

Federal Court



Cour fédérale

**Date : 20101118**

**Docket: T-292-10**

**[Unrevised certified translation]**

**Citation: 2010 FC 1149**

**Ontario, Ottawa, November 18, 2010**

**PRESENT: The Honourable Mr. Justice Boivin**

**BETWEEN:**

**J.M. ROBERT BEAULIEU**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review of a decision by the Level II adjudicator of the Royal Canadian Mounted Police (RCMP), dated January 12, 2010. That decision dismissed the applicant's grievance on the ground that it was barred by the limitation period under paragraph 31(2)(a) of the *Royal Canadian Mounted Police Act*, R.S., 1985, c. R-10 (the Act). The applicant seeks an order setting aside the decision and remitting the matter back for reconsideration.

Facts

[2] The applicant has been a member of the RCMP since March 23, 1982, and currently holds the rank of corporal.

[3] In order to be promoted to the next rank of sergeant, the applicant is required to participate in the RCMP job simulation exams. RCMP procedures set out that a member seeking promotion must register with the RCMP's Personnel Office before being called to take the RCMP's promotion examinations.

[4] The applicant was called and took the RCMP's promotion examinations, which were held on Saturday, February 9, 2008, at the Université de Montréal.

[5] On March 27, 2008, the RCMP denied his overtime claim.

[6] The following day, on March 28, 2008, the applicant filed a grievance with the RCMP's Central Region Office for the Coordination of Grievances (OCG), alleging that he had lost the equivalent of four (4) overtime hours at double time due to the denial of his overtime claim on March 27, 2008.

Decision of the Level I adjudicator

[7] On January 5, 2009, the initial decision of the Level I adjudicator dismissed the applicant's grievance on the ground that he had failed to present it within the limitation period of thirty (30) days set out in paragraph 31(2)(a) of the Act. The adjudicator also refused to refer the grievance to the External Review Committee (ERC) on the ground that the grievance was not the type of grievance that could be referred to the Committee.

[8] In support of his decision, the Level I adjudicator noted that, on two occasions, namely, on December 13, 2007, and on January 15, 2008, the RCMP had sent, in both official languages, a communiqué to each member's e-mail account stating that examinations are taken on a free and voluntary basis and that no scheduling changes or overtime would be authorized. The same message was sent out via the "News" account.

[9] The adjudicator subsequently concluded that the members had known about the RCMP's decision from the moment they read the communiqué but that they had nonetheless decided to take the examination. In the adjudicator's opinion, the members should have filed their grievances within thirty (30) days of having become aware of the communiqué. The adjudicator added that the potential denial of each applicant's claim would not be a new decision because the denial would be the equivalent of upholding or implementing the decision noted in the communiqué.

[10] Given that the adjudicator had no reference date that would point to when the applicant would have become aware of the communiqué explaining the specifics about the examination, he

concluded that the applicable date was the date on which the applicant took the examination, namely, February 9, 2008.

[11] The adjudicator subsequently found that, in the applicant's case, he had taken the examination on February 9, 2008, and filed his grievance on March 28, 2008, some forty-eight (48) days later, thereby exceeding the limit of thirty (30) days set out in paragraph 31(2)(a) of the Act.

Impugned decision (Level II adjudicator's decision)

[12] On January 12, 2010, the Level II grievance adjudicator, RCMP Superintendent Robert Codère, upheld the Level I adjudicator's decision and dismissed the applicant's grievance on the ground that he had failed to meet the deadline for filing grievances set out in paragraph 31(2)(a) of the Act, and on the ground that he had not requested an extension of time.

[13] The Level II adjudicator found that the mere publishing of notices indicating that overtime hours would not be paid to members taking promotion examinations did not amount to prejudice in itself (Level II adjudicator's decision, at para. 41).

[14] The Level II adjudicator noted that he agreed with the Level I adjudicator with regard to when the time for presenting the grievance began, i.e. on February 9, 2008. The adjudicator added that when the applicant took the examination on February 9, 2008, he suffered an immediate loss and he should have presented his grievance within the period of thirty (30) days following February 9, 2008.

[15] On March 2, 2010, the applicant filed an application with this Court for judicial review of the decision of Level II adjudicator Robert Codère, dated January 12, 2010.

Issues

[16] This application for judicial review raises the following three issues:

*1- What is the standard of review to be applied to the RCMP Level II adjudicator's decision dated January 12, 2010?*

*2- Was the Level II adjudicator's decision dismissing the applicant's grievance reasonable?*

*3- Did the Level II adjudicator err by not referring the applicant's grievance to the External Review Committee (ERC) of the RCMP in accordance with subsection 33(4) of the Act?*

Relevant provisions

[17] The relevant provisions of the *Royal Canadian Mounted Police Act* are the following:

PART I

PARTIE I

COMMISSIONER

COMMISSAIRE

Appointment

Nomination

**5.** (1) The Governor in Council may appoint an officer, to be known as the Commissioner of the Royal Canadian Mounted Police, who, under the direction of the Minister, has the control and management of the Force and all matters connected therewith.

**5.** (1) Le gouverneur en conseil peut nommer un officier, appelé commissaire de la Gendarmerie royale du Canada, qui, sous la direction du ministre, a pleine autorité sur la Gendarmerie et tout ce qui s'y rapporte.

Delegation

Délégation

(2) The Commissioner may delegate to any member any of the Commissioner's powers, duties or functions under this Act, except the power to delegate under this subsection, the power to make rules under this Act and the powers, duties or functions under section 32 (in relation to any type of grievance prescribed pursuant to subsection 33(4)), subsections 42(4) and 43(1), section 45.16, subsection 45.19(5), section 45.26 and subsections 45.46(1) and (2).

(2) Le commissaire peut déléguer à tout membre les pouvoirs ou fonctions que lui attribue la présente loi, à l'exception du pouvoir de délégation que lui accorde le présent paragraphe, du pouvoir que lui accorde la présente loi d'établir des règles et des pouvoirs et fonctions visés à l'article 32 (relativement à toute catégorie de griefs visée dans un règlement pris en application du paragraphe 33(4)), aux paragraphes 42(4) et 43(1), à l'article 45.16, au paragraphe 45.19(5), à l'article 45.26 et aux paragraphes 45.46(1) et (2).

### PART III

### PARTIE III

#### GRIEVANCES

#### GRIEFS

#### PRESENTATION OF GRIEVANCES

#### PRÉSENTATION DES GRIEFS

##### Right of member

##### Règle

**31.** (1) Subject to subsections (2) and (3), where any member is aggrieved by any 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

**31.** (1) Sous réserve des paragraphes (2) et (3), un 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 à la présente partie dans le cas où la présente loi, ses règlements ou les consignes du commissaire ne prévoient

grievance process provided for by this Part.

aucune autre procédure pour corriger ce préjudice.

Limitation period

Prescription

(2) A grievance under this Part must be presented

(2) Un grief visé à la présente partie doit être présenté :

(a) at the initial level in the grievance process, within thirty days after the day on which the aggrieved member knew or reasonably ought to have known of the decision, act or omission giving rise to the grievance; and

a) au premier niveau de la procédure applicable aux griefs, dans les trente jours suivant celui où le membre qui a subi un préjudice a connu ou aurait normalement dû connaître la décision, l'acte ou l'omission donnant lieu au grief;

(b) at the second and any succeeding level in the grievance process, within fourteen days after the day the aggrieved member is served with the decision of the immediately preceding level in respect of the grievance.

b) à tous les autres niveaux de la procédure applicable aux griefs, dans les quatorze jours suivant la signification au membre de la décision relative au grief rendue par le niveau inférieur immédiat.

...

[...]

Final level in grievance process

Dernier niveau

**32.** (1) The Commissioner constitutes the final level in the grievance process and the Commissioner's decision in respect of any grievance is final and binding and, except for judicial review under the *Federal Courts Act*, is not subject to appeal to or review by any court.

**32.** (1) Le commissaire constitue le dernier niveau de la procédure applicable aux griefs; sa décision est définitive et exécutoire et, sous réserve du contrôle judiciaire prévu par la *Loi sur les Cours fédérales*, n'est pas susceptible d'appel ou de révision en justice.

Commissioner not bound

Non-assujettissement du commissaire

(2) The Commissioner is not bound to act on any findings or recommendations set out in a report with respect to a grievance referred to the Committee under section 33, but if the Commissioner does not so act, the Commissioner shall include in the decision on the disposition of the grievance the reasons for not so acting.

(2) Le commissaire n'est pas lié par les conclusions ou les recommandations contenues dans un rapport portant sur un grief renvoyé devant le Comité conformément à l'article 33; s'il choisit de s'en écarter, il doit toutefois motiver son choix dans sa décision.

Rescission or amendment of decision

Annulation ou modification de la décision

(3) Notwithstanding subsection (1), the Commissioner may rescind or amend the Commissioner's decision in respect of a grievance under this Part on the presentation to the Commissioner of new facts or where, with respect to the finding of any fact or the interpretation of any law, the Commissioner determines that an error was made in reaching the decision.

(3) Par dérogation au paragraphe (1), le commissaire peut annuler ou modifier sa décision à l'égard d'un grief visé à la présente partie si de nouveaux faits lui sont soumis ou s'il constate avoir fondé sa décision sur une erreur de fait ou de droit.

REFERENCE TO  
COMMITTEE

RENOI DEVANT LE  
COMITÉ

Reference to Committee

Renvoi devant le Comité

**33.** (1) Before the Commissioner considers a grievance of a type prescribed pursuant to subsection (4), the Commissioner shall refer the grievance to the Committee.

**33.** (1) Avant d'étudier un grief d'une catégorie visée par règlement pris en vertu du paragraphe (4), le commissaire le renvoie devant le Comité.

...

[...]

Grievances referable to

Griefs qui doivent être renvoyés



Committee

(4) The Governor in Council may make regulations prescribing for the purposes of subsection (1) the types of grievances that are to be referred to the Committee.

...

Rules

**36.** The Commissioner may make rules governing the presentation and consideration of grievances under this Part, including, without limiting the generality of the foregoing, rules

*a)* prescribing the members or classes of members to constitute the levels in the grievance process; and

*b)* specifying, for the purposes of subsection 31(4), limitations, in the interests of security or the protection of privacy of persons, on the right of a member presenting a grievance to be granted access to information relating thereto.

devant le Comité

(4) Le gouverneur en conseil peut, par règlement, prescrire, pour l'application du paragraphe (1), les catégories de griefs qui doivent faire l'objet d'un renvoi devant le Comité.

[...]

Règles

**36.** Le commissaire peut établir des règles pour régir la présentation et l'étude des griefs en vertu de la présente partie, et notamment :

*a)* pour déterminer les membres ou catégories de membres qui constitueront les différents niveaux que prévoit la procédure applicable aux griefs;

*b)* pour imposer, au nom de la sécurité ou de la protection de la vie privée, des restrictions au droit que le paragraphe 31(4) accorde à un membre qui présente un grief de consulter la documentation pertinente placée sous la responsabilité de la Gendarmerie.

[18] Section 36 of the *Royal Canadian Mounted Police Regulations (1988)*, SOR/88-361 (the Regulations) provides the following:

PART II

PARTIE II

GRIEVANCES	GRIEFS
PRESENTATION OF GRIEVANCES	PRÉSENTATION DES GRIEFS
<p><b>36.</b> For the purposes of subsection 33(4) of the Act, the types of grievances that are to be referred to the External Review Committee are grievances relating to</p>	<p><b>36.</b> Pour l'application du paragraphe 33(4) de la Loi, les catégories de griefs qui doivent faire l'objet d'un renvoi devant le Comité externe d'examen sont les suivants :</p>
<p>(a) the Force's interpretation and application of government policies that apply to government departments and that have been made to apply to members;</p>	<p>a) les griefs relatifs à l'interprétation et à l'application, par la Gendarmerie, des politiques gouvernementales visant les ministères qui ont été étendues aux membres;</p>
<p>(b) the stoppage of the pay and allowances of members made pursuant to subsection 22(3) of the Act;</p>	<p>b) les griefs relatifs à la cessation, en application du paragraphe 22(3) de la Loi, de la solde et des allocations des membres;</p>
<p>(c) the Force's interpretation and application of the <i>Isolated Posts Directive</i>;</p>	<p>c) les griefs relatifs à l'interprétation et à l'application, par la Gendarmerie, de la <i>Directive sur les postes isolés</i>;</p>
<p>(d) the Force's interpretation and application of the <i>R.C.M.P. Relocation Directive</i>; and</p>	<p>d) les griefs relatifs à l'interprétation et à l'application, par la Gendarmerie, de la <i>Directive de la Gendarmerie sur la réinstallation</i>;</p>
<p>(e) administrative discharge for grounds specified in paragraph 19(a), (f) or (i).</p>	<p>e) les griefs relatifs au renvoi par mesure administrative pour les motifs visés aux alinéas 19a), f) ou i).</p>

Standard of review

1- *What is the standard of review to be applied to the RCMP Level II adjudicator's decision dated January 12, 2010?*

[19] The applicant argues that the standard of review applicable to the interpretation of the limitation period set out in paragraph 31(2)(a) of the Act is correctness, and to its application to the facts of this limitation period, reasonableness (*Thériault v. Canada (Mounted Police)*, 2006 FCA 61, [2006] F.C.J. No. 169).

[20] The respondent argues instead that the standard applicable to the Level II adjudicator's decision is reasonableness because the adjudicator had to determine the moment at which the applicant knew or reasonably ought to have known of the decision giving rise to the grievance in order to establish when the thirty-day limitation period began. This is essentially a question of fact and must be subject to the standard of reasonableness.

[21] To demonstrate the high degree of deference owed by this Court, the respondent cites *Horton v. Canada (Attorney General)*, 2004 FC 793, [2004] F.C.J. No. 969, in which the facts were very similar to those in this matter, since the adjudicator also had to determine whether the grievance had been filed within the limitation period. Justice Layden-Stevenson determined that it was a question of fact and that the applicable standard of review was reasonableness.

[22] The respondent also refers to the teachings of Justice Décary in *IBM Canada Ltd. v. Hewlett-Packard (Canada) Ltd.*, 2002 FCA 284, [2002] F.C.J. No. 1008, at paragraph 16:

[16] . . . The temptation to qualify certain issues as "jurisdictional" for the purpose of attracting a less deferential standard is to be resisted (see *Canada v. McNally Construction Inc. and Abco Industries Limited*, 2002 FCA 184, Stone J.A. at para. 23). It is within the Tribunal's jurisdiction to decide whether a complaint is time-barred; there is no legal issue as to the interpretation of subsection 6(1) of the Regulations; the determination in the case at bar of the starting point is a pure question of fact; and the Tribunal's knowledge of the procurement process places it in the best position to decide when a complainant became aware or reasonably should have become aware of the basis of a complaint.

[23] This Court also notes that, at paragraph 47 of *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9, the Supreme Court of Canada defined reasonableness in the following way:

[47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. . . . A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[24] The issue of the limitation period in the case at bar is essentially one of mixed fact and law, hinging more on the facts, i.e. at what point in time the applicant knew or reasonably ought to have known of the decision, act or omission. Accordingly, the appropriate standard of review to be applied to the Level II adjudicator's decision with regard to the beginning of the limitation period is reasonableness and the Court must show deference.

The RCMP grievance process

[25] Pursuant to sections 31 *et seq.* of the Act, the RCMP grievance process begins with the filing of a grievance at the initial level by an officer of the RCMP. If a member is not satisfied with the decision rendered by the Level I adjudicator, he or she may file their grievance with a Level II adjudicator. Under subsections 32(1) and 32(3) of the Act, the second level constitutes the final level in the grievance appeal process.

[26] With regard to the types of grievances set out in section 36 of the Regulations, it is the RCMP Commissioner who constitutes the second level. Subsection 33(1) of the Act provides that before the Commissioner considers a grievance of a type prescribed pursuant to section 36 of the Regulations, the Commissioner shall refer the grievance to the ERC, which will then consider the matter and present its findings and recommendations. The Commissioner is free to accept or reject the findings of the ERC. If the Commissioner rejects the findings, subsection 32(2) sets out that he or she must provide reasons in writing.

[27] For grievances which are not referable to the ERC, the Commissioner has delegated his powers to an officer of the RCMP to act as a Level II adjudicator.

Analysis

2- *Was the Level II adjudicator's decision dismissing the applicant's grievance reasonable?*

[28] The applicant argues that he could not challenge the denial of his overtime claim before he submitted this claim and before he received the decision denying his claim. According to the

applicant, he did not have the required interest to present a grievance and was therefore not obliged to challenge the RCMP's stated policy on a theoretical or pre-emptory basis before even having worked overtime, claimed overtime or received the negative decision. He is therefore alleging that the Level II adjudicator's decision was unreasonable.

[29] For his part, the respondent alleges that the Level II adjudicator's decision finding that the beginning of the limitation period was the date on which the applicant took the examination, namely, on February 9, 2008, was reasonable. The respondent argues that, on two occasions, namely, on December 13, 2007, and on January 15, 2008, the RCMP sent out the communiqué which specified that promotion examinations were to be taken on a free and voluntary basis and that no scheduling changes or overtime would be authorized.

[30] The Court is of the opinion that the Level II adjudicator's decision upholding the Level I adjudicator's decision that the limitation period began on the date the applicant took the examination was reasonable. In fact, the applicant could reasonably have expected that his overtime claim would be denied. In *Horton*, the Federal Court found that the decision of the Level II adjudicator, who had determined that Corporal Horton's grievance was barred by the limitation period since he had known from the month of October 1995 (nearly two years after the response to his formal request) that his request for standby compensation would be refused, was reasonable. Starting from the principles set out in that decision and in paragraph 31(2)(a) of the Act, this Court is of the view that the same conclusion applies to the case at bar: the applicant ought to have known,

from December 13, 2007, or January 15, 2008, that his claim would be denied. In that sense, the wording of paragraph 31(2)(a) of the Act is clear:

**31.** (1) Subject to subsections (2) and (3), where any member is aggrieved by any 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.

Limitation period

(2) A grievance under this Part must be presented

(a) at the initial level in the grievance process, within thirty days after the day on which the aggrieved member knew or reasonably ought to have known of the decision, act or omission giving rise to the grievance; and

**31.** (1) Sous réserve des paragraphes (2) et (3), un 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 à la présente partie dans le cas où la présente loi, ses règlements ou les consignes du commissaire ne prévoient aucune autre procédure pour corriger ce préjudice.

Prescription

(2) Un grief visé à la présente partie doit être présenté :

a) au premier niveau de la procédure applicable aux griefs, dans les trente jours suivant celui où le membre qui a subi un préjudice a connu ou aurait normalement dû connaître la décision, l'acte ou l'omission donnant lieu au grief;

(Emphasis added.)

[31] In the case at bar, the applicant was informed of the employer's decision on two (2) occasions – via the “News” account as well as directly by e-mail. The evidence in the record, and more specifically the applicant's affidavit, does not show that he had not received, become aware of

or read the communiqués issued on December 13, 2007, and on January 15, 2008. Moreover, the evidence in the record contains no request for an extension of time on the applicant's part.

[32] The Court must therefore conclude that the applicant knew or ought to have known that his overtime claim would be denied by the RCMP. Armed with this information, the applicant decided to take the promotion examination on February 9, 2008, with full knowledge of the consequences. In the absence of a reference date as the date on which the applicant would have become aware of the communiqué, the adjudicator's decision to set February 9, 2008, the date the applicant took the examination and the date he claims he suffered prejudice, as the start of the limitation period, is therefore, in this case, reasonable.

3- *Did the Level II adjudicator err by not referring the applicant's grievance to the External Review Committee (ERC) of the RCMP in accordance with subsection 33(4) of the Act?*

[33] The role of the External Review Committee (ERC) of the RCMP is to provide a report by an independent third party which sets out its findings and makes recommendations to the parties with regard to the grievance.

[34] The applicant claims that the Level II adjudicator erred by not referring his grievance to the ERC in accordance with subsection 33(4) of the Act and paragraph 36(a) of the RCMP Regulations. According to the applicant, his overtime claim is the result of the application of a government policy to members of the RCMP.



[35] In response to this, the respondent argues that the issue that had to be considered by the Level II adjudicator was not one of the types of grievances listed in paragraph 36(a) of the Regulations because the decision disposed of a preliminary issue (and not the merits of an issue) and the applicant's overtime claim does not involve the application of a government policy that applies to government departments which was then made to apply to members.

[36] Alternatively, the respondent argues that the Level II adjudicator would not have had the jurisdiction to refer the applicant's grievance to the ERC due to the fact that only the Commissioner has the authority to do so. The respondent also noted that when a Level I adjudicator makes a preliminary determination that a member failed to file his or her grievance within the limitation period set out in paragraph 31(2)(a) of the Act, the adjudicator does not proceed to analyze the grievance within the meaning of section 33 of the Act, but simply makes a determination as to the admissibility of the grievance.

[37] The Court is of the view that the decision is not one which can be referred to the ERC because, in this case, it is first and foremost a preliminary decision.

[38] Whatever the case may be, the issue of overtime hours does not apply because it does not amount to a general government policy that was made to apply to members of the RCMP within the meaning of paragraph 36(a) of the Regulations. In fact, section 22 of the Act states that the Treasury Board shall establish the pay and allowances to be paid to the members of the RCMP. The documents adduced in evidence regarding overtime for RCMP members (Volume 2 – Tabs 3 and 4

in the Applicant's Record) apply only to RCMP members and cannot be linked to a general government policy that was made to apply to members of the RCMP within the meaning and intent of paragraph 36(a) of the Regulations. To this effect, the 1995 document entitled [TRANSLATION] *Overtime for Members of the Royal Canadian Mounted Police* (Volume 2 – Tab 4 of the Applicant's Record) specifically refers to subsection 22 of the Act under the [TRANSLATION] "Authority" section.

[39] Consequently, this grievance is not described in paragraph 36(a) of the Regulations and is therefore not the type of grievance that can be referred to the ERC.

[40] For all these reasons, the Court is of the opinion that the Level II adjudicator's decision is reasonable and falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*). This application for judicial review is dismissed.

**JUDGMENT**

**THE COURT ORDERS AND ADJUDGES** that the present application for judicial review be dismissed with costs.

“Richard Boivin”

---

Judge

Certified true translation

Sebastian Desbarats, Translator

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-292-10

**STYLE OF CAUSE:** J.M. ROBERT BEAULIEU v.  
THE ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** November 3, 2010

**REASONS FOR JUDGMENT:** BOIVIN J.

**DATED:** November 18, 2010

**APPEARANCES:**

James R.K. Duggan FOR THE APPLICANT

Marie-Josée Bertrand FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

James R.K. Duggan, Counsel FOR THE APPLICANT  
Montréal, Quebec

Myles J. Kirvan FOR THE RESPONDENT  
Deputy Attorney General of Canada  
Montréal, Quebec