Federal Court  Cour fédérale

**Date: 20210513**

**Docket: T-600-20**

**Citation: 2021 FC 443**

**Ottawa, Ontario, May 13, 2021**

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

**Docket: T-600-20**

**BETWEEN:**

**SCOTT MCGILLIVRAY**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

## JUDGMENT AND REASONS

## I. Introduction

[1] This is an application for judicial review of the March 3, 2020 decision of a Conduct Adjudicator [the "Conduct Adjudicator Decision"], appointed to hear an appeal under sections 45.11 and 45.16 of the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10 [the "*RCMP Act*"]. The Conduct Adjudicator dismissed the Applicant's appeal of a Decision of the Conduct

Authority [the "Conduct Authority Decision"], which found that the Applicant had failed to comply with a lawful order to submit leave.

## II. Background

[2] The Applicant, Corporal Scott McGillivray, became a member of the Royal Canadian Mounted Police [RCMP] in 2009. He is an experienced police officer. Prior to joining the RCMP as a regular member, he was part of the RCMP's First Nations Youth Development Program for a brief period in 1993 and later worked for a municipal police force. As of 2014, the Applicant has held the rank of Corporal with the RCMP.

[3] Beginning in 2014, the Applicant was dealing with a number of personal and professional issues, including the health of his parents and workplace issues within the Burnaby Detachment of the RCMP. This led him to seek the care of health professionals, including from a psychiatrist.

[4] In light of these difficulties, the Applicant underwent several detachment transfers. He was posted to the Burnaby Detachment of the RCMP in May of 2016, but was later restricted from working at this detachment, with the approval of the RCMP Health Services. In December of 2016, the Applicant was cleared to return to full duty, while remaining on restriction from the Burnaby Detachment.

[5] The Applicant sought a compassionate transfer to the Okanagan area of British Columbia due to the failing health of his father. He was posted to the Surrey Detachment while awaiting this transfer and pending the sale of his home. The Applicant's compassionate transfer to

Kelowna was approved in February of 2017 and he was permanently transferred on June 30, 2017.

[6] The Applicant did not show up to work at the Surrey Detachment, although he completed some training and a court attendance in March of 2017. The Applicant believed that he was absent from work for medical reasons during this time.

[7] Between February and July of 2017, several pertinent communications occurred between the Applicant and the RCMP related to his return to work and leave entitlements. In brief, some of these communications included the following:

i. On February 23, 2017, Staff Sergeant Marina Wilks emailed the Applicant a reminder that he is no longer considered "ODS";

ii. On March 7, 2017, Corporal Tracy Dubnyk and Staff Sergeant Curtis Burks spoke to the Applicant about his non-attendance at the Surrey Detachment, which was later clarified by Staff Sergeant Wilks. They further informed the Applicant of his compassionate leave entitlements;

iii. Staff Sergeant Wilks met with the Applicant on or about March 21, 2017 and advised him that he was accountable for his leave hours to the Burnaby Detachment; and

iv. On May 3, 2017, Inspector Janice Mann instructed the Applicant to contact Corporal Dubnyk to account for any leave outstanding, including compassionate and annual leave.

[8] On July 18, 2017, the Applicant was issued a letter from Chief Superintendent Stephan Drolet, the Officer in Charge of the Burnaby Detachment [the "Order"]. It stated, in part:

> From February 27, 2017 to June 30, 2017, you are entitled to 312 hours of leave as per above. During this same time period and based on a 40 hour work week, you were paid for 688 hours excluding stat holiday entitlement. You were advised on numerous occasions that any absence from work outside of entitlements, would require a leave pass. To date you have not submitted compassionate or annual leave despite access to RCMP systems such as TEAM and HRMIS. Based on our calculations, you <u>are required</u> submit 376 hours of annual leave for approval as well as the compassionate leave. **Please ensure you address this outstanding matter no later than September 1, 2017.**
>
> [Emphasis in original]

[9] On August 29, 2017, the Applicant's psychiatrist sent a letter to the RCMP Health Services, stating that as of February 15, 2017, the Applicant "was not suitable for any kind of duties be it administrative or operational". Further, the Applicant sent an e-mail to Chief Superintendent Drolet, on August 31, 2017 [the "Response"], indicating in part:

> In regards to your letter regarding time owed there does seem to be some confusion. I have been in touch with my Doctors and they have assured me they have contacted Health Services to clarify the issue. I will continue to liaise with them and make sure all is rectified.

[10] Correspondence respecting the leave issue continued between Inspector Mann and the Applicant. Inspector Mann agreed to delay the deduction of hours from his leave bank, while the

RCMP Health Services continued to discuss the matter with the Applicant's psychiatrist. On October 12, 2017, Inspector Mann wrote:

> I hope what your doctors provide to Health Services is what they are looking for to confirm medical leave for the time period in question. In the interim I will ask to Ottawa to hold off taking any action until I hear from Health Services.

[11] Ultimately, 376 hours were deducted from the Applicant's annual leave bank in August of 2018. The Applicant has grieved the deduction, the outcome of which is still pending.

[12] On May 4, 2018, the Applicant was issued a Notice of Conduct Meeting in respect of two *RCMP Code of Conduct* allegations, under the *Royal Canadian Mounted Police Regulations, 2014*, SOR/2014-281 [the "*RCMP Code of Conduct*"] (the Notice of Conduct Meeting was incorrectly dated March 4, 2018). The first allegation was that the Applicant had failed to attend the Surrey Detachment, in contravention of section 4.1 of the *RCMP Code of Conduct*. The second allegation was that the Applicant refused to comply with a lawful order or direction by a member superior in rank, contrary to section 3.3 of the *RCMP Code of Conduct*.

[13] The Conduct Authority Decision, dated June 5, 2018 found that only the second allegation had been established:

> In his letter, Chief Superintendent Drolet was clear in his expectations that you were to submit leave requests for time off without medical authorization, in the amount of 376 hours by September 1, 2017. While you acknowledged receipt of the email and replied to Chief Superintendent Drolet prior to the September 1, 2017 diary date, it was for the purpose of disagreeing with the order, given your medical status. The order/direction was lawful, in writing and from a member superior in rank and you failed to comply with this lawful order. Your suggestion that medical leave was authorized was not supported by information received from

> RCMP Health Services. The RCMP Health Services Officer had not authorized medical leave between February 25, 2017 and June 30, 2017, the period of time where you ought to have been reporting to Surrey Detachment.

[14] A written reprimand was imposed as the conduct measure. In determining the appropriate conduct measure, the Conduct Authority considered aggravating and mitigating factors, as well as the public perception / organizational impact. The aggravating factors included: a failure to accept responsibility, a lack of remorse, the failure to abide by a senior officer appeared to be contemptuous and deliberate in nature, and the Applicant was held to a high standard as it relates to following the direction of an officer at a superior rank.

[15] The Applicant appealed the Conduct Authority Decision, on June 23, 2018, which was upheld by the Conduct Adjudicator, in a Decision dated March 3, 2020.

[16] The Applicant seeks an Order setting aside the Conduct Adjudicator Decision and directing that the Applicant's appeal to the Conduct Adjudicator be allowed. In the alternative, the Applicant seeks an Order that the appeal be remitted to a different or, alternatively, the same Conduct Adjudicator for redetermination.

## III. Decision Under Review

[17] The Conduct Adjudicator upheld the Conduct Authority Decision and dismissed the appeal. She outlined the background facts and procedure and further noted that RCMP members have voluntarily agreed to abide by a higher standard of conduct, compared to the ordinary

citizen. However, this standard does not call for perfection. She further set out her obligations under subsection 33(1) of the *Commissioner's Standing Orders (Grievances and Appeals)*, SOR/2014-289 [*Commissioner's Standing Orders*], and discussed the administrative appellate standard of review she owed in relation to the Conduct Authority Decision.

[18] The Conduct Adjudicator found at paragraphs 36 and 37:

> [36] I find the Appellant's [Applicant] rationale to be flawed and based on assumptions. First off, Chief Superintendent Drolet's three-page letter constituted an official direction for the Appellant to act by a certain date. The author was a member superior in rank to the Appellant. As Chief Superintendent Drolet had the requisite authority to act, and absent any evidence provided by the Appellant to the contrary, the direction is presumed to be lawful. Although it did not contain the words "order" or "direction", it was clear that the Appellant was required to act, and not **requested** to act, thus indicating it was not optional. The Appellant's failure to adequately respond to the direction, **regardless of the subsequent actions of Inspector Mann**, constitutes the gravamen (i.e., the constitutive element) of the allegation of refusing to obey a lawful order or direction. The Appellant's last-minute August 31, 2017, email to the letter was deflective in its meaning and clearly was a signal that he had no intention of obeying the intent or the letter of the direction. The only optional "request" I noted was the final sentence indicating that, should the Appellant have any questions, he could contact the Member Services Non-Commissioned Officer of Burnaby Detachment.
>
> [37] Consequently, I find that Chief Superintendent Drolet's letter of July 18, 2017, constituted a lawful direction to act, given by a member superior in rank to the Appellant who refused to obey said direction by the date indicated.
>
> [Emphasis in original]

## IV. Issues

[19] The issue on this application is whether the Conduct Adjudicator Decision is reasonable.

## V. Standard of Review

[20] The parties agree that the standard of review engaged in this case is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]).

## VI. Relevant Provisions

[21] The relevant provisions include:

**Subsection 33(1) of the *Commissioner's Standing Orders*:**

| **Decision of Commissioner** | **Décision du commissaire** |
|---|---|
| **33 (1)** The Commissioner, when rendering a decision as to the disposition of the appeal, must consider whether the decision that is the subject of the appeal contravenes the principles of procedural fairness, is based on an error of law or is clearly unreasonable. | **33 (1)** Lorsqu'il rend une décision sur la disposition d'un appel, le commissaire évalue si la décision qui fait l'objet de l'appel contrevient aux principes d'équité procédurale, est entachée d'une erreur de droit ou est manifestement déraisonnable. |

**Section 3.3 of the *RCMP Code of Conduct:***

| | |
|---|---|
| **3.3** Members give and carry out lawful orders and direction. | **3.3** Les membres donnent et exécutent des ordres et des directives légitimes. |

## VII. Analysis

### A. *Reasonableness Review*

[22] It is the Respondent's position that a clear directive was set out in the Order – to submit leave. The Conduct Adjudicator's reasons for upholding the Conduct Authority Decision and finding that the Applicant failed to adequately respond to the Order were reasonable. The Respondent asserts that the Applicant's primary argument suggests that disagreement with the Order is sufficient compliance with the Order. The Respondent submits that this position undermines a central obligation that falls upon members of the RCMP – that they comply with the chain of command.

[23] The Applicant submits that the Conduct Adjudicator unreasonably concluded that he disobeyed the Order: (1) the wording of the Order was not properly considered in that the Applicant did *address* the outstanding leave balance by way of his Response to Inspector Mann; (2) the subsequent dialogue with Inspector Mann was unreasonably found to be irrelevant; and (3) the Conduct Adjudicator unreasonably considered the element of intent. The Applicant further asserts that the Conduct Adjudicator unreasonably criticized the Response as last minute.

[24] The Conduct Adjudicator Decision, as a whole, must be transparent, intelligible and justified (*Vavilov*, above at para 81). A reasonable decision is one that is based on "an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85).

B. *The Standard of Review Applied by the Conduct Adjudicator*

[25] As a preliminary matter, the parties agree that one of the questions before the Conduct Adjudicator was whether the Conduct Authority Decision was "clearly unreasonable", pursuant to subsection 33(1) of the *Commissioner's Standing Orders*, above:

| **Decision of Commissioner** | **Décision du commissaire** |
|---|---|
| **33(1)** The Commissioner, when rendering a decision as to the disposition of the appeal, must consider whether the decision that is the subject of the appeal contravenes the principles of procedural fairness, is based on an error of law or is clearly unreasonable. | **33(1)** Lorsqu'il rend une décision sur la disposition d'un appel, le commissaire évalue si la décision qui fait l'objet de l'appel contrevient aux principes d'équité procédurale, est entachée d'une erreur de droit ou est manifestement déraisonnable. |

[26] The Conduct Adjudicator properly interpreted that "clearly unreasonable" is also understood to mean "patently unreasonable". This interpretation was affirmed by the Federal Court of Appeal, following the parties filing of their written submissions, in *Smith v Canada (Attorney General)*, 2021 FCA 73 at paragraph 56 [*Smith*] (see also *Kalkat v Canada (Attorney General)*, 2017 FC 794 at para 62).

[27] This does not change the task before me, where this Court must apply the reasonableness standard in its review of the Conduct Adjudicator Decision (*Smith*, above at para 27). As stated by the Respondent, the issue for judicial review is whether the Conduct Adjudicator Decision was reasonable, based on the record and arguments before him and in light of the patently unreasonable standard with which he was to review the Conduct Authority Decision.

C. *The Reasonableness of the Conduct Adjudicator Decision*

[28] The grounds raised by the Applicant do not render the Conduct Adjudicator Decision unreasonable in this case. The Applicant's arguments ask this Court to reinterpret the meaning of the Order, by emphasizing specific words and re-weighing the evidence that was before the Conduct Adjudicator. The justification, transparency or intelligibility of the Conduct Adjudicator Decision has not been undermined on this basis.

[29] The Applicant does not take issue with the authority of Chief Superintendent Drolet to issue the Order or with the lawfulness of the Order itself. The Conduct Adjudicator noted that "[m]embers of the RCMP, by the terms of their engagement, have voluntarily agreed to abide by a higher standard of conduct than that of the ordinary citizen" (*The Queen and Archer v White*, [1965] SCR 154 at 158). Section 3.3 of the *RCMP Conduct of Conduct* provides that: "[m]embers give and carry out lawful orders and direction".

[30] The Applicant focuses on the specific word *address* when arguing that the Order did not require him to actually submit leave requests by the date in question. He allegedly *addressed* the Order by sending an email Response to Chief Superintendent Drolet on August 31, 2017, which indicated he would continue to work on the leave issue. The Conduct Adjudicator was reasonable in finding that the Order constituted a requirement to submit annual and compassionate leave. Such an interpretation is consistent with reading the Order in its entirety and within context:

> Based on our calculations, you <u>are required</u> submit 376 hours of annual leave for approval as well as the compassionate leave.

> **Please ensure you address this outstanding matter no later than September 1, 2017**.
>
> [Emphasis in original]

[31] The Applicant further asserts that the Conduct Adjudicator erred by finding that the subsequent actions of Inspector Mann were irrelevant. He submits that insubordination requires an intent to undermine or challenge management authority, which was not present in this case. The Applicant followed-up and responded promptly to Inspector Mann's correspondence, demonstrating a willingness to accept the authority of the RCMP.

[32] I do not go as far as to suggest that the law of insubordination is applicable in this case. The Applicant asks this Court to rely on labour arbitration decisions and secondary sources, which allegedly support a finding that the Conduct Adjudicator's consideration of the Applicant's intention was unreasonable.

[33] The Order in this case did not invite further action. In such a context, where RCMP members are held to a higher standard of conduct, and in light of section 3.3 of the *Code of Conduct*, where RCMP members are to carry out lawful orders, this is not an appropriate case to find that a clear Order constitutes an invitation for further discussion. The Conduct Adjudicator's determination is not unreasonable on this basis.

[34] This said, I take issue with the Conduct Adjudicator's characterization of the Applicant's Response. The Conduct Adjudicator found that the Applicant refused to obey a lawful order or direction because he failed "to adequately respond". In assessing the adequacy of the Applicant's

Response, the Conduct Adjudicator notes that the Applicant's August 31, 2017 email to Inspector Mann was last minute, deflective and a signal that the Applicant had no intention of obeying the intent or the letter of the direction.

[35] This characterization cannot be upheld on the facts. The Applicant's Response was made before the September 1, 2017 timeframe. It signaled the Applicant's intention to clarify confusion related to his leave entitlements and an approach to address the matter. Notably, the Applicant responded to Inspector Mann in a manner that she found adequate, to the extent that she informed the Applicant that she would hold off on taking any further action. These facts are inconsistent with a finding that the Applicant had no intention of obeying the Order and was deflective.

[36] Nevertheless, while I have sympathy for the Applicant's extenuating personal circumstances, and am not in agreement with the critical nature of the Adjudicator's characterization of the Applicant's Response, these facts do not render the Conduct Adjudicator Decision unreasonable.

[37] In the context of this case, it was not unreasonable for the Conduct Adjudicator to find that the Applicant did not obey the Order by September 1, 2017.

## VIII. Conclusion

[38] The Decision of the Conduct Adjudicator is reasonable. This application is dismissed.

## IX. Costs

[39] Costs are awarded to the Respondent in the amount of $2,500.

**JUDGMENT in T-600-20**

**THIS COURT'S JUDGMENT is that:**

1. This application is dismissed; and

2. Costs are awarded to the Respondent in the amount of $2,500.

"Michael D. Manson"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-600-20 |
| **STYLE OF CAUSE:** | SCOTT MCGILLIVRAY v ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | HELD BY VIDEOCONFERENCE |
| **DATE OF HEARING:** | MAY 3, 2021 |
| **JUDGMENT AND REASONS:** | MANSON J. |
| **DATED:** | MAY 13, 2021 |

**APPEARANCES:**

| | |
|---|---|
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| Robert Gibson | FOR THE RESPONDENT |

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