

Federal Court



Cour fédérale

Date: 20220805

Docket: T-813-21

Citation: 2022 FC 1171

Ottawa, Ontario, August 5, 2022

PRESENT: Mr. Justice Pentney

BETWEEN:

NIKOLA PASIC

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Nikola Pasic, is a civilian member of the Royal Canadian Mounted Police (RCMP). He filed a grievance claiming that his pay has been calculated incorrectly because the RCMP erred in the way they matched it to the Public Service pay structure for comparable positions. The net effect of this, according to the Applicant, is that he has been significantly under-paid.

[2] The final level Adjudicator [Final Adjudicator] found that the Applicant's pay was fixed by Treasury Board rather than the RCMP and therefore his grievance could not be dealt with

under the RCMP grievance system. In addition, the Final Adjudicator ruled that the Applicant's two previous grievances dealt with the same essential subject-matter, and thus he was barred from pursuing it a third time.

[3] The Applicant seeks judicial review of that decision, on the basis that it is unreasonable, and that he was denied procedural fairness because the decision-maker did not approach his case with an open mind. He submits that the decision-maker failed to consider that the RCMP has interpreted the Treasury Board pay policy, and therefore the case falls within the grievance process. He also claims that the Final Adjudicator failed to inquire into how the RCMP's error in interpreting the relevant Treasury Board pay policies has caused him to be under-paid, and that the decision contains logical errors and fails to account for certain key evidence. Based on all of this, the Applicant asks that the decision be overturned and that the Court grant him the remedies he seeks, including a correction to his pay and pension as well as retroactive compensation and other relief.

I. Background

[4] The Applicant is a civilian member of the RCMP, working as a Computer Support Technician at the CP-02 level. In May 2019, he submitted a grievance alleging that the RCMP had incorrectly interpreted the Treasury Board Directive regarding the establishment of pay rates for RCMP civilian members. He claimed that the RCMP mistakenly relied on annual salaries rather than the hourly rate of pay when it pay-matched his position to its Public Service counterpart, and thus he has been under-paid for many years.

[5] The Applicant's grievance relied on a Treasury Board Directive from 1972 (T.B Decision 714373), which established and revised the rates of pay for Regular Members and Civilian Members of the RCMP. He pointed to section 3.11.2 of the Treasury Board Terms and Conditions of Employment: "When the rate of pay is an hourly rate it is multiplied by the normal workweek multiplied by 52.176 to establish the annual pay." He claimed that he is required to work a 40 hour work week, with one-half hour per day for lunch. But he says he is frequently required to work through his lunch hour. The Applicant asserted that his Public Service counterpart position works a 37.5 hour week, and that they would be paid for working through their lunch hour. The Applicant summarized his complaint in the following way:

I am an hourly worker. I am supposed to be pay matched to the Computer Services Group hourly wage. That translates into the annual rate of pay.

So taking the annual rate of pay from a 37.5 hour work week, inputting it into the above formula, then reversing it while sneaking in a 40 hour Standard Work Week brings me to an hourly wage rate less than my CS Counterparts.

That is the sleight of hand that has been going on. Any grade 9 high school math class can tell you that. Why can't the RCMP?

[6] The RCMP asked the initial level Adjudicator [Initial Adjudicator] to dismiss the grievance for two reasons: it was an abuse of the grievance process because the Applicant had previously filed two grievances dealing with the same subject-matter, and the final level decisions in those matters were binding. The RCMP pointed out that there had been no changes to the applicable policy and the applicable terms and conditions had been frozen since April 2016 due to collective bargaining. The Applicant had not sought judicial review of either of the two previous grievance decisions and thus they were binding; the RCMP submitted that his further attempt to grieve the same subject-matter constituted an abuse of process.

[7] In addition, the RCMP argued that the substance of the grievance related to a decision taken by the Treasury Board and therefore the matter fell outside of the jurisdiction of the RCMP grievance process.

[8] The Applicant's response claimed that the RCMP's submissions showed administrative bias because it raised the issue of standing as a means of foreclosing his chance to argue his case. He also submitted that his allegation that the RCMP had not followed the Treasury Board Directive was not dealt with in the prior grievance proceedings. Finally, he submitted that the core of his grievance related to the RCMP's interpretation and application of the Treasury Board policy and thus it fell within the mandate of the RCMP grievance procedure.

[9] The initial level decision found that there was no administrative bias, but rather the RCMP grievance administration authority was simply following procedure when it advised the Applicant of the applicable policies regarding standing. The Initial Adjudicator found that the Applicant lacked standing to pursue his grievance for two reasons: the subject-matter of the grievance related to a Treasury Board decision and was therefore not made in the administration of the RCMP. Secondly, the Applicant was seeking to re-litigate his previous grievances by using "broadly stated and non-specific variations of the same argument" with regard to his pay. He had been informed that he could seek judicial review after each of the prior grievances but failed to do so. The Initial Adjudicator therefore ruled that the Applicant lacked standing to pursue his current grievance.

[10] The Applicant pursued the matter at the final level, alleging that the initial level decision was reached in a manner that breached procedural fairness and was clearly unreasonable. He argued that the Initial Adjudicator had shown bias in ruling that RCMP decisions on pay are not

made in the administration of the Force's affairs, and because the decision-maker lacked basic mathematical skills. He submitted that he is an hourly worker and that his pay is supposed to match the Public Service – Computer Systems group's hourly wage rather than their annual rate.

[11] The Final Adjudicator dismissed the grievance. The details of the decision are discussed below, and so a brief summary will suffice here. On the procedural fairness claim, the Final Adjudicator found that the Applicant's claim of bias was really a disagreement with the substance of the initial level decisions. He therefore dismissed this aspect of the claim. Turning to the merits, the Final Adjudicator ruled that the initial level decision was not clearly unreasonable (the standard he was required to apply, as explained below). This is a highly deferential standard. Applying this approach, the Final Adjudicator agreed with the initial level finding that the Treasury Board is responsible for establishing the pay rates of RCMP members, and therefore the grievance could not be dealt with under the RCMP grievance system. In addition, the Final Adjudicator also found that the subject-matter of the current grievance (the Applicant's rate of pay) had been previously adjudicated and therefore it should not be allowed to proceed a third time.

[12] The Applicant seeks judicial review of this decision.

II. Issues and Standards of Review

[13] The Applicant raises two main issues:

- A. Did the Final Adjudicator breach procedural fairness by failing to provide him with an opportunity to be heard and by demonstrating bias?

B. Is the decision unreasonable because the Final Adjudicator ignored key evidence and based the result on logical fallacies?

[14] Different standards of review apply to the two issues.

[15] Questions of procedural fairness require an approach resembling the correctness standard of review, in which a reviewing court asks “whether the procedure was fair having regard to all of the circumstances” (*Canadian Pacific Railway Company v Canada (AG)*, 2018 FCA 69 [*Canadian Pacific*] at para 54). As noted in *Canadian Pacific* at paragraph 56, “the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond.”

[16] The second issue is to be assessed in accordance with *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. Under the *Vavilov* framework, a reviewing court “is to review the reasons given by the administrative decision maker and determine whether the decision is based on an internally coherent chain of reasoning and is justified in light of the relevant legal and factual constraints” (*Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post*] at para 2). The burden is on the Applicant to satisfy the Court “that any shortcomings or flaws relied on... are sufficiently central or significant to render the decision unreasonable” (*Vavilov* at para 100, cited with approval in *Canada Post* at para 33).

III. Analysis

A. *The legal and policy framework*

[17] Before discussing the two main issues, it will be useful to set out the legal and policy framework that governs the RCMP grievance process.

[18] The *Royal Canadian Mounted Police Act*, RSC 1985, c R-10 [*RCMP Act*] sets out the right of members to present grievances in the following terms:

Presentation of Grievances	Présentation des griefs
<p>Member's right</p> <p>31 (1) Subject to subsections (1.01) to (3), if a member is aggrieved by a decision, act or omission in the administration of the affairs of the Force in respect of which no other process for redress is provided by this Act, the regulations or the Commissioner's standing orders, the member is entitled to present the grievance in writing at each of the levels, up to and including the final level, in the grievance process provided for by this Part.</p>	<p>Règle</p> <p>31 (1) Sous réserve des paragraphes (1.01) à (3), le membre à qui une décision, un acte ou une omission liés à la gestion des affaires de la Gendarmerie causent un préjudice peut présenter son grief par écrit à chacun des niveaux que prévoit la procédure applicable aux griefs prévue par la présente partie dans le cas où la présente loi, ses règlements ou les consignes du commissaire ne prévoient aucune autre procédure pour réparer ce préjudice.</p>

[19] Subsection 22(1) regarding pay and allowances is also relevant:

Pay and allowances	Fixation par le Conseil du Trésor
<p>22 (1) The Treasury Board shall establish the pay and</p>	<p>22 (1) Le Conseil du Trésor établit la solde et les</p>

allowances to be paid to
members.

indemnités à verser aux
membres de la Gendarmerie.

[20] The mandate of the Final Adjudicator is defined in subsection 18(2) of the *Commissioner's Standing Orders (Grievances and Appeals)*:

An adjudicator, when rendering the decision, must consider whether the decision at the initial level contravenes the principles of procedural fairness, is based on an error of law or is clearly unreasonable.

[21] With this background, we turn to the issues.

B. *Did the Final Adjudicator breach procedural fairness?*

[22] The Applicant claims that the Final Adjudicator denied him procedural fairness in three ways: by a decision that reflects “confirmation bias” flowing from the assumption that the policies and manuals are correct, without ever inquiring into that question; by denying him a hearing and thus giving the impression that the Final Adjudicator’s mind was closed; and because the adjudication process is not independent of the RCMP.

[23] As discussed during the hearing, the concept of “confirmation bias” is a term used in the social sciences but it does not give rise to a denial of procedural fairness unless it can be demonstrated that the decision-maker did not approach the matter with an open mind. In this case, there is a substantial overlap between the Applicant’s arguments on confirmation bias and closed mind and so these will be discussed together.

[24] The Applicant points to the fact that the Final Adjudicator failed to examine key evidence including a Treasury Board directive regarding pay and an article on standing under the *RCMP Act*. He contends that this demonstrates that the Final Adjudicator was biased against him. In

essence, this argument reflects the Applicant's frustration that he has not been allowed to present his substantive arguments about his rate of pay, because the Final Adjudicator ruled on the preliminary issue of standing rather than getting into the merits of his claim.

[25] The Final Adjudicator assessed the Applicant's bias claim by referring to the leading authority on procedural fairness, *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*]. The Final Adjudicator noted that two essential elements of procedural fairness are the right to be heard and the right to an impartial decision-maker, and found that the Applicant had been granted both in the grievance process. The Applicant does not challenge this finding, and at the hearing of this matter he did not strongly pursue his argument that the process is not fair because the Adjudicators are part of RCMP management.

[26] The Applicant's main procedural fairness argument is that he never got a hearing, and thus was denied the opportunity to present his evidence and arguments about how the RCMP set his rate of pay. Although he has pursued an argument that the Final Adjudicator brought a closed mind to the hearing, I am not persuaded that this was the case. The decision is thorough, considers the Applicant's submissions and evidence, and the Applicant cannot point to any specific indication that the Final Adjudicator brought a closed mind to the proceeding because of the way in which the process unfolded.

[27] The threshold to establish a denial of procedural fairness is a high one: *Wasylunuk v Canada (Royal Canadian Mounted Police)*, 2021 FC 426 at para 45. In this case, the Applicant has failed to meet it. Many of the points he raised under this ground are considered in the next section dealing with the reasonableness of the decision.

[28] I cannot agree with the Applicant's contention that the Final Adjudicator failed to give due consideration to his position, or decided the case on the preliminary question of standing in order to avoid a hearing on the merits. The wording of the decision supports the opposite conclusion; the Final Adjudicator reviews the Applicant's arguments in some detail, and applies the governing jurisprudence to the issues he had raised. This is not indicative of a closed mind.

[29] Further, the Applicant's reliance on the Supreme Court of Canada's decision in *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 is misplaced. That case involved a challenge to statutory provisions that prevented RCMP members from unionizing and collective bargaining. The Applicant has not brought a constitutional challenge to the validity of the RCMP grievance structure here, although his arguments make clear that he disagrees with the statutory and regulatory framework. That is not a basis for a finding of bias.

[30] The Applicant knew the case he had to meet and had a full and fair opportunity to present his evidence and arguments. He has not established a reasonable basis to find that the Final Adjudicator's mind was closed, and no other ground of bias has been established. For these reasons, I dismiss the Applicant's claim that he was denied procedural fairness.

C. *Is the Final Adjudicator's decision reasonable?*

[31] The Applicant submits that the decision is unreasonable because, citing *Vavilov*, he argues that the Final Adjudicator used circular reasoning, failed to consider key evidence, and did not examine the core of his grievance. The net effect of these flaws makes the decision unreasonable, according to the Applicant.

[32] The Applicant argues that the decision fails to exhibit common sense and ordinary logic, because the Final Adjudicator failed to ask the RCMP to explain how it was possible two hourly employees doing the same work could be paid different hourly wages. He says that the reasoning in the decision simply does not “add up”, and thus, according to *Vavilov*, it is unreasonable. An example of this is the Final Adjudicator’s treatment of a key Treasury Board document the Applicant had submitted in support of his grievance, which shows that the RCMP has failed to properly interpret how annual pay is calculated.

[33] Two introductory comments will help to situate the discussion of this issue. First, it is useful to recall that the Final Adjudicator was required to determine whether the initial level decision was “clearly unreasonable.” Therefore, on judicial review, in accordance with *Vavilov*, I am required to determine whether the Final Adjudicator’s finding that the initial level decision was not “clearly unreasonable” is, itself, unreasonable.

[34] Second, the reasonableness of the decision is assessed with reference to the issues that the parties raised before the decision-maker. In this case, the Final Adjudicator described the issues in the following manner:

[64] The initial level decision examines the two pivotal questions with respect to standing:

- 1) *Was the decision, act or omission made in the administration of the Force?*
- 2) *Was this matter previously adjudicated?*

[35] The question before me, therefore, is whether the Final Adjudicator’s decision on these two questions is reasonable. While much of the Applicant’s argument was focused on the substance of his grievance, it should be noted that the decision being challenged did not

determine whether the Applicant's complaint about his pay was well-founded; rather, it focused on the preliminary question of standing, as that term is understood within the RCMP grievance process.

[36] After summarizing the issues, the Final Adjudicator referred to the framework for reasonableness review set out in *Vavilov*, and then noted that the "clearly unreasonable" standard compelled significant deference, citing *Kalkat v Canada (Attorney General)*, 2017 FC 794, where this Court found that the "clearly unreasonable" standard was equivalent to the "patently unreasonable" standard of review. The Final Adjudicator noted that the Federal Court of Appeal confirmed this interpretation in *Smith v Canada (Attorney General)*, 2021 FCA 73. As the Final Adjudicator stated at paragraph 70: "In applying this standard, the [Applicant] must not only identify that the initial level adjudicator erred, but also show that the error was determinative in reaching an outcome that would not have been possible without the mistake."

[37] No issue was raised by the Applicant regarding this finding, and it is consistent with the governing case-law (see *Zak v Canada (Attorney General)*, 2021 FCA 80; *Podmoroff v Canada (Attorney General)*, 2021 FC 421).

[38] The Applicant submits that the Final Adjudicator's analysis of whether his grievance involved a "decision, act or omission made in the administration of the Force" is unreasonable because it failed to give due consideration to an article on this issue that he had submitted, entitled: "Subsection 31(1) of the RCMP Act: the "Standing" Requirement, by Lisa Thiele". The Applicant relies on the following statement from the article:

3. "The member has no standing because the decision at issue was made according to a Treasury Board policy over which the Force has no control."

This reasoning is dangerous because it is incomplete. There are many decisions made in the administration of the Force pursuant to policies issued by the Treasury Board that the Force has no authority to change. This does not mean they are not grievable. The relevant determination to be made is whether the Force actually made the decision, by interpreting or applying a Treasury Board policy, or whether the decision is one that was made by the Treasury Board itself and not by the Force.

[39] The Applicant claims that this statement should have been considered by the Final Adjudicator, because his grievance relates to the RCMP's interpretation of the Treasury Board policy on pay. He says that the failure to consider this aspect of his case foreclosed the proper inquiry into the extent to which the RCMP had exchanges with the Treasury Board regarding the proper interpretation of the pay policy, and this is unreasonable.

[40] The Respondent submits that the Final Adjudicator's finding on this point is reasonable, because there is no evidence in the record that the RCMP actually interpreted the Treasury Board policy in any meaningful way. Instead, according to the Respondent, the record demonstrates that the RCMP was required to simply follow the pay policy that had been set by Treasury Board.

[41] The Final Adjudicator's analysis of this point summarized the arguments of the parties, and then focused on the challenge to the Initial Adjudicator's decision. While the Applicant had argued that the Initial Adjudicator had agreed with his position that RCMP decisions on pay are made in the administration of the Force, the Final Adjudicator found that this was not a complete description. He noted that the initial level decision had found that Treasury Board set the rate of annual pay as well as the calculation factors required to convert the annual rate of pay to an hourly rate of pay. The Final Adjudicator found that the Initial Adjudicator correctly found that

the RCMP was bound by subsection 22(1) of the *RCMP Act*, which provides that Treasury Board is solely responsible for establishing the rate of pay for members.

[42] In applying this to the complaint raised by the Applicant's grievance, the Final Adjudicator found that the initial level decision appropriately referred to the RCMP's National Compensation Manual provisions regarding annual rates of pay and pay periods and pay factors, noting that these follow the pay factors set by Treasury Board. Based on this, the Final Adjudicator agreed with the finding of the Initial Adjudicator that there was no room for interpretation by the RCMP because the Treasury Board "has the sole authority for deciding the rate of pay, the scheduled workweek (37.5 verses 40 hour), what is to be pay matched, the pay factors and other provisions such as whether meal breaks are paid or not." (Decision, para 81).

[43] The Applicant claims that the Final Adjudicator denied him a fair hearing by failing to inquire whether there was documentation showing exchanges between the RCMP and Treasury Board regarding the interpretation of the pay policy. In my view, this argument misses the mark, because the onus was on the Applicant to bring forward such evidence, and this was not done. There is no basis to find the decision to be unreasonable because of a failure to consider evidence that was not before the decision-maker.

[44] The Applicant also challenges the finding by the Final Adjudicator that the Treasury Board document on pay administration, which provides for a conversion of annual rates to an hourly wage (the workweek hours multiplied by a factor of 52.176 quoted above) "is the same factor as set out in the [National Compensation Manual], albeit in reverse" (Decision, para 79). He claims that this demonstrates flawed reasoning, because the hourly rate is used to establish the annual rate, not the reverse. He submits that if the Public Service comparator group

worked more hours, they would be paid more; however, he is working more hours but receiving the same annual income as his counterparts.

[45] In my view, even if this aspect of the Final Adjudicator's decision is in error – a point on which I make no finding – this in itself would not be sufficient to make the decision unreasonable. There is simply no evidence that the RCMP did more than to apply the policy decisions taken by Treasury Board in exercise of its authority under subsection 22(1) of the *RCMP Act*. That is the key finding of the Final Adjudicator on this point, and it is supported in the evidence as considered within the applicable legal framework.

[46] There is no basis to find this aspect of the decision to be unreasonable.

[47] Turning to the second issue before the Final Adjudicator, whether the matter had been previously adjudicated, the Applicant contends that the decision is unreasonable because none of his previous grievances had relied on the 1972 Treasury Board Directive, and none of them had ever examined the substance of his complaint regarding how his pay was determined.

[48] The Final Adjudicator reviewed the objection raised by the RCMP on this ground as well as the Applicant's reply, and noted that the Initial Adjudicator had thoroughly examined this question. The decision continued:

[90] After carefully reviewing the current Grievance and the decisions for grievances 2016335258 and 2018335700, I must agree with the initial level adjudicator that the Grievor is clearly attempting to challenge his rate of pay. The initial level adjudicator appropriately applied paragraph 10(a) of the Commissioner's Standing Orders (Grievances and Appeals) and dismissed the Grievance for that reason as well.

[91] Furthermore, the initial level adjudicator is correct that repeatedly bringing forth the same subject matter that has already

been adjudicated, despite being notified that there is no further recourse within this process, is an abuse of process. The Grievor has also been advised on each occasion that if he disagreed with the decisions at the final level he has the right to seek recourse to the Federal Court.

[49] Based on this analysis, the Final Adjudicator upheld the Initial Adjudicator's ruling on this element.

[50] The Applicant did not address this issue in detail in either his written or oral submissions, other than to assert that the substance of his grievance had never been addressed and that it was based on a different argument and analysis than his previous ones. I am unable to conclude that there is a basis to overturn the decision on this ground. The crux of the Applicant's arguments in all of his grievances have been about how his pay is established, and the ongoing impact on him of that error. The Final Adjudicator examined the finding below, as well as the grievances themselves, and concluded that they overlapped to such a degree that the Applicant should be barred from pursuing the issue again. That finding is supported in the evidence and based on the applicable legal framework. Under the *Vavilov* framework, that is all that reasonableness review requires of a decision-maker.

IV. Conclusion

[51] For the reasons set out above, the application for judicial review will be dismissed. Although, from one perspective, the Applicant's frustration with his inability to have his complaint examined in detail may be understandable, there is no legal basis to find that the decision is unreasonable, in light of the evidence and the legal and policy framework that applies.

[52] The Respondent sought lump sum costs in the amount of \$1,500, in light of the complexity of this matter and the nature of the record. In exercise of my discretion under Rule 400, and considering the circumstances of the matter, I would instead award lump sum costs to the Respondent in the amount of \$500.

JUDGMENT in T-813-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. The Applicant shall pay to the Respondent lump sum costs in the amount of \$500.00.

“William F. Pentney”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-813-21

STYLE OF CAUSE: NIKOLA PASIC v ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: OCTOBER 6, 2021

JUDGMENT AND REASONS: PENTNEY J.

DATED: AUGUST 5, 2022

APPEARANCES:

Nikola Pasic	ON HIS OWN BEHALF
Jena Montgomery Laetitia Auguste	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT
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