

Date: 20070926

Docket: A-450-06

Citation: 2007 FCA 305

**CORAM: DESJARDINS J.A.
DÉCARY J.A.
RYER J.A.**

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

**CONSTABLE H.S. GILL,
Regimental No. 40635**

Respondent

Heard at Vancouver, British Columbia, on September 17, 2007.

Judgment delivered at Ottawa, Ontario, on September 26, 2007.

REASONS FOR JUDGMENT BY:

DÉCARY J.A.

CONCURRED IN BY:

**DESJARDINS J.A.
RYER J.A.**

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REASONS FOR JUDGMENT

DÉCARY J.A.

[1] This is an appeal from a decision of O'Keefe J. (2006 FC 1106) allowing an application for judicial review of a decision of the Commissioner of the Royal Canadian Mounted Police (the Commissioner). In his decision, the Commissioner ordered that the respondent be dismissed from the RCMP.

[2] The facts have been carefully set out by O'Keefe J. and I need not repeat them here.

[3] The *Royal Canadian Mounted Police Act* (R.S.C. 1985, c. R-10) (the Act) establishes in much detail a mechanism whereby the conduct of a member of the RCMP is assessed in relation to an alleged contravention of the Code of Conduct set out in the *RCMP Regulations* (1988, SOR/88-361).

[4] A hearing is to take place before a three-member panel (the Adjudication Board) (ss. 43(2)). The member alleged to have contravened the Code of Conduct receives a notice in writing of the hearing together with, *inter alia*, a copy of any written or documentary evidence that is intended to be produced at the hearing, a copy of any statement obtained from a forthcoming witness and also a list of exhibits (ss. 43(4)). The notice of hearing shall contain “a separate statement of each alleged contravention” and “a statement of the particulars of the act or omission constituting each alleged contravention” (ss. 43(5)(a) and (b)). A statement of particulars “shall contain sufficient details, including, where practicable, the place and date of each contravention . . . to enable the member . . . to determine each . . . contravention so that the member may prepare a defence and direct it to the occasion and events indicated in the notice” (ss. 43(6)). Subsection 45.11(1) allows an amendment to be made to correct “a technical defect in the notice of the hearing under subsection 43(4) that does not affect the substance of the notice”. No amendment is allowed with respect to the requirements of subsection 43(5) and 43(6).

[5] The decision of the Adjudication Board is recorded in writing and shall include a statement of the findings on questions of fact, reasons for decisions and a statement of the sanctions (ss. 45.11(2)).

[6] The decision of the Adjudication Board may be appealed to the Commissioner (ss. 45.14(1)), but before the Commissioner considers an appeal he shall refer the case to the RCMP External Review Committee (the Review Committee) established pursuant to section 25 of the Act and comprised of persons who are not members of the RCMP (ss. 45.15(1)).

[7] The Review Committee is provided with the record of the hearing (ss. 45.15(4)). It may decide to institute a hearing (ss. 34(4) and (45(5))) and on completion of a hearing, it prepares a report in writing setting out such findings and recommendations as it sees fit (ss. 35(13) and 45(5)). The report is sent to the other parties and to the Commissioner.

[8] The Commissioner then considers the appeal. He does so on the basis of the record before the Adjudication Board, the statement of appeal and any written submissions made to him, and “he shall take into consideration the findings or recommendations set out in the report, if any”, of the Review Committee (ss. 45.16(1)).

[9] The Commissioner renders a decision in writing, including reasons for the decision (ss. 45.16(5)). However, “the Commissioner is not bound to act on any findings or recommendations set out in a report” prepared by the Review Committee, but if he “does not so act, [he] shall include in the decision on the appeal the reasons for not so acting”(ss. 45.16(6)).

[10] For all practical purposes, therefore, the appeal before the Commissioner is with respect essentially to the decision and record of the Adjudication Board. The Commissioner is not bound by

the report of the Review Committee, but if he does not agree with it, he must say why in his reasons for decision.

[11] For the purpose of this appeal, the Court is solely concerned with three of the allegations made against the respondent, *i.e.* allegations nos. 2, 3 and 4, which read as follow:

Allegation #2:

That on or about March 25, 2000, at or near the city of Pitt Meadows, in the Province of British Columbia, you conducted yourself in a disgraceful manner that brings discredit on the force, contrary to section 39(1) of the *Royal Canadian Mounted Police Regulations, 1988*.

FURTHER TAKE NOTICE THAT the particulars of the act or omission constituting, singularly or collectively, the said alleged contravention of the *Code of Conduct* are as follows:

Particulars of Allegation #2

1. At all material times, Cst. GILL was a member of the Royal Canadian Mounted Police ("RCMP"), posted in "E" Division, in the Province of British Columbia.
2. On or about March 25, 2000, while on duty in Pitt Meadows, B.C., following the arrest of Ryan Sherbuck, Cst. GILL was discourteous, disrespectful and/or unprofessional towards him, including making unnecessary remarks to taunt Mr. Sherbuck or to cause him to feel threatened.

Allegation #3:

That on or about May 4, 2000, at or near the city of Pitt Meadows, in the Province of British Columbia, you conducted yourself in a disgraceful manner that brings discredit on the Force, contrary to section 39(1) of the *Royal Canadian Mounted Police Regulations, 1988*.

FURTHER TAKE NOTICE THAT the particulars of the act or omission constituting, singularly or collectively, the said alleged contravention of the *Code of Conduct* are as follows:

Particulars of Allegation #3

1. At all material times, Cst. GILL was a member of the Royal Canadian Mounted Police ("RCMP"), posted in "E" Division, in the Province of British Columbia.
2. On or about May 4, 2000, Cst. GILL, during the course of a bar check of Rooster's Pub in Pitt Meadows, B.C., Cst. GILL arrested Jeremy Ferraro without reasonable grounds for doing so, thereby exceeding his authority.
3. In effecting the arrest, Cst. GILL used force excessive in the circumstances.

Allegation #4

That on or about May 21, 2000, at or near the city of Maple Ridge, in the Province of British Columbia, you conducted yourself in a disgraceful manner that brings discredit on the Force, contrary to section 39(1) of the *Royal Canadian Mounted Police Regulations, 1988*.

FURTHER TAKE NOTICE THAT the particulars of the act or omission constituting, singularly or collectively, the said alleged contravention of the *Code of Conduct* are as follows:

Particulars of Allegation #4

1. At all material times, Cst: GILL was a member of the Royal Canadian Mounted Police ("RCMP"), posted in "E" Division, in the Province of British Columbia.
2. On or about May 21, 2000, Cst. GILL effected an arrest upon Randy Strange.
3. After having Mr. Strange in his custody, restrained by handcuffs and secured in the rear of his police vehicle, Cst. GILL assaulted Mr. Strange, including by punching him in the face.

[12] With respect to allegations 2 and 4, the Adjudication Board found that they were established and warranted, in the case of allegation no. 2, the forfeiture of pay for ten days and a reprimand and, in the case of allegation no. 4, a direction to resign from the Force within fourteen days, failing which he would be dismissed from the Force. (These sanctions are both contemplated by ss. 45.12(3) of the Act). The Review Committee was of the view that the acts of misconduct found by the Adjudication Board were outside the ambit of the particulars contained in the notice of hearing; allegations 2 and 4, therefore, had not been established. The Commissioner decided that the statement of particulars met the requirements of the Act and he endorsed the sanctions imposed by the Adjudication Board.

[13] With respect to allegation 3, the Adjudication Board found that the two components of the allegation, namely, arrest without reasonable grounds and excessive use of force, were established; a sanction of dismissal from the Force was imposed. The Review Committee found that even though only one component was established, *i.e.* arrest without reasonable grounds, “the more critical issue was whether the appellant had reasonable grounds to make the arrest” and it ended up finding that allegation no. 3 was established (A.B. vol. 2, p. 646). The Review Committee then went on to examine the sanction of dismissal imposed by the Adjudication Board in light of its own finding that allegations nos. 2 and 4 had not been established, and it found it to be excessive. It would have imposed, instead, a forfeiture of pay for ten days and a reprimand. The Commissioner, while agreeing with the Review Committee that allegation 3 was established, decided, in view of Mr. Gill’s conduct “which shows a pattern of anger and violence that is simply unacceptable” (A.B. vol. 2, p. 669) that dismissal from the Force was a proper sanction.

[14] In the Federal Court, O’Keefe J. was of the view, at para. 57, that “the issue of whether the particulars contained sufficient details so as to comply with subsection 43(6) of the *RCMP Act* is a question of mixed fact and law”, attracting a reasonableness *simpliciter* standard of review. He was also of the view, at para. 58, that findings of disgraceful conduct and findings on the sanctions to be imposed are primarily fact-driven and discretionary determinations attracting the standard of patent unreasonableness. I agree, and so did counsel at the hearing.

[15] The Federal Court Judge having applied the proper standards, the standard which this Court is in turn to apply to the impugned decision is that of “palpable and overriding error” (see *Shneidman v. Canada (Attorney General)*, 2007 FCA 192 at para. 17, per Sexton J.A. There is no suggestion here that the Judge made an extricable error of law in reviewing the sufficiency of the particulars.

[16] I shall deal, first, with allegation no. 3. The Judge’s role was to determine whether the findings of the Commissioner were patently unreasonable. Despite the use of words that might leave the impression that the Judge proceeded, rather, to a re-weighing of the evidence, I am satisfied that he applied the proper test. His conclusion, in effect, is that there was simply no evidence before the Adjudication Board that could support the findings of the Commissioner. The Judge made no palpable or overriding error in reaching that conclusion.

[17] Turning now to allegations 2 and 4, it is important to note at the outset that the requirements of the Act with respect to the contents of the notice of hearing are particularly onerous. In addition

to the “where practicable, place and date” of each contravention, the member should be put in a position to “direct (his) defence to the occasion and events indicated in the notice” (ss. 43(6)). The fact that, under subsection 45.11(1), amendments are only allowed with respect to “technical defects” (*i.e.* related to the requirements of subsection 43(4)) that do not “affect the substance of the notice”), illustrates the extent of the care with which the RCMP is expected to draft the terms of the particulars that are alleged.

[18] This is not to say that the particulars should be read microscopically or in an unduly narrow manner. They need not be drafted in minute details or in a manner that meets all the standards imposed by the Courts with respect to criminal proceedings. The member is served, after all, with a copy of the evidence. The terms used must attempt to describe as accurately as practicable the substance of the allegation. Where a statement of particulars sets out in deliberate terms the boundaries of the allegation insofar as place, date, occasion or events are concerned, the member should expect the Adjudication Board and, eventually, the Commissioner, not to base its ultimate decision on findings that go beyond these boundaries. In the end, the sufficiency of the notice will be assessed according to the circumstances of a given case.

[19] In the case at bar, the RCMP chose to restrict the occasion and the events of the contravention in a way that gave the Adjudication Board little room to manoeuvre. A comparison of the terms used in allegations no. 2, 3 and 4 is revealing. Allegation no. 2 refers to misconduct occurring “following the event”; allegation no. 3 refers to an arrest without reasonable grounds “during the course of a bar check” and to the use of “force excessive in the circumstances”;

allegation no. 4 refers to an assault occurring “after having Mr. Strange in his custody, restrained by handcuffs and secured in the rear of (the) police vehicle”.

[20] It so happens that with respect to allegation no. 2, the Adjudication Board found the respondent guilty of misconduct prior to the event and of excessive use of force “in the event”. The latter misconduct was not set out in the particulars of allegation no. 2, but is distinctive enough to have been set out as a specific ground in allegation no. 3.

[21] The same may be said with respect to allegation no. 4, where the particulars were minutely specified and where the Adjudication Board, despite having accepted the respondent’s version of events, nevertheless, went on to find him guilty of misconduct not alleged in the particulars.

[22] The Review Committee was of the view that the Adjudication Board had “committed an error in law by, in effect, substituting its own allegations of misconduct for the allegations that had been presented by the [R.C.M.P.] and which it had rejected” (A.B. col. 2, p. 643).

[23] The Commissioner decided not to act on the Review Committee report – which it is his right to do provided he explains his reasons for doing so – and the Federal Court Judge was ultimately of the view that the reasons given by the Commissioner did not address the concerns of the Review Committee.

[24] The Review Committee was saying, essentially, that the Adjudication Board could not on the one hand find that the particulars as drafted had not been established and on the other hand find the member guilty with respect to particulars which were not set out in the allegations.

[25] The Commissioner in his reasons skirted that issue, which is a fundamental one. He concluded in a very general way that “the statements of the particulars in the present case met the requirements of the Act as [they] contained the place and date of each allegation. Furthermore, [they were] specific enough to enable [the member] to prepare a proper defence” (A.B. vol. 2, p. 668). He focused on the “conduct” of the member and not on the particulars of that conduct, which is precisely where the problem as identified by the Review Committee laid.

[26] In the circumstances, the Judge made no palpable and overriding error in concluding that the decision of the Commissioner did not meet the reasonableness *simpliciter* standard.

[27] I would therefore dismiss with costs the appeal in respect of allegations nos. 2, 3 and 4.

[28] However, as noted by counsel for the appellant and agreed to by counsel for the respondent, the decision of the Commissioner with respect to allegation no. 1 – which was not contested by the respondent – is maintained, as is the sanction imposed with respect to that allegation – *i.e.* a ten days’ forfeiture of pay, together with a reprimand. This oversight must be corrected.

[29] In the end, the appeal will be allowed, with costs to the respondent, for the sole purpose of substituting the following judgment to that of the Judge:

The application for judicial review is allowed in part, the decision of the Commissioner dated May 27, 2004 is set aside with respect to allegations nos. 2, 3 and 4 and the matter is referred back to the Commissioner solely for the purpose of imposing the sanction imposed with respect to allegation no. 1, *i.e.* a ten days' forfeiture of pay, together with a reprimand.

Costs to the applicant.

“Robert Décary”

J.A.

“I concur.
Alice Desjardins J.A.”

“I concur.
C. Michael Ryer J.A.”

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET: A-450-06

STYLE OF CAUSE: AGC v.
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CONCURRED IN BY: DESJARDINS J.A.
RYER J.A.

DATED: September 26, 2007

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