Date: 20100108

Docket: T-574-09

Citation: 2010 FC 20

Ottawa, Ontario, January 8, 2010

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

MANUEL PIZARRO

Applicant

and

ATTORNEY GENERAL FOR CANADA and APPROPRIATE OFFICER "E" DIVISION OF THE ROYAL CANADIAN MOUNTED POLICE

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. OVERVIEW

[1] This judicial review concerns the discipline of a RCMP member and centres on rejection of expert evidence from a RCMP authorized psychologist that there was a causal connection between the member's "disgraceful conduct" and the stress created by his job.

[2] On February 27, 2009, the then acting Commissioner of the RCMP (Commissioner) denied Pizarro's appeal of an Adjudication Board's (Board) decision made November 18, 2005 directing

that Pizarro resign from the Force within fourteen (14) days or be dismissed. The Commissioner's decision was made after his receipt of the RCMP External Review Committee (ERC) recommendation to dismiss the appeal.

[3] Pizarro admitted that he had acted in a disgraceful manner contrary to s. 39(1) of the *Royal Canadian Mounted Police Act* (RCMP Act) after pleading guilty to attempted fraud over $5,000 contrary to the *Criminal Code*. The only issue before the Board and the Commissioner was the imposition of an appropriate sanction.

Section 39(1) reads:

39. (1) Every member alleged to have contravened the Code of Conduct may be dealt with under this Act either in or outside Canada,	**39.** (1) Tout membre à qui l'on impute une contravention au code de déontologie peut être jugé selon la présente loi au Canada ou à l'extérieur du Canada :
(*a*) whether or not the alleged contravention took place in or outside Canada; and	*a*) que la contravention alléguée ait été ou non commise au Canada;
(*b*) whether or not the member has been charged with an offence constituted by, included in or otherwise related to the alleged contravention or has been tried, acquitted, discharged, convicted or sentenced by a court in respect of such an offence.	*b*) que le membre ait été ou non accusé d'une infraction constituée par la contravention alléguée, en faisant partie ou s'y rattachant, ou qu'il ait ou non été jugé, acquitté, libéré, reconnu coupable ou condamné par un tribunal relativement à une telle infraction.

II. FACTUAL BACKGROUND

A. *General*

[4] An Agreed Statement of Facts as to the disgraceful conduct was used at both the Board and Commissioner level. It is the interpretation of the events leading up to the disgraceful conduct – the attempted fraud - which is in issue.

[5] Pizarro joined the RCMP in 1996. His first posting was to Gibson, British Columbia on the "Sunshine Coast".

[6] He became involved in undercover drug investigations and was apparently good at this difficult work. His evidence was that he received death threats which were never addressed by his superiors. The most that was done was to move him to a neighbouring detachment on the Sunshine Coast, still close to those who were threatening him.

[7] Dr. Nicole Aubé, a clinical psychologist and a consultant for the RCMP for 18 years, originally saw Pizarro in 1999 and 2000 as part of the RCMP's annual undercover debriefing. Thereafter, she saw him as part of her clinical practice. Her evidence is a critical element in this judicial review.

[8] Pizarro began seeing Dr. Aubé in her capacity as a psychologist working with the RCMP in the Member Assistance Program. He was suffering from stress, extreme depression and paranoia.

Although his request for a transfer was denied, he refused to take sick leave, apparently because of his sense of duty to continue to serve as a police officer.

[9] In June 2001, Pizarro learned that he was the target of an undercover anti-corruption investigation. He had been suspected of being a “dirty cop”; the allegations included drug usage, sexual misconduct, assault and theft. He took a polygraph test as part of the investigation and he passed that test.

[10] At this point it appears that he was cleared of suspicion but no steps were taken to clarify that fact and requests for transfer from the Sunshine Coast were again denied until the following year. In the interim, his working situation was difficult as was his personal life. He felt distrust from his peers and his 10-year relationship fell apart in part due to the strain of the job and the impact of the investigation.

[11] Finally, in 2002, Pizarro was transferred to Langley, British Columbia, not particularly distant from the Sunshine Coast. According to the evidence, he still suffered stress, anxiety and depression. He had not been formally cleared of suspicion and his working circumstances were strained. His work began to decline, he felt threatened by criminals in the area and a new personal relationship with another detachment member collapsed.

[12] Pizarro continued to see Dr. Aubé intermittently, more so during the apparently stressful times in the Spring and Summer of 2001, Spring 2003 and particularly the Summer of 2003 just prior to the events which constituted the “disgraceful conduct”.

[13] Eventually, in January 2004, rather than taking sick leave, Pizarro took an unpaid leave of absence to return to his home in Montreal to attend university.

[14] In February 2005, while in Montreal, Pizarro received in a blank envelope a report informing him of the nature and outcome of the anti-corruption investigation. The allegations were found to be completely baseless. This was the only step RCMP management took to clear Pizarro’s name. There was no letter, much less an apology or recognition of the personal toll on him nor was there any evidence of information conveyed to other RCMP members acknowledging the baseless allegations.

[15] The Court has outlined these general facts because it is important to understand this context in order to address the expert evidence issue which is at the root of this judicial review.

B. *Disgraceful Conduct*

[16] In July 25, 2003, Pizarro was involved in a single vehicle accident in which his Honda motorcycle was damaged. He had basic insurance which did not cover this incident. The bike was ridable and was not repaired.

[17] On August 11, 2003, Pizarro renewed his insurance, purchasing a comprehensive policy. Thereafter, on October 23, 2003, he phoned in a report of the accident claiming that he had struck a bird the previous day. Over the following months he actively pursued his claim including having the bike inspected, making regular inquiries and making a series of false statements.

[18] It was apparent that the insurer ICBC was suspicious of the claim, and pressed him for more details. Eventually he withdrew the claim before any funds were paid out.

[19] Pizarro was charged with attempted fraud over $5,000 under s. 380(1)*(a)* of the *Criminal Code*. He pled guilty and was sentenced by Judge Angelomatis of B.C. Provincial Court on May 12, 2005.

[20] In a somewhat unusual endorsement of a convicted person, the learned judge reluctantly concluded that because Pizarro is a police officer, the judge could not, in the interests of the public, give him an unconditional discharge. The judge imposes a sentence of one (1) day, deemed served.

[21] In rendering judgment, the learned judge accepted the evidence of the experts as to his mental health and concludes that it was the RCMP that was ultimately responsible for what happened. The learned judge's specific words were:

> I am going to make an aside here. Constable Pizarro has in no way maligned or abused the RCMP. I, however, sitting where I am, feel that I can make some comments that I can validly confirm and corroborate, that they collectively, the RCMP, in his case passed the buck, led to a situation where a member and his mental health was

> compromised, and ultimately if anyone is responsible for what happened it is they.

[22] The learned judge noted in particular that there had never been an apology for the anti-corruption investigation and the significant impact that the investigation and the manner of handling it had on Pizarro's personal and professional life.

[23] The learned judge found that the RCMP, instead of apologizing, transferred Pizarro to an environment where he was clearly monitored, clearly being questioned and where he was the subject of suspicion. These circumstances immediately predated the "incident" – the attempted fraud.

[24] The learned judge had hoped that a disciplinary board would take his words into account and that the RCMP would have the wherewithal to recognize the very unusual and specific circumstances Pizarro was in and to continue to utilize his skills.

[25] In November 2005, Pizarro went before an Adjudication Board made up of two Superintendents and one Inspector. The AOR (appropriate officer's representative – essentially the prosecutor) called only one witness, the ICBC claims adjuster who had dealt with the file.

[26] Germane to this judicial review is the fact that there was no evidence called as to the loss of the "Commanding Officer's confidence". That issue was dealt with solely through submissions of the AOR.

[27] The Member's Representative ("MR" – a civilian RCMP member acting as defence counsel) called five witnesses; two were character witnesses, Pizarro himself, and the last two witnesses were psychologists, accepted by the Board as expert witnesses.

[28] The first of these, Mr. Fournier, a clinical psychologist, conducted an independent assessment of Pizarro in 2004. He testified that Pizarro had suffered from anxiety and depression as early as 2001, forming his probable psychological condition at the time of the incident. The residual effects were still present in 2004 and required treatment.

[29] Fournier opined that the condition was related to the events surrounding the anti-corruption investigation, relationship break-ups and persisting large scale humiliation and distrust. Fournier concluded that Pizarro's behaviour was out of character, that it was highly unlikely he would engage in it again having been successfully treated and that Pizarro had no personality disorders or traits that would affect police work.

[30] The final witness, Dr. Aubé, gave a written report, much of which has been described, as well as giving *viva voce* evidence. She further noted that no one who had gone through what Pizarro had could do so without being emotionally touched. She also wrote that if RCMP management had written an apology, it would have assisted Pizarro in overcoming the devastating effects of the investigation on his career.

[31] Dr. Aubé concluded her report in much the same way as the learned provincial court judge had, stating first that Pizarro's conduct was out of character, expressing a hope for leniency and expressing "that there is a direct causal link between any misbehaviour and the stress that he went through over the past four years".

[32] Dr. Aubé testified that Pizarro's misconduct reflected a victim who had "acted out". That "acting out" can include "self-punishing" behaviour such as committing crimes.

C. *Board Decision*

[33] Since there was an Agreed Statement of Facts as to the attempted fraud, the allegation of disgraceful conduct had been established. The real issue was the appropriate sanction.

[34] The Board recognized that to properly determine this it had to establish the range of appropriate sanction, determine the aggravating and mitigating factors, and select the appropriate penalty.

[35] The Board concluded that the appropriate range of sanction was from forfeiture of ten days' pay to dismissal.

[36] In considering the mitigating and aggravating factors, the Board held that the aggravating factors outweighed the mitigating factors. The principal aggravating factors listed were (a) the loss of the confidence of Pizarro's Commanding Officer; (b) the *Criminal Code* conviction; (c) that

ICBC investigates fraud in partnership with the RCMP; (d) the ICBC employee felt betrayed by Pizarro; (e) the attempted fraud was a set of deliberate steps; and (f) past disciplinary problems. This last item was given little importance.

[37] On the issue of the causal relationship between Pizarro's emotional state and his actions, the Board rejected this thesis. The Board's rationale was as follows:

- the anti-corruption investigation had ended two years prior and Pizarro had been transferred and was reported to be doing well;
- the steps taken to commit the fraud were spread over several months;
- Pizarro's acts were a deliberate choice and not an "acting out" as described by Dr. Aubé; and
- there was no evidence that Pizarro could not distinguish right from wrong.

[38] In rejecting Dr. Aubé's evidence, the Board said:

> Third, Dr. Aubé's opinion about the causal link between the conduct of the member and his emotional state of mind was formed at the time of her testimony as this is when she learned about the allegation against Constable Pizarro. Therefore we gave little weight to her evidence on this causal link.

[39] The Board does refer to a letter of July 17, 2003, at which time Dr. Aubé expressed the view that Pizarro had enough stability to work as a constable or as a Sky Marshall. That letter was written approximately two years before her opinion in respect of the Board hearing.

[40] The Board concluded that the appropriate sanction was to require Pizarro to resign within fourteen (14) days and, in default, to be dismissed from the Force.

[41] Pizarro then appealed that Board decision to the Commissioner via the RCMP External Review Committee. The Committee recommended to the Commissioner that he deny the appeal. The reasons for that recommendation were largely adopted by the Commissioner and therefore need not be repeated. The most germane conclusion was that the Board erred in its grounds for giving no weight to Dr. Aubé's evidence but that such evidence would not be accepted nor would it make any difference in the result.

D. *Commissioner's Decision*

[42] On February 27, 2009, the Acting Commissioner dismissed Pizarro's appeal and confirmed the Board's decision and sanction. It is unnecessary to set out all the facts relied upon; these are detailed above in the Background and in the Board's decision.

[43] Pizarro had submitted "new evidence" to the Commission on appeal. The Commissioner allowed the "new evidence" in, although he found that the bulk of the evidence did not meet the "fresh evidence" criteria.

[44] The Commissioner did concede that one piece of new evidence was indeed "new" since it was not available at the time of the hearing. That evidence was contained in Pizarro's affidavit which stated that on July 31, 2007, the Veteran Affairs Office recognized that he suffered from

work-related psychological injury as a direct result of his duties with the RCMP, specifically the anti-corruption investigation and the threats he received.

[45] The Commissioner concluded that the Veterans Affairs' finding had no bearing on Pizarro's case because the process and objectives of Veterans Affairs are distinct from the RCMP disciplinary process.

[46] The Commissioner adopted a standard of review analysis in his review of the Board's decision which was akin to a court's analysis of that standard in respect of judicial review. In so doing, the Commissioner relied upon Justice de Montigny's decision in *Kinsey v. Canada (Attorney General)*, 2007 FC 543. That decision has relevance to this matter for different reasons than that cited by the Commissioner.

[47] As the parties did not raise the issue of the standard of review adopted by the Commissioner, the Court will only say that a review by the Commissioner is not a judicial review and care must be exercised in the Commissioner not abdicating responsibility while recognizing that some functions of a board put the Board in a better position to draw certain conclusions – credibility being a possible example.

III. ANALYSIS

A. *Standard of Review*

[48] Whether the Commissioner came to an appropriate decision as to the sanction to be imposed – which is the core decision – is subject to a standard of reasonableness. Previous decisions have recognized the greater expertise the Commissioner would have in this regard coupled with the privative clauses, the largely fact-driven nature of the proceeding and the highly discretionary nature of the decision (see *Kinsley*, above, and *Dunsmuir v. New Brunswick*, 2008 SCC 9). The standard with respect to core jurisdictional matters and procedural fairness is correctness (see *Gill v. Canada (Attorney General)*, 2007 FCA 305).

[49] As the Commissioner adopted a reasonableness standard in his review of the Board's decision, the Court would be considering "the reasonableness of the reasonableness" finding – a cumbersome and unhelpful framework. However, in this case, the critical error commences at the Board and is repeated and enhanced by the Commissioner himself. That error is the treatment of the expert evidence of Dr. Aubé.

B. *Aubé Evidence – Causal Connection to Employer*

[50] To reiterate, the Board said that it gave little weight to Dr. Aubé's opinion about the causal link between Pizarro's conduct and his emotional state of mind because her opinion was formed at the time of her testimony, which was when she learned about the allegations against Pizarro. Both

the ERC and the Commissioner acknowledged that this finding of fact was wrong but both, for slightly different reasons, went on to hold that the error did not affect the outcome of the case.

[51] The Commissioner's conclusion is surprising in view of the fact that he had adopted a deference standard in respect of the Board. One area where deference may be warranted is credibility findings, yet the Commissioner was prepared to excuse the error by substituting his own reasons why the evidence was not credible. Both his act of substitution of opinion and the Commissioner's own opinion are in error.

[52] Dr. Aubé's evidence was an absolutely essential element of Pizarro's case. She was highly qualified and sufficiently proficient to work with the RCMP for 18 years and to the extent that she must have been generally credible to the Force. Her evidence not only went to Pizarro's state of mind but it dealt with how that state would manifest itself by "acting out". Importantly, Dr. Aubé's opinion pointed to some element of responsibility within RCMP management.

[53] In the usual course, where there is an error of the magnitude of the Board's, the Commissioner should have sent it back to a new board. As recognized in *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, relied on by the Respondent, it is only in the exceptional cases that relief, at least in the form of a re-hearing, would not flow from an error in fairness. This case and this error are not one of those exceptions. On this point alone, this judicial review should be granted.

[54] There is nothing inevitable about the result if the matter had been sent back. Dr. Aubé's opinion is consistent with Mr. Fournier's. It is also consistent with the comments of the learned provincial court judge on the issue of the responsibility of RCMP management. Her opinion that Pizarro suffered emotional disability due to circumstances at his employment is also consistent with the findings of the Department of Veterans Affairs.

[55] The Commissioner compounded this error in not constituting a new hearing board in the face of a critical error by reaching an unreasonable conclusion in substitution of the Board's finding.

[56] It is well settled law that, absent some specific dictate to the contrary, a decision maker is not compelled to accept the conclusions of an expert where there is no contradictory evidence. However, when a decision maker does so, there must be good reasons, generally outside the specific area of expertise, to do so.

[57] The Commissioner accepted the ERC's conclusion that despite the Board's error with respect to the basis of the adverse credibility finding, the experts' evidence could be disregarded for the following reasons:

(a) Pizarro's misconduct occurred in steps over several months;

(b) Pizarro's actions were deliberate and planned, reflecting a criminal mind;

(c) Pizarro understood the consequences of his actions;

(d) the anti-corruption investigation ended nearly two years before the misconduct;

(e) Pizarro generally did well at work in 2003 despite his residual condition;

(f) Pizarro's condition did not stop him from going to school at the time of the misconduct;

(g) Pizarro was recommended (by Dr. Aubé) for Air Marshall duties around the time of the misconduct;

(h) there was no sign of impairment or incoherence when Pizarro first contacted the ICBC claims adjuster; and

(i) Pizarro's written statement about the crash revealed an organized, coherent mind.

[58] The difficulty with the Board and Commissioner relying on these items to discount expert evidence contrary to their conclusion of Pizarro's misconduct is that these matters either engage psychological expertise which neither of them had or involve matters which ought to, in fairness, have been put to the experts before relying on them to discount the expert.

[59] The conclusions with respect to deliberations over time assume that a person in Pizarro's psychological condition would only act spontaneously. There was no evidence on this point – a matter which requires expert evidence. The conclusion that these actions by Pizarro show a criminal mind is contrary to all the expert and learned (provincial court judge's) opinions and no foundation for this conclusion was advanced.

[60] In respect of Pizarro's understanding of his actions, the Board adopted a test – whether Pizarro could distinguish between right and wrong – similar to that for proof of insanity. There is no

suggestion that this is an appropriate test or that it was supported by any expert evidence as to mental capacity and the nature of “acting out”.

[61] With respect to the other factors relied upon by the Board and the Commissioner, these were never put to the experts, particularly Dr. Aubé, to test whether these matters were inconsistent with a person suffering from Pizarro’s condition. Matters such as ability to attend school or job performance or his manner of dealing with ICBC are properly the purview of experts. The Commissioner’s particular concern about the inconsistency between alleged cognitive impairment and Dr. Aubé’s recommendation to serve as an Air Marshall were never put to the witness.

[62] The Commissioner used the Air Marshall recommendation as both evidence of Pizarro’s state of mind and fitness for duty and to attack Dr. Aubé’s credibility. The Commissioner’s position is itself inconsistent having concluded that the Board erred in dismissing Dr. Aubé’s evidence, and the Commissioner justifies that rejection on the Board’s finding as to a significant causal link. Importantly, neither the Board nor the Commissioner ever gave the expert the opportunity to explain her findings before each of them embarked on their own rejection and substitution of the expert opinion.

[63] A decision maker does not necessarily have to confront an expert with every concern he or she may have but the failure to elicit an answer may undermine the reasonableness of the decision maker’s adverse conclusions. Such is the case here where the Commissioner reached conclusions which may have been intuitive to him but for which there was no evidentiary expert basis. The

failure to put these matters to the expert to impugn the expert's evidence was unreasonable and unfair in these circumstances.

[64] The Commissioner's decision, therefore, was unreasonable and the process in which he engaged was contrary to the principles of fairness.

[65] The Court is concerned that the Commissioner and the Board went out of their way to undermine the causal relationship with work conditions and ignore the responsibility that RCMP management may bear for Pizarro's conduct. Not only was there expert evidence to that effect, further, there was no expert evidence to the contrary and lastly, but importantly, there was confirmatory opinion in the learned provincial court judge's decision – a matter which was before both the Board and the Commissioner.

[66] In this regard, Pizarro supplied an affidavit of new evidence. He specifically raised the finding by Veterans Affairs of psychological injury as a direct result of his duties with the RCMP, specifically the anti-corruption investigation and threats he received. The Commissioner dismissed this evidence because the process and objectives of Veterans Affairs are distinct from the RCMP disciplinary process. The relevance of the Veterans Affairs' decision is clearly obvious – that Pizarro suffered a work-related injury. The Commissioner's dismissal of this decision as irrelevant is perverse as it clearly went to one of the key elements of the cause of Pizarro's misconduct.

[67] It is noteworthy that in citing this “new” evidence, the Commissioner omits from his recitation of that evidence the concluding words describing the threats “that were never dealt with by my superiors”.

[68] The Commissioner’s failure to address RCMP management’s responsibility – a failure also by the Board and the ERC – raises concerns about reasonable apprehension of bias. The treatment of Pizarro’s psychological conditions raises the spectre of how the RCMP would have treated a member who had suffered a physical job-related injury and whether the Commissioner would have been prepared to draw conclusions about physical abilities and consequences in the absence of expert evidence.

C. *Commanding Officer’s Confidence*

[69] Pizarro raised as one of his grounds of judicial review the reliance placed, as an aggravating factor, on the finding that Pizarro has lost the Commanding Officer’s confidence.

[70] Although this factor is listed first in the list of aggravating factors, I cannot conclude that it was the primary or most important factor. The fact that it was not discounted, as was past disciplinary action, does confirm that it was one important factor.

[71] There was no evidence led as to this “loss of confidence”, it was simply the argument of the AOR. Evidence of an aggravating factor could not be simply proceeding with the charge of disgraceful conduct because it would be a “given” not a factor.

[72] The difficulty for Pizarro is that he did not specifically raise this issue before the Commissioner. The matter is further complicated by the fact that the judgment of Justice de Montigny in *Kinsey*, above, was before the Commissioner but on the point of the standard of review not on the issue of fairness raised by unproven allegations of loss of confidence.

[73] In *Kinsey*, above, Justice de Montigny outlined the unfairness of a finding of "loss of confidence" where the member is not given an opportunity to address the facts behind the alleged "loss of confidence".

[74] In the present case, the prejudice to Pizarro is clear. Firstly, there was no evidence of loss of confidence. Secondly, Pizarro was denied any opportunity to confront the basis for such loss. Pizarro was denied any chance to test how his conduct in his situation would cause such loss and yet other members of the RCMP who may have committed crimes of physical violence would still be allowed to remain with the Force.

[75] The Court recognizes that there are certain distinctions between this situation and *Kinsey* as advanced by the Respondent's counsel. However, those distinguishing features do not undermine the principles engaged in the *Kinsey* decision. I concur with Justice de Montigny that the inability to confront the claim of "loss of confidence" is unfair and the decision should be quashed.

[76] Having concluded that there are other grounds on which the Commissioner's decision should be quashed, it is not strictly necessary for me to find on this "loss of confidence" issue or on whether it can form a ground of review despite not having been raised.

[77] However, were it necessary, I would do so on the basis that a finding made without evidence is a jurisdictional error and the decision is a nullity (see *Shubenacadie Indian Band v. Canada (Human Rights Commission)*, [1998] 2 F.C. 198 and *Douglas Aircraft Co. of Canada v. McConnell*, [1980] 1 S.C.R. 245). The issue is the absence of evidence not the sufficiency of evidence. The AOR put in no evidence to substantiate the claim of "loss of confidence".

[78] I need not deal with *Oberlander v. Canada (Attorney General)*, 2009 FCA 330, which is a case that arises in a particular and unique context.

IV. CONCLUSION

[79] The Court is concerned that this case involves the senior management of the RCMP adjudicating on the conduct of its senior management. There is no way procedurally to avoid this issue. However, there is a new Commissioner and a direction to him to constitute a new Adjudication Board to conduct the proceeding *de novo* should offer some assurance of a fairer process.

[80] Therefore, this judicial review will be granted. The Commissioner's decision will be quashed as well that of the ERC and the Board. The Commissioner is directed to reasonably

expeditiously constitute a new Adjudication Board to determine this matter of the sanctions for disgraceful conduct charges against Pizarro. The Applicant shall have his costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is granted. The Commissioner's decision is quashed as well that of the ERC and the Board. The Commissioner is directed to reasonably expeditiously constitute a new Adjudication Board to determine this matter of the sanction to be imposed in respect of the disgraceful conduct charges against the Applicant. The Applicant is to have his costs in this judicial review.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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