Federal Court Cour fédérale

Date: 20220304

Docket: T-13-21

Citation: 2022 FC 308

Ottawa, Ontario, March 4, 2022

PRESENT: Mr. Justice McHaffie

BETWEEN:

FREDERICK GREENE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Frederick Greene seeks judicial review of an adjudicator's decision dismissing an appeal of his discharge from the Royal Canadian Mounted Police. Mr. Greene's discharge followed the elimination in 2012 of the RCMP's Community Safety Officer Pilot Program, of which he was a member.

[2] Mr. Greene argues the adjudicator unreasonably refused to consider his arguments regarding his treatment during an aborted training session at the RCMP's Depot Division training academy. He also argues the adjudicator unreasonably dismissed his argument that the RCMP failed in its obligations to ensure members are "treated equitably and given every reasonable opportunity to continue their careers," and to make "every reasonable effort" to train members for other posts. He had argued in particular that the RCMP improperly took no further steps to search for positions or train him after he successfully appealed his initial discharge in 2018, and that the RCMP's overall efforts to assist him after the elimination of the Pilot Program were inadequate.

[3] For the reasons set out below, I agree with Mr. Greene. The extent to which the RCMP could rely on the training at Depot to satisfy its obligations was central to Mr. Greene's discharge appeal. Mr. Greene argued the RCMP's termination of his training at Depot due to a temporary injury was unreasonable and discriminatory and that the training could therefore not be considered a "reasonable effort." The adjudicator's reasons for not addressing these arguments were unreasonable and did not accord with the record. The adjudicator also did not meaningfully address Mr. Greene's arguments that the RCMP failed to fulfill its obligation to make "every reasonable effort," particularly after the first successful appeal.

[4] I conclude that notwithstanding the deference that must be shown to the adjudicator, the rejection of Mr. Greene's discharge appeal must be set aside. The application for judicial review is therefore granted and Mr. Greene's appeal is remitted for redetermination. In accordance with the agreement of the parties, Mr. Greene is awarded his costs in the amount of $2,500.

II. Issues and Standard of Review

[5] Mr. Greene raises the following issues on this application:

A. Did the adjudicator err in refusing to consider relevant arguments?

B. Did the adjudicator err in concluding the RCMP's efforts to continue his employment were sufficient?

[6] Both of these issues go to the merits of the adjudicator's decision and are reviewable on the reasonableness standard: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25.

[7] Mr. Greene argues that the refusal to consider a party's arguments is a form of procedural unfairness, citing the Ontario Divisional Court's decision in *Ontario Educational Communications v Communications, Energy and Paperworkers Union*, 2013 ONSC 3307. I cannot agree. I note that the Divisional Court in that case was addressing an arbitrator's refusal to address an argument because it was raised by a less central party even though that party was granted full rights as a party, which the Divisional Court considered unfair: *Ontario Educational Communications* at paras 59–63. The issue was thus the unfairness in granting party status to an entity but then not treating them as a party. That is not the situation here.

[8] In any event, the Supreme Court of Canada has subsequently confirmed that assessing an administrative decision maker's failure to respond to a party's central arguments on the merits of a matter is an aspect of reasonableness review: *Vavilov* at paras 127–128. In my view, the same

approach must apply where the administrative decision maker has deliberately decided not to consider an argument or, as in this case, effectively prohibited the party from making an argument on substantive, rather than procedural, grounds. I therefore consider that both of the issues in this application are reviewable on the reasonableness standard.

III. Factual and Legal Framework

A. *Mr. Greene's position and the unsuccessful training at Depot*

[9] In June 2008, Mr. Greene was hired by the RCMP as a Community Safety Officer (CSO) in Prince George, British Columbia, at the rank of Special Constable. The CSO position was part of a pilot program being conducted by the RCMP in its "E" Division. In 2012, the RCMP decided to eliminate the CSO Pilot Program. The RCMP offered those in the CSO Pilot Program, including Mr. Greene, three options: (i) apply to remain as a Special Constable by becoming a Community Constable; (ii) apply to become a regular member of the RCMP; or (iii) transition to becoming a civilian non-uniformed Community Program Officer. The Community Constable option was part of another "E" Division pilot program that would involve a 22-week training program at the RCMP's Depot Division in Regina, Saskatchewan.

[10] Mr. Greene chose the Community Constable option and signed a Letter of Agreement with "E" Division regarding his training at Depot and his posting to Prince George upon successful completion of that training. Mr. Greene was to be trained as part of a special troop at Depot to train CSOs to become Community Constables after the termination of the CSO Pilot Program. The training was to begin on September 28, 2015. The Letter of Agreement specified

that if Mr. Greene was unsuccessful in the training, he would return to his position until a possible transition to a Community Program Officer position was obtained. If there were no such positions, then Mr. Greene could be "Workforce Adjusted (WFA)," a concept discussed further below that describes the process leading to potential discharge.

[11] Unfortunately, Mr. Greene broke his wrist in a fall from a ladder at his home a month prior to attending Depot. The break required surgery, which was performed shortly before he left for Depot. He started his training at Depot as required, but had functional limitations owing to his surgery and associated medical advice.

[12] Part of the Depot training program was a Physical Abilities Requirement Evaluation or PARE. Mr. Greene was scheduled to undertake the PARE on October 1, 2015, three days after starting the Community Constable training program at Depot. He was unable to undertake the test owing to his injury and his test was rescheduled to October 7, 2015. On October 7, Mr. Greene was seen by a Health Services Officer (HSO) with the RCMP. There was a good prognosis for full recovery and Mr. Greene was prepared to run the PARE if cleared to do so. However, the HSO would not clear him, putting him instead on modified training status with restrictions on his activities for a period of time.

[13] Although Mr. Greene requested an extension of time in which to run the PARE, his training agreement was terminated because he did not complete the PARE within three days of the initial test, a requirement in the Community Constable Program Assessment Procedures. Mr. Greene returned to Prince George and resumed his duties as a CSO on October 9, 2015.

[14] In mid-November, a briefing note was prepared on Mr. Greene's situation, recommending that he return to Depot to complete the remainder of the training with the Community Constable troop. He could then be scheduled for missed portions of skills training with regular member troops at Depot. On the basis of the briefing note, the Human Resources Officer (HRO) for "E" Division wrote to the Chief Human Resources Officer for the RCMP, proposing Mr. Greene's reinsertion into the Community Constable troop at Depot, noting that "we consider this a temporary DTA [duty to accommodate] situation."

[15] The Commanding Officer at Depot, however, did not support Mr. Greene's return. She adopted the conclusions contained in a memorandum on the issue, which noted that the modules Mr. Greene had missed by then included building blocks he needed to continue with the program and that it would be difficult to make up the skills in a shortened time. Concern was expressed that compromising Mr. Greene's training could put him and others at risk, and would "set a precedent for Depot Division" in terms of their training programs. This was considered to present risk and liability to the RCMP and "call into question the integrity and validity of our training." Mr. Greene was advised in January 2016 that he would not be permitted to return to Depot to resume the Community Constable training, and that no future Community Constable training program was planned, since it was also a pilot program.

B. *The first work force adjustment process and discharge*

[16] Careers at the RCMP are governed in part by the RCMP's Career Management Manual. Chapter 6 of the Manual addresses "work force adjustment," that is, a situation where the services of an RCMP member are no longer required for reasons including the discontinuation of

a function. The Manual sets out a process by which a Notice of Work Force Adjustment is sent to an affected member at least six months in advance of the proposed date of discharge. The member is then placed in “surplus priority status” until their date of discharge and their name is placed on a National Priority List, which is accessed to fill vacancies.

[17] Mr. Greene relies on a number of policies and provisions in Chapter 6 of the Manual that set out the RCMP’s obligations prior to discharge, including in particular the following:

> **1. Policy**
>
> […]
>
> 1.4. The RCMP will ensure that, wherever possible, alternate posts within the member ranks or alternate positions within member groups and levels, as applicable, are provided to members affected by a work force adjustment situation in accordance with the provisions set forth in this Directive. This should not be construed as the continuation of a specific post or position, but rather as a continuation of a member’s status as a member within the RCMP.
>
> […]
>
> **3. Roles and Responsibilities**
>
> 3. 1. The Commissioner is responsible for:
>
> […]
>
> 3.2.2. ensuring that affected members are treated equitably and given every reasonable opportunity to continue their careers as members of the RCMP where possible;
>
> NOTE: This Directive will be applied to keep involuntary discharges to a minimum.
>
> […]
>
> 3.3.2. ensuring the division cooperates with Career Development and Resourcing Offices, or where applicable, Executive/Officer Development and Resourcing (E/ODR), to facilitate the appointment or reassignment of affected members as quickly and efficiently as possible;
>
> […]

> **6. Reasonable Job Offer**
>
> 6.1. Within the six-month surplus priority period, the CDRA [Career Development and Resourcing Advisor], or where applicable, E/ODR, will work with the affected member to identify reassignment opportunities for a reasonable job offer.
>
> […]
>
> **9. Training**
>
> 9.1. To facilitate the transfer of an affected member, every reasonable effort will be made to train an affected member for existing or anticipated posts or positions within the member ranks or groups and levels as applicable, if training is required.

[18] If a member is discharged as a result of a work force adjustment situation, the Manual considers this to be an administrative discharge for the promotion of economy and efficiency of the RCMP, a ground for discharge provided in paragraph 20.2(1)(*k*) of the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10 [*RCMP Act*]:

Commissioner's powers	**Pouvoirs du commissaire**
20.2 (1) The Commissioner may	**20.2 (1)** Le commissaire peut :
(k) discharge any member, other than a Deputy Commissioner, for the promotion of economy and efficiency in the Force; and	**k)** licencier tout membre, autre qu'un sous-commissaire, par mesure d'économie ou d'efficacité à la Gendarmerie;

[19] Also relevant to the discharge process in the RCMP are the *Commissioner's Standing Orders (Employment Requirements)*, SOR/2014-292 [*CSO (Employment Requirements)*]. Standing orders such as the *CSO* (*Employment Requirements)* are issued pursuant to the Commissioner's rule-making powers under the *RCMP Act* and are promulgated as regulations: *RCMP Act*, s 2(2). The *CSO* (*Employment Requirements)* provides that a notice must be served on a member if there is an intent to discharge them under paragraph 20.2(1)(*k*) of the *RCMP Act*,

advising them of that intent, the grounds for it, and the member's right to provide a written response: *CSO* (*Employment Requirements)*, ss 8(1)(*d*), 9(1). The process then involves the member's written response, disclosure of any new information, a potential meeting with the member, and a decision on the discharge: *CSO* (*Employment Requirements)*, ss 9(2)–12.

[20] Section 13.3 of Chapter 6 of the Manual confirms that the discharge proceedings outlined in the *CSO* (*Employment Requirements)* are applicable to affected members who are discharged as a result of a work force adjustment situation.

[21] In August 2016, the Commanding Officer of "E" Division sought approval to invoke a work force adjustment situation for nine CSOs for whom other positions had not been found, including Mr. Greene. On April 4, 2017, the RCMP served Mr. Greene with a one-page Notice of Work Force Adjustment dated March 31, 2017.

[22] This Notice set out that Mr. Greene's position was being abolished, that his services would not be required after April 4, 2017, and that he would be discharged effective October 4, 2017. The Notice confirmed that as an affected member, the RCMP would make "every reasonable effort" to redeploy him to other duties within the RCMP. However, the Notice did not advise Mr. Greene of his right to make submissions, as required by section 9 of the *CSO* (*Employment Requirements)*.

[23] As set out in the Manual, Mr. Greene's name was placed on the National Priority List. The six-month period passed without another position being identified, and Mr. Greene was discharged on October 4, 2017.

C. *Mr. Greene's first challenge to the discharge*

[24] Mr. Greene appealed his discharge pursuant to paragraph 20(1)(*d*) of the *CSO (Employment Requirements)*. Such appeals are governed by a different set of RCMP standing orders, the *Commissioner's Standing Orders (Grievances and Appeals)*, SOR/2014-289 [*CSO (Grievances and Appeals)*], as well as the RCMP's Administration Manual II.3 "Grievances and Appeals." Under subsection 47(3) of the *CSO (Grievances and Appeals)*, an adjudicator must consider whether the decision being appealed "contravenes the principles of procedural fairness, is based on an error of law or is clearly unreasonable."

[25] On January 29, 2018, an adjudicator granted Mr. Greene's appeal. The adjudicator found the requisite level of procedural fairness was not met, rendering Mr. Greene's discharge invalid. In particular, the adjudicator found the relevant provisions of the *CSO (Employment Requirements)* were "completely ignored," as Mr. Greene did not receive a notice of intent to discharge that complied with the *CSO (Employment Requirements)*, was not informed of his right to present written submissions or request a meeting, and was never served with a final decision.

[26] Given his conclusions on the fairness issue, the adjudicator did not address Mr. Greene's remaining grounds of appeal. Those other grounds included an allegation that the RCMP failed to make every reasonable effort to train Mr. Greene, discriminated against him on the basis of

age and gender, and failed in its obligations under the *Canadian Human Rights Act*, RSC 1985, c H-6 to accommodate his age and disability in the provision of the training at Depot.

[27] By way of remedy, the adjudicator directed Mr. Greene be reinstated and receive his pay and allowances from the date of his discharge. He further directed that the matter be remitted "in order to reinitiate the discharge process in compliance with the *CSO (Employment Requirements)*."

D. *The second work force adjustment process and discharge*

[28] On October 9, 2018, an RCMP Human Resources Officer issued to Mr. Greene a Notice of Intent to Discharge a Special Constable Member. This was a considerably more detailed document than the one-page Notice of Work Force Adjustment. It consisted of the 18-page Notice of Intent to Discharge itself, plus a further 224 pages of attachments, including documents relating to Mr. Greene's posting to Depot, the original Notice of Work Force Adjustment, the resulting adjudicator's appeal decision, and other internal RCMP correspondence pertaining to Mr. Greene and his potential employment. The 18-page notice set out the reasons for the work force adjustment, including a lengthy and detailed description of the events surrounding Mr. Greene's terminated training at Depot in 2015; a description of his discharge, his appeal, and the appeal decision; and a summary of the RCMP's attempts to seek a reasonable job offer. It included the RCMP's conclusion that it had "done it's [*sic*] due diligence and fulfilled its obligation to provide a reasonable job offer" through the opportunity to attend Depot, and that further searches for reasonable job offers were also completed after the termination of Mr. Greene's training at Depot.

[29] Mr. Greene filed a response to the Notice of Intent to Discharge, as he was invited to do in the Notice and entitled to do by the *CSO (Employment Requirements)*. He did so without the assistance of legal counsel. Mr. Greene's response argued that the RCMP had failed to provide him with "every reasonable opportunity" to continue his career with the RCMP. He highlighted his achievements and experience with the RCMP, provided a number of support letters, and gave his account of the terminated training at Depot and the RCMP's lack of subsequent efforts to find other positions.

[30] In discussing the termination of his training at Depot, Mr. Greene argued he should have been given the opportunity to continue training with restrictions, noted that his request for an extension of time to run the PARE because of his injury was denied, and argued it was inappropriate for the RCMP to fail to consider his age and experience in assessing his performance. He highlighted that others at Depot appeared to have been allowed to continue training with injuries, and that the three-day policy changed after his departure to allow recruits more time to complete the PARE. His response linked the duty to make "every reasonable effort" to cases involving human rights accommodations. It also listed, under the heading "Relevant law or policy," the *RCMP Act*, the *Canadian Human Rights Act*, the Manual, and the Commissioner's Standing Orders. However, his response did not specifically allege the RCMP had discriminated against him on the basis of age or temporary disability.

[31] Decision-making authority on the discharge was subsequently transferred to Assistant Commissioner Eric Stubbs. When notified of this, Mr. Greene made no objection, and requested that A/Commr Stubbs be provided with "ALL of [his] previous supporting submissions and

support letters." After being appointed, A/Commr Stubbs sent a letter to the Officer in Charge of National Aboriginal Policing Services (NAPS) at the RCMP, asking if there were currently any Community Constable troops at Depot, and if any were scheduled in the near future. The answer came back negative, with a note that the Community Constable program was a pilot project and that a report was being developed that would include recommendations on whether to normalize the program. This exchange was disclosed to Mr. Greene, who responded with an email again referring to aspects of his experience at Depot. He referred to "prejudices against a group of special constables" and to not having been given time to get a medical note to participate in the PARE. Again, though, he did not expressly allege that he had been discriminated against on the basis of age or temporary disability.

[32] On November 29, 2019, A/Commr Stubbs issued his decision in the form of a two-page Order to Discharge. The Order to Discharge referred to the Notice of Intent to Discharge, Mr. Greene's response, and the subsequent supplementary exchanges. It stated that in accordance with paragraph 20.2(1)(*k*) of the *RCMP Act*, A/Commr Stubbs had "determined, as outlined in the *attached Record of Decision*, that you should be discharged from the RCMP for the promotion of economy and efficiency in the Force" [italics in original]. It ordered that Mr. Greene "be discharged from the RCMP effective the date of the *Record of Decision*" [italics in original].

[33] Other than setting out the materials he referred to and stating that he had made his determination pursuant to paragraph 20.2(1)(*k*) of the *RCMP Act*, the Order to Discharge provides no reasons for decision other than referring to the "*attached Record of Decision*."

Although there was uncertainty on this subject at the hearing before me, neither counsel were able to confirm the existence of any other reasons for decision. To the extent that the "*Record of Decision*" A/Commr Stubbs referred to included any other reasons for decision, they were not produced by the RCMP in the certified tribunal record and do not appear in the Court record.

[34] Based on my review of the record, it appears that A/Commr Stubbs issued no additional reasons, or at least none that were provided to either Mr. Greene or the adjudicator who heard the appeal of his decision. I say this for the following reasons:

- while A/Commr Stubbs refers to an "*attached Record of Decision*" and states that the discharge will be "effective the date of the *Record of Decision*," there is no attachment to the Order to Discharge and no document with that title or an effective date is found in the certified tribunal record;

- no additional reasons from A/Commr Stubbs are found in the certified tribunal record, although it is certified by the Registrar, Recourse Appeals and Review, of the RCMP to reflect a true copy of the complete record of information before the adjudicator;

- the "Facts" section of Mr. Greene's appeal submissions contains a section titled "Administrative Discharge Decision," which describes A/Commr Stubbs' exchange with NAPS and Mr. Greene's submissions, but provides no description of any reasons given by A/Commr Stubbs;

- similarly, the adjudicator's reasons include a separate section entitled "Reasons for the Decision," but it refers only to paragraph 20.2(1)(*k*) of the *RCMP Act*, Part 2 of the *CSO (Employment Requirements)*, and the adjudicator's role on appeal, without any summary

of reasons given for the decision by A/Commr Stubbs. Indeed, although the adjudicator stated that she was obliged to give "respectful attention" to the reasons given by the decision maker, citing paragraph 84 of *Vavilov* and paragraph 48 of *Dunsmuir v New Brunswick*, 2008 SCC 9, her reasons make no reference to the content of any reasons given by A/Commr Stubbs beyond the Order to Discharge;

- in her description of the "Background" to the appeal, the adjudicator referred to the Order to Discharge as being the decision which was the subject of the appeal, with specific reference to the two pages in the appeal record containing the Order to Discharge and not to any additional pages that might contain reasons;

- at the conclusion of her analysis, the adjudicator found the "decision, albeit brief, and the materials and information that were before [A/Commr Stubbs], allowed me to understand his conclusions and rationale." The reference to a "brief" decision and the apparent need to refer to the materials and information before A/Commr Stubbs to understand his conclusion suggests he gave no other reasons.

[35] As noted, the Order to Discharge refers to the Notice of Intent to Discharge. Paragraph 9(1)(*b*) of the *CSO (Employment Requirements*) requires a notice of intent to discharge to set out "the grounds on which the decision maker intends to make the decision." In the absence of any further reasons beyond the summary of materials considered and the reference to paragraph 20.2(1)(*k*) of the *RCMP Act*, I am prepared to accept that the reasons for A/Commr Stubbs' decision were effectively those set out in the Notice of Intent to Discharge, supplemented implicitly by his exchange with NAPS. I note that as part of the materials before

the decision maker at the time of his decision, the Notice of Intent to Discharge would generally be considered to be part of the "record of decision," the term used by A/Commr Stubbs.

E. *The second appeal and the adjudicator's dismissal*

[36] Mr. Greene again appealed the discharge to an adjudicator, a process for which he was represented by counsel. Mr. Greene's appeal centred on the question of whether the RCMP had made reasonable efforts to maintain his employment with the RCMP. He raised three main concerns: (i) the RCMP's failure to conduct a further search for alternate employment after the first appeal decision; (ii) the RCMP's reliance on its efforts to train Mr. Greene at Depot, despite those efforts having been terminated in an unreasonable and discriminatory way; and (iii) the lack of other adequate efforts to retrain or employ Mr. Greene.

[37] As noted above, an appeal pursuant to the *CSO (Grievances and Appeals)* considers whether the decision contravenes the principles of procedural fairness, is based on an error of law, or is clearly unreasonable: *CSO (Grievances and Appeals)*, s 47(3). While the adjudicator's reasons briefly addressed whether there was procedural unfairness or an error of law, concluding there was neither, her decision appropriately focused on whether A/Commr Stubbs' decision was clearly unreasonable.

[38] The adjudicator first addressed Mr. Greene's arguments regarding his experiences at Depot and the termination of the Letter of Agreement. The adjudicator gave her view that "the Appellant has valid questions as to why the PARE test needed to be completed at the onset of training and why only one extension of three business days was provided." However, the

adjudicator concluded she could not consider these arguments because (i) to properly examine the issue, Mr. Greene had to present a grievance at the relevant time, since she could not examine the issues or the reasons for them "without the relevant decision makers being heard within proper processes, as that would create new procedural fairness issues"; (ii) the allegations of discrimination under the *Canadian Human Rights Act* were not raised before A/Commr Stubbs, and Mr. Greene was precluded by section 5.3.1.5 of Administrative Manual II.3 and subsection 40(2) of the *CSO (Grievances and Appeals)* from presenting new evidence or information on appeal; and (iii) the time limitations for bringing a complaint in the *Canadian Human Rights Act* highlighted the importance of raising complaints of discrimination as soon as practicable, which Mr. Greene did not do by way of complaint under the *Canadian Human Rights Act*, grievance under the *RCMP Act*, or in response to the Notice of Discharge.

[39] The adjudicator then considered Mr. Greene's arguments that the RCMP did not make reasonable efforts to retain him. She found that (i) the RCMP was clear that there were no Special Constable roles in "E" Division for which Mr. Greene qualified; (ii) there had been earlier inquiries about positions in "E", "F", and "K" Divisions, and no indication that the inability to staff positions had changed after the first appeal decision; and (iii) it was "key to remember" that Mr. Greene's position had been abolished such that he could not simply be offered another position at the Special Constable rank. The adjudicator referred to the options Mr. Greene had been offered in 2012, including the Depot training, as well as his placement on the National Priority List. She concluded the RCMP considered its operational needs in making reasonable efforts to find Mr. Greene a job, and that A/Commr Stubbs arrived at his conclusions without making a manifest and determinative error.

IV. Analysis

A. *The adjudicator unreasonably refused to consider relevant arguments*

[40] I conclude it was unreasonable for the adjudicator to disregard the issues raised by Mr. Greene in respect of his treatment at Depot, including both his argument that his dismissal from Depot was unreasonable and his argument that it was discriminatory.

[41] The adjudicator's role, as set out in subsection 47(3) of the *CSO (Grievances and Appeals)*, was to assess whether the decision to discharge Mr. Greene was clearly unreasonable. This role, conferred on them by the applicable regulatory scheme, was an important legal constraint on the adjudicator's decision: *Vavilov* at paras 108–110. The decision the adjudicator was reviewing, as reflected in the Notice of Intent to Discharge, was premised on a conclusion that the RCMP had fulfilled its obligations under the work force adjustment provisions in the Manual. These included obligations to treat affected members equitably and give them every reasonable opportunity to continue their careers; to work with the affected member to identify reassignment opportunities for a reasonable job offer; and to make every reasonable effort to train an affected member for existing or anticipated positions.

[42] The RCMP, and implicitly A/Commr Stubbs, relied substantially on the training offered at Depot in October 2015 for the conclusion that reasonable steps had been taken and a reasonable job offer had been made to Mr. Greene. To assess whether this conclusion was "clearly unreasonable," the adjudicator was tasked with assessing whether it was reasonable to rely on the training at Depot for this purpose. Whether the training was terminated for

inappropriate reasons, including discriminatory ones, was a relevant and important determination the adjudicator had to consider.

[43] The adjudicator did not suggest that the reasonableness of the termination of training at Depot was an irrelevant consideration for her assessment of the reasonableness of the decision to discharge Mr. Greene, or that the allegations were unsubstantiated. To the contrary, she considered Mr. Greene had “valid questions” on the issue, and that they were “relevant, credible and reasonably could have affected the […] decision.” Rather, the adjudicator found there were three reasons not to deal with the arguments, each related to when or whether the issue was properly raised. Recognizing the deference due to the adjudicator on the issue, I conclude the adjudicator’s grounds for declining to address the issue were not reasonable.

(1) Grievability

[44] The adjudicator first found that she could not consider the arguments because Mr. Greene could have grieved the termination of the Depot training. In my view, this was unreasonable. As Mr. Greene argues, no prior grievance could have addressed the issue before the adjudicator, namely whether the decision to discharge him was clearly unreasonable. Indeed, the *RCMP Act* provides for a right of grievance only for matters “in respect of which no other process for redress is provided by this Act, the regulations or the Commissioner’s standing orders”: *RCMP Act*, s 31(1). Mr. Greene had a right to appeal the discharge decision under paragraph 20(1)(*d*) of the *CSO (Employment Requirements)*, such that his discharge itself was not grievable. The adjudicator of that appeal had the authority and obligation to consider all matters relevant to that determination.

[45] Nor would any such grievance have determined the issue before the adjudicator, namely whether it was reasonable to rely on the offer of training at Depot as fulfilment of the RCMP's work force adjustment obligations. Put another way, neither the discharge decision maker nor the adjudicator could assess whether the training at Depot constituted reasonable efforts or a reasonable job offer without also assessing whether it was reasonably terminated by the RCMP. The fact that no separate grievance was filed seeking to set aside the termination of the training at Depot does not permit the discharge decision maker or the adjudicator to effectively assume that the Depot training was a reasonable effort while disregarding arguments to the contrary.

[46] On this issue, I consider it worth noting the difference between the adjudicator's role and that of a court on judicial review. Judicial review is an inherently discretionary remedy, such that courts will generally decline to hear applications for judicial review of matters that could be subject to grievance, even if its jurisdiction to hear such a matter is not ousted: *Vaughan v Canada*, 2005 SCC 11 at paras 33–41. The adjudicator, however, was hearing an appeal pursuant to a right that was expressly granted to Mr. Greene by statute. In my view, she could not simply refuse to consider matters relevant to the discharge decision on the basis that they might have been the subject of a grievance.

[47] The adjudicator's concern about the need for relevant decision makers to be heard in the context of a grievance process was also misplaced. The parties agree that the decision makers in question are those at Depot who decided to terminate Mr. Greene's training and to refuse his reinsertion. To a significant extent, information from those decision makers was already part of the discharge record. The Notice of Intent to Discharge set out that the RCMP was relying on the

offer of training at Depot as a significant part of its reasonable efforts in Mr. Greene's work force adjustment process. It specifically referred to and relied on the fully documented decisions and rationales of Depot leading to the termination and the Depot response to the request to reinsert Mr. Greene as part of the duty to accommodate.

[48] To the extent that Depot had additional information or submissions on the issues, they could have been obtained in the discharge process as readily as a grievance process. The decision making process described in the *CSO (Employment Requirements)* includes the possibility that the decision maker obtains "new information" after the notice of intent is served: *CSO (Employment Requirements)*, s 9(3). It is clear from A/Commr Stubbs' exchanges with NAPS about the existence of further troops at Depot that he considered he had the ability to seek out new information from relevant decision makers on issues germane to Mr. Greene's discharge. He sought no additional information regarding the circumstances of Mr. Greene's dismissal from Depot. Nor did A/Commr Stubbs himself decline to consider the reasonableness of the actions at Depot on the basis that it was a grievable issue.

[49] I therefore conclude that it was unreasonable for the adjudicator to find that she could not consider Mr. Greene's arguments about the termination of his Depot training because he had to contest that termination by presenting a grievance.

[50] I note that this is the only ground the adjudicator gave for declining to deal with Mr. Greene's arguments regarding the reasonableness of his dismissal from Depot and how it affected the RCMP's reliance on the Depot training as part of the work force adjustment process.

The remaining two grounds given by the adjudicator pertained only to Mr. Greene's argument that the RCMP failed in its duty to accommodate Mr. Greene at Depot and that the termination of his training was therefore discriminatory.

(2) New argument on appeal

[51] The adjudicator found she could not consider Mr. Greene's discrimination arguments because they had not been raised before A/Commr Stubbs. Mr. Greene argues the adjudicator unreasonably applied jurisprudence related to new *evidence* on appeal to a question about new *arguments* on appeal, and that the discrimination arguments were reasonably raised before A/Commr Stubbs. I need not address the former argument because I conclude the record shows that the discrimination arguments were adequately raised before A/Commr Stubbs, in a manner not addressed by the adjudicator. The adjudicator's finding that the arguments were new arguments she could not consider was therefore unreasonable.

[52] The adjudicator said she had carefully examined the material before A/Commr Stubbs at the time he rendered his decision. She cited in particular Mr. Greene's submission in response to the notice requesting termination of the Letter of Agreement, his submission in response to the Notice of Intent to Discharge, and his subsequent exchanges. In these, the adjudicator found "two occasions that may suggest an argument of discrimination," namely the reference to the *Canadian Human Rights Act* referred to at paragraph [30] above, and a reference in one of Mr. Greene's responses to additional disclosure that referred to CSOs being singled out at Depot. The adjudicator found these to be "the only information that remotely suggest the appellant

meant to allege discrimination," and concluded they were unsupported statements insufficient to be considered as having raised discrimination as an issue before A/Commr Stubbs.

[53] However, the record reveals that the question of whether it was discriminatory to send Mr. Greene home from Depot because of his injury had been raised and was recognized by the RCMP since shortly after it occurred. As set out above at paragraph [14], shortly after his return from Depot, an HRO for "E" Division proposed reinsertion into the troop at Depot, noting that "we consider this a temporary DTA [duty to accommodate] situation." As Mr. Greene noted in submissions to the adjudicator, the invocation of the duty to accommodate shows a recognition of human rights concerns about discrimination.

[54] It is also clear that an allegation of discrimination on the basis of age and disability was raised squarely in Mr. Greene's first appeal of his discharge. The adjudicator decided that first appeal on procedural grounds, but his reasons quote a passage from Mr. Greene's submissions stating that "[i]t was particularly inappropriate for the RCMP to fail in its obligations under the *Canadian Human Rights Act* to accommodate age and disability in the provision of the training."

[55] Both the correspondence seeking Mr. Greene's reinsertion and the adjudicator's decision on the first appeal were expressly referred to in the Notice of Intent to Discharge. They were also attached as documentation supporting the Notice of Intent to Discharge. As noted above, in the absence of any other reasons, the Notice of Intent to Discharge must be taken as effectively being the reasons for A/Commr Stubbs' decision. In any event, A/Commr Stubbs stated in the Order to Discharge that he had considered the Notice of Intent to Discharge. He also indicated

that he had considered all correspondence exchanged with Mr. Greene after the issuance of the Notice of Intent, which included a request that "ALL of [his] previous supporting submissions and support letters" be put before A/Commr Stubbs.

[56] In my view, Mr. Greene's specific submissions in response to the Notice of Intent to Discharge, made while he was not represented by counsel, must be read in light of this additional context. In those submissions, Mr. Greene cited the *Canadian Human Rights Act*, which had previously been cited with specific reference to allegations of discrimination on the basis of age and disability. He underscored his injury and the refusal to give him "time to get a medical clearance for a wrist injury." He submitted he "should have been given the opportunity to remain in the troop and continue his training with limited restrictions." He tied the "every reasonable effort" obligation to the duty to accommodate in human rights cases. He submitted the RCMP's reasons for failing him were arbitrary and improper and that they refused "to make obvious necessary concessions." He submitted that it was inappropriate to fail to consider his age in assessing his performance in the training. As Mr. Greene concedes, these were not complete or well-advanced arguments. However, I conclude it was unreasonable for the adjudicator to conclude solely on the basis of the two passages she cited that Mr. Greene's discrimination argument was not sufficiently raised before A/Commr Stubbs for her to be able to consider it on appeal.

[57] I note in this regard a certain irony in the adjudicator's concern that Mr. Greene's discrimination argument should have been made more clearly in his response to the Notice of Intent to Discharge so that A/Commr Stubbs could consider it before rendering his decision. As a

general rule, this is an important concern, particularly where the legislator has signaled an intent that the matter be decided by the first instance decision maker: *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 23–25. However, in this case, the fact is that A/Commr Stubbs did not address through reasons *any* of the arguments raised by Mr. Greene in his response to the Notice of Intent to Discharge, including those described above regarding his treatment at Depot. Rather, as noted above, the only reasons apparently given by A/Commr Stubbs were those implicitly adopted in the Notice of Intent to Discharge itself, issued before Mr. Greene filed his submissions. There seems little basis to conclude that A/Commr Stubbs would have issued reasons if Mr. Greene had expressly used the legal language of "discrimination on the basis of disability."

(3) Timing of raising discrimination arguments

[58] As a related and additional concern about the discrimination argument, the adjudicator observed that paragraph 41(4)(*e*) of the *Canadian Human Rights Act* provides for a one-year limitation on making a human rights complaint. She reasonably noted that this limitation highlighted the importance of raising complaints of discrimination as soon as practicable. The adjudicator noted a number of occasions on which Mr. Greene could have raised a discrimination complaint, beginning with his response to the notice of termination of the Letter of Agreement, continuing through the potential grievance process, and ending with his response to the Notice of Intent to Discharge in November 2018.

[59] While I agree with Mr. Greene that the one-year limitation in paragraph 41(4)(*e*) of the *Canadian Human Rights Act* is not directly relevant since he was not filing a complaint under

that Act, I do not read the adjudicator as concluding that the limitation period was applicable. Rather, she pointed to the provision as indicative of the importance of raising discrimination complaints in a timely way, an entirely reasonable observation. However, in my view the adjudicator's assessment of whether the discrimination complaint was raised in a timely way was not reasonable, since it was effectively based on the grievability of the matter and on the conclusion that it was a new argument raised for the first time on appeal of the second discharge decision. For the reasons I have given above, these were not reasonable conclusions. The adjudicator's reference to the importance of timeliness therefore cannot stand as an independent ground for refusing to consider Mr. Greene's arguments about discrimination and the duty to accommodate.

[60] I repeat that the concern about new arguments and timing related only to Mr. Greene's arguments of discrimination and the *Canadian Human Rights Act*. These findings of the adjudicator cannot apply to Mr. Greene's other arguments that the termination of his training at Depot was unreasonable, arbitrary, and improper. Those arguments were clearly raised in response to the Notice of Intent to Discharge. The adjudicator only dismissed these aspects of his arguments about his treatment at Depot on the basis of grievability, which I have addressed above.

[61] For these reasons, I conclude it was unreasonable for the adjudicator to have held that she could not address Mr. Greene's arguments that the RCMP could not rely on the training at Depot in fulfillment of its work force adjustment obligations because of the circumstances in which that training was terminated.

B. *The adjudicator unreasonably failed to address Mr. Greene's arguments about the RCMP's efforts*

[62] As noted above, in addition to his arguments about the RCMP's reliance on its efforts to train him at Depot, Mr. Greene made two other arguments on appeal in support of his general position that the RCMP failed to fulfill its work force adjustment obligations. He argued the RCMP had not fulfilled its obligations to make reasonable efforts because it failed to conduct a further search for employment after the first appeal decision. And he argued the RCMP's other efforts to retrain or employ Mr. Greene were inadequate.

[63] With respect to the former, the first appeal decision required the RCMP to "reinitiate the discharge process in compliance with the *CSO (Employment Requirements)*." Mr. Greene argued this obliged the RCMP to conduct a new work force adjustment process and search for alternative employment based on the RCMP's needs in 2018, which was not done other than through A/Commr Stubbs' communications with NAPS.

[64] With respect to the latter, Mr. Greene argued that the sum total of the RCMP's efforts were the aborted training at Depot, the communications with NAPS in 2018, and generalized inquiries about positions in "E", "F" and "K" Divisions conducted on behalf of all impacted CSOs in 2015. He specifically noted that the RCMP did not present him with the other two options originally offered (becoming a Community Program Officer or a regular member), and did not engage in a search for a position he could be trained to fill.

[65] The adjudicator’s analysis of these arguments was, in effect, to refer to the inquiries made prior to the first appeal and to state that “there is no indication that the inability to staff these positions changed since the appeal decision or that the qualifications changed.” The adjudicator went on to underscore that Mr. Greene’s substantive position had been abolished, and to refer again to the Depot training. She also noted that the other options originally offered remained, and that it was unclear what efforts Mr. Greene made to pursue these options. The adjudicator ultimately concluded that A/Commr Stubbs made no manifest and determinative error, considered all of the materials, and allowed the adjudicator to understand his conclusions, such that the decision was not clearly unreasonable.

[66] I agree with Mr. Greene that this analysis failed to address his primary arguments. Significantly, Mr. Greene argued the RCMP had to undertake a new work force adjustment process in light of the first appeal decision. If there was such an obligation, it would impose requirements on the RCMP to work with Mr. Greene to identify reassignment opportunities for a reasonable job offer, and to make every reasonable effort to train him for existing or anticipated posts. The adjudicator did not expressly consider whether the RCMP had such an obligation, or whether it met that obligation after the first appeal decision. Rather, the adjudicator referred only to efforts before the first appeal, and effectively applied them to the period three years later based on the observation that there was no indication the situation had changed. I agree with Mr. Greene that relying on a presumed lack of change in the situation constitutes no meaningful analysis or response to his arguments about the positive obligations on the RCMP to make reasonable efforts to find employment for him.

[67] As the Supreme Court of Canada underscored in *Vavilov*, the principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties: *Vavilov* at para 127. Mr. Greene's concerns about the RCMP's failure to conduct any meaningful efforts after the first appeal decision, or throughout the period from his departure from Depot until his discharge, were at the heart of his submissions on appeal. I agree that the adjudicator failed to "meaningfully grapple" with those arguments in its brief discussion of the reasonableness of the RCMP's work force adjustment efforts both after the first appeal and as a whole: *Vavilov* at para 128.

V. Conclusion

[68] For the foregoing reasons, and notwithstanding the deference due to the adjudicator, I conclude that the adjudicator made material errors that were sufficiently central or significant to render the decision unreasonable: *Vavilov* at para 100.

[69] The adjudicator's decision will therefore be set aside and Mr. Greene's appeal of his discharge will be remitted for redetermination.

[70] In accordance with the parties' agreement, costs in the inclusive amount of $2,500 are awarded to Mr. Greene as the successful party.

JUDGMENT IN T-13-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted. The adjudicator's decision of December 7, 2020 is set aside and the applicant's appeal of his discharge from the Royal Canadian Mounted Police is remitted for redetermination.
2. The respondent shall pay the applicant's costs in the inclusive amount of $2,500.

"Nicholas McHaffie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-13-21
STYLE OF CAUSE:	FREDERICK GREENE v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	JANUARY 13, 2022
JUDGMENT AND REASONS:	MCHAFFIE J.
DATED:	MARCH 4, 2022

APPEARANCES:

Christopher Rootham	FOR THE APPLICANT
Helen Park	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nelligan O'Brien Payne LLP Ottawa, Ontario	FOR THE APPLICANT
Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT