an unreasonable decision must not be allowed to stand.

[32] The Applicant asserts that, when applying the factors set out in *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC) [*Baker]*, it is clear that Cpl. Smith was entitled to a high level of procedural fairness approaching the "judicial" or "quasi-judicial" end of the procedural scale and that, in the present case, there were a number of breaches of procedural fairness. Firstly, the Applicant argues that the Adjudicator failed to ensure that sufficient reasons were given in the Conduct Authority Decision. Secondly, the Applicant challenges the inclusion of another officer's notes in the Conduct Authority Decision. Finally, the Applicant reiterates that the Conduct Authority's refusal to recuse himself constitutes a breach of procedural fairness due to a reasonable apprehension of bias.

VIII. Respondents' Submissions

[33] The Respondent argues that it was appropriate for the Adjudicator to apply the standard of patent unreasonableness to the Conduct Authority Decision and that the Adjudicator's decision, as a whole, was reasonable in determining that the Conduct Authority Decision contained sufficient reasons.

[34] According to the Respondent, the inclusion of another officer's notes in the Conduct Authority Decision was not inappropriate and argued that the Adjudicator was correct in determining that the Conduct Authority's refusal to recuse himself did not constitute a breach of procedural fairness due to a reasonable apprehension of bias.

IX. Analysis

A. *Adjudicator's Choice of Standard of Review*

[35] The parties disagree about whether the Adjudicator erred in interpreting subsection 33(1) of the *Commissioner's Standing Orders (Grievances and Appeals)* (SOR/2014-289) which reads as follows:

Decision of Commissioner	**Décision du commissaire**
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

[36] In selecting the applicable standard of review, the Adjudicator was interpreting legislation closely connected to the home statute. Accordingly, a standard of reasonableness applies to the Adjudicator's decision (*Kalkat*, above, at para 52). This means that the standard of review selected by the Adjudicator must fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at para 47).

[37] Mr. Justice Michael Manson examined this issue in *Kalkat* at para 62, and held that:

> [62] …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.

[38] The Adjudicator undertook an extensive analysis in order to arrive at the conclusion that the standard of patent unreasonableness applies to the Conduct Authority Decision. This analysis included a review of relevant case law, the meaning of the word "clearly", and the French text of subsection 33(1). The Adjudicator's conclusion that the applicable standard of review was patent

unreasonableness is justifiable, transparent, and intelligible. The Court agrees that this was a reasonable conclusion.

B. *Procedural Fairness*

[39] Cpl. Smith asserts that an application of the *Baker* factors to this case results in a high degree of procedural fairness being owed (*Baker* at para 23). The Court agrees.

[40] The process that Cpl. Smith has taken part in has been highly adjudicative in nature. Accordingly, a higher degree of procedural fairness is owed, See *Baker*, above, at para 23. The statutory scheme also results in a higher degree of procedural fairness being owed due to subsection 45.16(9) of the *Royal Canadian Mounted Police Act* (RSC, 1985, c R-10) because "a Commissioner's decision on an appeal is final and binding". The result of this decision is quite significant to Cpl. Smith because it could impact his career indefinitely. This calls for more procedural fairness (*Baker*, above, at para 25). In sum, the Applicant is owed a high degree of procedural fairness.

C. *Procedural Fairness- Adequacy of Reasons*

[41] The first issue with respect to procedural fairness is whether the Adjudicator erred in finding that the reasons in the Conduct Authority Decision were sufficient. The provision of sufficient, intelligible reasons is essential to procedural fairness in some circumstances (*Baker*, above, at para 43). The existence of a statutory right of appeal and the significance of the decision to Cpl. Smith resulted in written reasons being necessary.

[42] The Conduct Authority Decision provides reasons that are sufficiently detailed to allow Cpl. Smith to understand the case being made against him. These reasons are intelligible, clearly set out the allegations made against Cpl. Smith and describe the factors which led to the decision. The Adjudicator did not err in determining that the reasons provided were adequate.

[43] The Adjudicator noted that the Cpl. Smith had several opportunities to make extensive submissions and utilized those opportunities. The Adjudicator also outlines the facts that occurred on August 25, 2015 in some detail from paragraphs 17 to 25 of its decision. From paragraph 26 to 53 there is a detailed overview of the process of the investigation and an overview of the various submissions of Cpl. Smith. A lengthy analysis leading up to the conclusion is found in paragraph 54 to113. In that analysis the Adjudicator reviewed Cpl. Smith's allegations related to the breaches of procedural fairness, the analysis related to the storage of confidential and protected information (for both Protected "B" and "C" information) as well as the analysis related to the standard of review. When reviewing the Adjudicator's decision as a whole the Court finds that there were sufficient reasons given for its findings.

D. *Procedural Fairness- Identity of Decision-maker*

[44] According to Cpl. Smith, he "had the right to know who was making the decision, and that right was trampled when the officer's findings of fact were based on the presence of another officer's findings in the Conduct Authority Decision". Cpl. Smith argues that the Adjudicator erred when it ignored the source of the information. The Court is not persuaded by this argument.

[45] In its decision the Conduct Authority explicitly describes the materials and evidence relied upon in arriving at its decision. Specifically, the Conduct Authority states that he considered the circumstances of the two supervisor's inspection of the office. It is evident that the Conduct Authority relied on the text of a preliminary report prepared by another Sergeant that described the two supervisors' inspection of the office space. There was also never any question that the Conduct Authority was the decision-maker of first instance. There was no breach of procedural fairness on this issue. Therefore, the Adjudicator did not err by failing to find one.

E. *Procedural Fairness- Apprehension of Bias*

[46] The final question is whether the Adjudicator erred in its assessment that the Conduct Authority's refusal to recuse himself did not create a reasonable apprehension of bias.

[47] The Applicant's argument is the result of the Conduct Meeting held by the Conduct Authority for Corporal 2 that was related to the same sequence of events arising on August 25, 2015. Cpl. Smith argued that essentially he and Corporal 2 were 'co-accused' for the purposes of the Code Investigation.

[48] Based on the co-accused analogy, Cpl. Smith stated that "Findings by Canadian courts in criminal law suggest that it is a best practice, when a judge has determined a co-accused's matter arising from the same facts, to recuse herself from presiding over the trial of the other accused."

[49] The case of *R v GH*, OJ No 3635, 2002 (ON CA), which is relied upon by Cpl. Smith, actually supports the finding that there was no reasonable apprehension of bias in respect of the Conduct Authority. In that case (at para 8), the Ontario Court of Appeal held that failure to follow the best practice, as described above, does not create a reasonable apprehension of bias.

[50] Furthermore, the Applicant's argument is based on a misunderstanding of the concept of reasonable apprehension of bias. It is of little assistance to discuss best practices in the criminal law context. Instead, thought should be given to the specific context in which the Conduct Authority arrived at his decision. In this regard, Madame Justice L'Heureux-Dubé in *Baker* at para 47 held that "the standards for reasonable apprehension of bias may vary, like other aspects of procedural fairness, depending on the context and the type of function performed by the administrative decision-maker involved."

[51] Mr. Justice Richard Mosley in *Calandrini v Canada*, 2018 FC 52 at para 12 further describes this context:

> [12] Under the former procedures, contraventions of the Code of Conduct were referred to adjudication boards. This had resulted in substantial backlogs as the boards dealt with both serious and less serious breaches of the Code. As a result of changes implemented in 2014, contraventions of the Code which could be dealt with at the unit, branch or divisional level were referred to the CO's at each level for conduct meetings with the subject member.

[52] It is clear that the procedural changes were meant to facilitate the prompt determination of conduct hearings within RCMP units. It would be inconsistent with this purpose require a different Officer to investigate each individual alleged to have breached the Code of Conduct in a particular set of circumstances.

[53] A determination that a reasonable apprehension of bias exists is not to be made lightly as stated by a majority in *R v S (RD)*, [1997] 3 SCR 484:

> [484] The jurisprudence indicates that a real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence.

[54] The Applicant has adduced no evidence other than the mere fact that the Conduct Authority also conducted a conduct investigation into Corporal 2. The Adjudicator was correct in determining that there was no breach of procedural fairness due to a reasonable apprehension of bias.

F. *Reasonableness*

[55] For much of the same reasons related to the issue of the alleged breach of procedural fairness, the Court finds that the Adjudicator's decision, when read as a whole, is justified, transparent and intelligible and which falls within the range of acceptable and defendable outcomes.

[56] Specifically, as the allegation surrounded the treatment of the confidential and protected information, the Adjudicator reviewed and considered the evidence and submissions of Cpl. Smith on this particular issue. In doing such an analysis, the Adjudicator noted that certain of the information (such as source de-briefing reports and source payment receipts) that needed to be stored in the safe were not in fact stored in the safe (as Protected "C" information). In this regard the Adjudicator devoted some time to the opinion letter provided by another office that was

relied on by Cpl. Smith but nevertheless found that this opinion letter did not correspond with Cpl. Smith's handling of the protected information in question. The opinion noted that when certain information may start out as Protected "B" as part of the operational file and that it is to be held together with the administrative file and collectively it becomes Protected "C" and must be stored and secured as such. The Adjudicator considered the opinion letter and Cpl. Smith's argument that some of the information found on his desk in his office was in "transition" to be stored and was going to be stored in the appropriate place once he returned from his leave (Adjudicator's decision, para 82 to 91).

[57] While Cpl. Smith's arguments and explanations were rejected, the Adjudicator's decision nevertheless outlined the facts, it outlined and summarized all of the submissions made by the Cpl. Smith and it provided intelligible and transparent reasons and justification for its conclusions.

X. Conclusion

[58] For all of the above reasons this Application for judicial review is dismissed.

JUDGMENT in T-1619-17

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed with costs to the Respondent.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1619-17
STYLE OF CAUSE:	CPL. IAN SMITH v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	SEPTEMBER 13, 2018
JUDGMENT AND REASONS:	FAVEL J.
DATED:	MAY 31, 2019

APPEARANCES:

Mr. John K. Phillips Mr. Otto Phillips	FOR THE APPLICANT
Darcie Charlton	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Waddell Phillips PC Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Edmonton, Alberta	FOR THE RESPONDENT