Federal Court  Cour fédérale

Date: 20121116

Docket: T-1158-11

Citation: 2012 FC 1325

Ottawa, Ontario, November 16, 2012

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

JOHNATHON BRITTON

Applicant

and

ROYAL CANADIAN MOUNTED POLICE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] In this application for judicial review, the applicant seeks to have certain documents about his conduct removed from his Royal Canadian Mounted Police [RCMP] training file.

[2] Until he resigned, the applicant was a cadet, training to become a member of the RCMP. He first joined the RCMP training program in July of 2010. Towards the end of the program, he received two "unacceptable" ratings, and his first training contract was terminated on January 4, 2011. However, the RCMP offered him the opportunity to rejoin the program to complete the portions of the training he failed so he could graduate with the next group of cadets (a process

known as being "back-trooped"). The applicant accepted the offer and signed a second Cadet Training Agreement on January 6, 2011.

[3] The Cadet Training Agreement provided, amongst other things, that the applicant was not an employee of the RCMP and that the RCMP could terminate the applicant's training "at any time" if it determined he did not meet established performance criteria, failed to abide by the policy and procedures set out in the Cadet Training Handbook, or became involved in "any activity which may bring discredit to the Cadet Training Program or the RCMP, including … harassment".

[4] During the course of his training, the applicant became romantically involved with a civilian employee of the RCMP, whom he alleges is the niece of a former RCMP Commissioner. On January 25, 2011, that employee's supervisor contacted the facilitators of the cadet training program to lodge a complaint regarding the applicant's behaviour towards the female employee.

[5] Facilitators of the training program interviewed the employee and the applicant on January 25, 2011: Corporal Folk and Constable Clark interviewed the employee, while Corporals Folk and Morrison interviewed the applicant. From these interviews, it was determined that the applicant had pursued a relationship with the employee, after she had indicated she did not want one, and had sent inappropriate text messages to her, in which he used profanity and called her "a weak female". They also learned that the applicant made further inappropriate comments to the complainant employee over the telephone. The applicant admitted to much of this conduct during his interview.

[6] On January 27, 2011, following the interviews and receipt of favourable reports from others who had been involved in the applicant's training, Corporal Folk made a recommendation to her superiors to cease the applicant's training for failure to meet the RCMP's Core Values. These Values include integrity, professionalism and respect. In accordance with standard procedure applicable to such recommendations, the RCMP provided a detailed summary of Corporal Folk's factual findings to the applicant, along with a copy of a flow chart, outlining the decision-making process for release of a cadet from training. The flow chart clearly indicated that several more levels of approval were required before a decision to terminate the applicant's training could be made. The applicant was invited to provide a rebuttal to the recommendation within the standard 24-hour time frame contemplated in the RCMP's policies (contained in the cadet training materials).

[7] Rather than doing so, the applicant submitted his resignation in writing early in the morning on January 28, 2011 and left the RCMP's training facility that day. Since that time, he has not attempted to withdraw his resignation.

[8] The applicant did not make the present application for judicial review until July 11, 2011.

[9] In his application, he alleges that his resignation was forced and is therefore equivalent to a decision to terminate his training. He also argues that the RCMP's decision to cease his training should be set aside as it was procedurally unfair and because the decision-makers were allegedly biased. He further asserts that the recommendation to cease his training was unreasonable and should be set aside for this reason as well. While the applicant originally sought reinstatement, the only remedy he now seeks is an order that the reports and recommendations made regarding his

behaviour with the female employee be removed from his file. In support of this remedial request, the applicant relies on *Gayler v Canada (Director Personnel Careers Administration Other Ranks, National Defence Headquarters)*, [1995] 1 FC 801, 88 FTR 241, in which a similar remedial order was issued (along with other remedies) in circumstances where the RCMP was found to have denied the applicant procedural fairness in not disclosing the basis for a termination recommendation.

[10] The RCMP, for its part, alleges that this application should be dismissed as untimely because the applicant has not provided a satisfactory explanation of why he delayed nearly six months before making his application for judicial review. In the alternative, the RCMP asserts that it made no reviewable decision within the meaning of section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7 [FCA] and accordingly that this application should be dismissed on a preliminary basis for this reason as well. In the further alternative, the RCMP argues that it did not commit any breach of procedural fairness in its treatment of the applicant, that there is no evidence of actual bias on the part of those involved in making the recommendation to terminate the applicant's training and no basis upon which to conclude that there was a reasonable apprehension of bias. Finally, the RCMP submits that if the termination recommendation is reviewable, it was reasonable and entirely appropriate given the behaviour of the applicant and the high standards the RCMP rightly requires of its members.

[11] Both parties concur that costs should follow the event in this matter and should be awarded in a lump sum fashion, but are not agreed as to quantum.

[12] The following issues therefore arise in this matter:

1. Should the time for making this application be extended;
2. Did the RCMP make a reviewable decision that may be the subject of a judicial review application;
3. Did the RCMP commit a breach of the applicant's rights to procedural fairness;
4. Were those involved in making the recommendation actually biased or is there a reasonable apprehension of bias on the part of the RCMP in this matter;
5. Was the recommendation to cease the applicant's training reasonable; and
6. What quantum of costs should be awarded?

[13] For the reasons set out below, I have determined that this application is untimely, that an extension of time is not warranted and accordingly that the application will be dismissed. I have also found that, even if this were not the case, the RCMP did not make any reviewable decision that could be the subject of a judicial review application, did not violate the applicant's rights to procedural fairness, that the claim of actual or apprehended bias is without merit and that the recommendation to cease the applicant's training was reasonable. Therefore, even if this application had been made in a timely fashion, it would nonetheless have been dismissed. Finally, in terms of costs, I have determined that a lump sum award in the amount of $2000.00 is appropriate. Each of these matters is more fully discussed below.

Should the time for making this application be extended?

[14] Subsection 18.1(2) of the FCA establishes a time limit of 30 days within which to bring an application for judicial review. The 30 days run from the date an applicant becomes aware of the

decision giving rise to the application. Subsection 18.1(2) of the FCA provides the Court discretion to extend the time period for making an application. The case law establishes that the criteria normally considered by the Court in the exercise of such discretion include: the presence of an intention to initiate a judicial review application formulated within the 30 days following the decision, which continues until the date the application is made; a reasonable explanation for the delay, which involves consideration both of the length and cause of the delay; the absence of prejudice to the respondent; and demonstration that the application has some merit (see e.g. *Canada (Attorney General) v Hennelly*, [1999] FCJ No 846 (CA); *Muckenheim v Canada (Employment Insurance Commission)*, 2008 FCA 249). The Federal Court of Appeal has commented that the short time frame to commence a judicial review application is in the public interest as it ensures the finality of administrative decisions (*Berhad v Canada*, 2005 FCA 267 at para 60, leave to appeal to SCC refused, [2005] SCCA No 457).

[15] Here, the events giving rise to this application occurred over the time period from January 25 to January 28, 2011. There is no evidence that the applicant formulated an intention to seek judicial review during the 30 days following January 28. Indeed, the first indication in the record that the applicant sought redress was a letter from his counsel dated March 9, 2011 which asked for information as to the internal appeal or review options open to the applicant (see Certified Copy of Cadet Training File and Staffing File of Johnathon Britton [Certified File] at p 261).

[16] With respect to the reasons for the delay, counsel for the applicant argued that the applicant did not commence this judicial review application within a timely fashion because he feared that doing so would lead to the initiation of criminal charges against him by the RCMP. Counsel thus

asserted that the applicant waited until the expiry of the six month limitation period for the laying of a charge for a summary conviction offence before bringing this application. Counsel argued that his client's alleged fear was reasonable given the fact that the RCMP read the applicant a caution before conducting his interview.

[17] There are two problems with this argument. First, there is precious little in the way of evidence from the applicant to support it. All he states in his affidavits before the Court is that he was "was and still [is] weary [*sic*] of Court action against the RCMP given that it was intimated that criminal charges might be pressed" and that he was confused about the legal avenues that might be open to him when he signed the letter of resignation (Applicant's Record at p 37). This falls well short of explaining why the applicant waited nearly six months to commence this application. Secondly, and perhaps more importantly, the proffered reason for the delay does not accord with the facts because the applicant did not actually wait until the six month limitation period expired before commencing this application. The applicant sent the text messages and made the phone call during which he made the comments to the employee that gave rise to her complaints on January 23, 2011, yet this application was instituted on July 11, 2011, which is less than six months from the events in question. It is thus apparent that the explanation offered by counsel for the delay in instituting this application does not bear weight.

[18] In the absence of a reasonable explanation for the delay, the length of the delay, which is significant when compared to the 30 day time limit provided in the FCA, and the absence of proof of any continuing intention to institute this application, there is no reason why the time limit for commencing this application should be extended. In addition, as is discussed below, this application

is without merit, and this represents a further reason why it is not appropriate to extend the time limit for bringing this application. Accordingly, in the exercise of my discretion under subsection 18.1(2) of the FCA, I have determined that I will not extend the time limit for commencing this application and that it will thus be dismissed. However, as previously mentioned, the arguments raised by the applicant on the merits are without merit, and, thus, the application would be have been dismissed even if it had been made in a timely fashion.

Did the RCMP make a reviewable decision that may be the subject of a judicial review application?

[19] Turning, then, to the other arguments made by the applicant, as noted, he first asserts that his resignation should be considered to be the equivalent of a decision by the RCMP to terminate his training because he alleges that his decision to resign was not voluntarily. In support of this contention he alleges that he was informed by representatives of the RCMP that there was a strong case against him, that resignation was an option, that his termination was imminent and that criminal charges were being considered. From these facts he argues that the RCMP's conduct should be considered to be the equivalent of a decision to terminate his training, which is reviewable under section 18.1 of the FCA.

[20] There is case law from this Court suggesting that a decision of the RCMP to cease the training of a cadet is a decision which may be the subject of a judicial review application under section 18.1 of the FCA (*Kuntz v Canada (Attorney General)*, 2006 FC 815, [2006] FCJ No 1038 [*Kuntz*]; see also *Linnell v Canada (Attorney General)* (1996), 119 FTR 265, [1996] FCJ No 1168). There is likewise authority in the employment context, which arguably might be applied to

the situation of RCMP cadet trainees, which indicates that forced resignations are the equivalent of terminations.

[21] The applicant argues in this regard that resignations tendered in response to material adverse changes unilaterally imposed by the employer are considered the equivalent to an employer-initiated termination in constructive dismissal cases (citing *Farber v Royal Trust Co*, [1997] 1 SCR 846) and argues that the constructive dismissal cases are analogous to his situation. I disagree. The present case is not analogous to a constructive dismissal because the RCMP did not impose changes to the applicant's terms and conditions of engagement as a trainee. More relevant is the line of authority which holds that a resignation is equivalent to a termination if it is tendered in circumstances where the employee is told he or she will be fired if the resignation is not tendered (see e.g. *Deters v Prince Albert Fraser House Inc*, [1991] SJ No 409, 93 Sask R 205 (Sask CA).

[22] The applicant's case, however, is distinguishable from those where employees are faced with the stark choice of being fired or resigning. Contrary to what the applicant asserts, there is no evidence to indicate that the RCMP told the applicant that criminal charges were being considered: rather, all that occurred is that he was read a caution before he was interviewed. This falls far short of a threat of prosecution. Nor was the applicant told that the termination of his training was imminent; rather, the interviewers merely told him that they would be recommending termination of his training. As already discussed, the flow chart the applicant was given detailing the termination process indicated that the recommendation was but the first step in a multi-step process, where the concurrence of several others would have been required to effect a termination. As counsel for the respondent correctly notes, the applicant was familiar with the processes applicable to terminations

of cadets' training as he had been through the process just a few weeks previously under his first Training Agreement. There, the decision-makers at the initial level had recommended termination but this recommendation was ultimately not followed as he was back-trooped (see Certified File at pp 128-138). The evidence also demonstrates that the applicant was informed of the details of the conduct with which he was reproached, was given adequate time to seek legal advice and was afforded the standard 24 hours within which to respond to the termination recommendation but chose not to do so.

[23] In the circumstances, the termination of the applicant's training was not a forgone conclusion at the point the applicant tendered his resignation as the concurrence of several others in the RCMP hierarchy was required before the termination could have been effected. The circumstances of this case are similar to those in *Thompson v Sawyer*, [1986] AWLD 727, 68 AR 311 (Ab QB), where a probationary officer with a poor employment record was given the option to resign or to have his dismissal recommended to superiors. The officer chose to resign and the resignation was found to be voluntary because, despite the alternative that had been presented, it was found to be free from duress, threats or coercion.

[24] Similarly, in *Head v Ontario Provincial Police Commissioner* (1981), 40 OR (2d) 84, 127 DLR (3d) 366 (Ont CA), aff'd [1985] 1 SCR 566, the Ontario Court of Appeal found the resignation of a police officer to be voluntary, notwithstanding that it came after an extended interrogation during which he was told that he was under arrest for gross indecency and would be suspended from the force. While recognizing that the police force was likely eager to have the officer resign, the Court of Appeal reasoned that "[b]efore the resignation in this case can be said

to be 'no resignation' the respondent must demonstrate that he was the subject of such duress or coercion that the resignation was truly not voluntary, that is, not the act of his own free will. The facts in this case fall far short of this measure." (at para 6).

[25] Here, when confronted with the recommendation and being advised of the option of resigning, after having been afforded some time to think the issue through, the applicant chose to resign. On these facts, and in keeping with the jurisprudence just cited, his resignation is not the equivalent of a termination but rather is voluntary. The situation is also somewhat analogous to that considered in *Bouchard v Canada (Minister of National Defence)* (1998), 18 Admin LR (3d) 7, 158 FTR 232 (TD), affirmed on appeal on different grounds at [1999] FCJ No 1807, relied on by the RCMP, where this Court held that a refusal to allow an employee to withdraw her resignation did not give rise to a reviewable decision within the meaning of section 18.1 of the FCA.

[26] Thus, because the applicant's decision to resign was made voluntarily, the RCMP made no decision which may be the subject of a judicial review application under section 18.1 of the FCA in this case.

Did the RCMP commit a breach of the applicant's rights to procedural fairness?

[27] Turning, next, to the applicant's allegations regarding procedural fairness, he claims that the RCMP violated its obligation to accord him "an average degree" of procedural fairness in:

1. Providing him no notice of the hearing that the applicant alleges occurred during his exit interview;
2. Not allowing him to have counsel present during the alleged hearing;

3. Not providing full disclosure of the evidence against him; and

4. Not providing him an opportunity to challenge the evidence that was used against him.

[28] None of these allegations has any foundation and as such they may be disposed of quickly.

[29] The applicant alleges that the exit interview was in fact a termination hearing, during which his fate was decided. This allegation, however, is not supported by the evidence. Sergeant Christopher Short conducted the exit interview on behalf of the RCMP, which was also attended by Corporal Curtis Davis, and both provided affidavits as to what occurred. Their affidavits confirm that the interview was not a hearing to determine whether or not the applicant would be terminated but, rather, merely an exit interview, conducted to assist the RCMP in identifying and addressing any outstanding issues that might flow from the applicant's resignation. While the applicant indicated in one of his affidavits that he was told at the end of this interview that he was being terminated, Sergeant Short and Corporal Davis indicated otherwise in their affidavits. None of the deponents was cross-examined.

[30] I prefer the version of events offered by Sergeant Short and Corporal Davis over that of the applicant on this point for three reasons. First, they, unlike the applicant, have no personal interest in the outcome of this application and are less likely to have been upset during the exit interview: their evidence is therefore more likely to be reliable. Second, each of their affidavits corroborates the other, whereas the applicant's assertion is uncorroborated. Third, and perhaps most importantly, the objective documentary evidence supports Sergeant Short and Corporal Davis' version of events. In

this regard, the applicant signed a resignation letter prior to the interview (contained in the Respondent's Record at Tab 1K) and did not withdraw his resignation. The fact of having tendered a resignation letter is inconsistent with a hearing of the type the applicant alleges occurred. In addition, the typewritten notes of the interview, which are appended as Exhibit B to Sergeant Short's affidavit, corroborate his and Corporal Davis' version of events. The notes document that the interview in fact was an exit interview, during which the applicant's reasons for resignation were probed. The notes were later signed off on by more senior members of the RCMP, and their comments likewise demonstrate that the meeting was an exit interview and not a hearing. I therefore find that no hearing was conducted by the RCMP.

[31] Moreover, there is no evidence whatsoever that the applicant requested the presence of counsel at the exit interview. Thus, the first two of the alleged breaches of procedural fairness have absolutely no merit.

[32] The same is true of the allegations regarding lack of disclosure. The evidence demonstrates that the applicant was provided with a detailed summary of the allegations made against him and was provided with 24 hours to provide a rebuttal (see Applicant's Record at Tab 2A). While the timeframe for responding to the termination recommendation might seem short, the evidence establishes that this is the standard reply timeframe contemplated in the RCMP's training materials, which provide that "the cadet may submit the written response (rebuttal) by 12:00 noon on the day following the cadet being served a memorandum recommending termination of their Cadet Training Agreement" (Respondent's Record at Tab 2D). Indeed, the applicant complied with this short timeframe following the previous recommendation for his termination by submitting a rebuttal letter

within the 24 hour period (see Certified File at pp 126-127). Moreover, at no time did the applicant seek an extension of time to reply to the termination recommendation.

[33] The evidence therefore demonstrates that the RCMP made appropriate disclosure and the applicant was afforded an adequate opportunity to respond to the case against him. The applicant's allegations regarding lack of disclosure and lack of opportunity to challenge the evidence against him are accordingly without foundation.

[34] Thus, for these reasons, there is no merit to the claim that the RCMP denied the applicant procedural fairness.

Were those involved in making the recommendation actually biased or is there a reasonable apprehension of bias on the part of the RCMP in this matter?

[35] The applicant next asserts that there was both actual and apprehended bias, which entitles him to the relief sought. In terms of actual bias, he alleges that Corporal Folk had prejudged his situation because she was aware of his having been "back-trooped" (and of another "Needs Improvement" rating he had received during his second round of training) and because she indicated at the end of her interview of him that she would be recommending that his training be terminated. In terms of apprehended bias, the applicant alleges that there is a reasonable apprehension of same because the complainant employee was the niece of the then RCMP Commissioner. Corporals Folk and Davis and Sergeant Short have all stated in their affidavits, however, that they were unaware of this family connection (if it indeed exists). The only proof of the alleged familial relationship is the applicant's bald assertion to that effect, made in one of his affidavits. These allegations fall woefully short of establishing bias.

[36] Indeed, given the presumption of impartiality applicable to administrative decision-makers (*Zündel v Citron*, [2000] 4 FC 225, [2000] FCJ No 679 at paras 36-37 (CA); *Beno v Canada (Somalia Inquiry Commission)*, [1997] 2 FC 527, [1997] FCJ No 509 at para 29 (CA)), a high standard of proof applies to an assertion of bias (*R v S (RD)*, [1997] 3 SCR 484 [*R v S*] at para 113). The test to be applied when assessing whether there is a reasonable apprehension of bias is well-established and involves determining whether an informed person would conclude that it is more likely than not that the decision-maker would not decide fairly, either consciously or unconsciously (*Committee for Justice & Liberty v Canada (National Energy Board)* (1976), [1978] 1 SCR 369; and *R v S* at para 111). It is not necessary to establish that the decision-maker was actually biased, but rather simply that a reasonable and informed person, who had knowledge of the circumstances and viewed the situation realistically and practically, would conclude that the conduct of the decision-maker gives rise to a reasonable apprehension of bias (*R v* S at para 111).

[37] In this case, there is simply no basis for believing that the officers prejudged the applicant's case. Given this lack of evidence, the claim of bias amounts to nothing more than a sensational allegation. The recommendations made were completely predictable on the facts, which were largely undisputed by the applicant, and in no way give rise to the appearance that the decision-makers would be unable or unwilling to make fair recommendations with respect to the applicant's case.

Was the recommendation to cease the applicant's training reasonable?

[38] Turning, finally, to the reasonableness of the recommendation to terminate the applicant's training, the applicant asserts that the recommendation failed to take adequate account of the

positive feedback received from some of the applicant's trainers and thus is unreasonable. There is no merit in this submission because the evidence shows that this feedback was considered by Corporal Folk before she made her termination recommendation. Moreover, in light of the applicant's conduct, there was more than ample basis for her recommendation.

[39] In this regard, this Court should afford considerable leeway to the RCMP in its assessments of the suitability of candidates (as was noted by Justice Shore of this Court in *Kuntz*, cited above at para 20, at paras 38-39). Indeed, RCMP officers are often placed in highly stressful situations and the stability of candidates is an appropriate basis for screening. Here, the applicant displayed difficulty controlling his emotions and engaged in conduct that was disrespectful of women. The offensive comments he made occurred in the context of a very short dating relationship. The applicant's behavior, in my view, afforded the RCMP ample basis for concern as to the applicant's suitability as an officer and thus, if the RCMP made any decision in this matter, it was a reasonable one.

Costs

[40] It is well-established that, when appropriate, costs may be fixed by way of lump sum (*Federal Courts Rules,* Rule 400(4); *Dimplex North America Ltd v CFM Corp*, 2006 FC 1403 at para 3). Indeed, counsel for both parties concur as to the propriety of a lump sum award which should follow the event but differ as to quantum. The applicant suggests an all-inclusive amount of $1000.00 but the respondent takes no position on quantum. In light of the complexity of the case, the number of issues raised by the applicant, the length of the hearing and the amounts I have awarded in somewhat similar cases (see e.g. *Timson v Canada (Treasury Board - Correctional*

Service), 2012 FC 719 and *Slaeman v Canada (Attorney General)*, 2012 FC 641), I have determined that the appropriate figure is $2000.00 and accordingly fix costs, inclusive of fees and disbursements, in this amount.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed: and

2. The applicant shall pay costs to the respondent in the lump sum amount of $2000.00.

"Mary J.L. Gleason"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1158-11
STYLE OF CAUSE:	*Johnathon Britton v Royal Canadian Mounted Police*
PLACE OF HEARING:	Regina, Saskatchewan
DATE OF HEARING:	October 11, 2012
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