Federal Court  Cour fédérale

Date: 20170126

Docket: T-668-16

Citation: 2017 FC 97

Ottawa, Ontario, January 26, 2017

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

DENNIS MCGUFFIN,
MARK LEMAISTRE and
CHARLES SCOTT

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicants seek judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 of the March 23, 2016 decision made by Level II grievance adjudicator Stephen Foster in accordance with the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10 [RCMP Act] and the *Commissioner's Standing Orders (Grievances)*, SOR/2003-181 as repealed by Commissioner's Standing Orders (General Administration), SOR/2014-293 [CSOs (Grievances) 2003].

I. Overview

[2] The Applicants are now retired members of the Royal Canadian Mounted Police (RCMP). At the relevant time, they were Commissioned Officers, specifically, Critical Incident Commanders. Under the stand-by pay policy (Stand-by Policy) in existence prior to 2009, Commissioned Officers were not eligible to receive compensation for the time they were "on call" for Immediate Operational Availability (OA) or Operational Readiness (OR). In July 2009, after receiving information that the Stand-by Policy had been replaced with an OR / OA Allowance (the Allowance), which included Commissioned Officers, the Applicants claimed the Allowance for the time they had been on call for OR and OA since 2009. Their claims were denied on the basis that the relevant Treasury Board (TB) decision had not yet been made.

[3] The Applicants grieved the denial of their claim. The Early Resolution process did not resolve the grievance, but identified agreed upon facts and narrowed the issues to be determined by the adjudicator.

[4] The Level I Adjudicator found that Critical Incident Commanders were identified on an "on call" list for contact in the event of a critical or major incident. She found that the Inspector who denied the Applicants' claims did not have the authority to make the decision and that this was inconsistent with RCMP policy. She found that the Applicants were entitled to a decision by the proper authority and remitted the decision to approve or deny the claims to the Commanding Officer.

[5] The Level II Adjudicator dismissed the grievance on a different basis – that the Applicants were not designated to receive the Allowance. There was no dispute that the Applicants were on call for the relevant periods or that TB had approved the change in policy and that Commissioned Officers were entitled to claim and receive the Allowance. However, the Level II Adjudicator concluded that the Applicants were required to be designated to receive the Allowance and found that there was no evidence on the record that they were so designated.

[6] For the reasons that follow, the application for judicial review is granted.
The Level II Adjudicator breached procedural fairness by raising a new issue and basing his decision on this new issue without advising the parties and inviting submissions on the interpretation of the Operational Manual (OM) and the Administration Manual (AM) with respect to the designation of members. Whether the Level II decision is characterized as an appeal or a *de novo* process, the breach of procedural fairness is evident.

[7] In addition, the Level II Adjudicator's decision is not reasonable, which is to some extent linked to the breach of procedural fairness.

[8] The decision is based on the Adjudicator's own interpretation of the policy provisions – without any evidence on the record with respect to the rationale for the policy or its proper interpretation – and a misunderstanding of the basis for the grievance.

[9] The Respondent's submissions in this application for judicial review sought to buttress both the grievance respondent's position and the Level II Adjudicator's reasons, but the record does not support that these were the reasons relied on by the Adjudicator.

II. The Background

[10] The Applicants were Critical Incident Commanders in 2009 until their respective retirement dates. They explain that in the "D" Division there are six Critical Incident Commanders. In any given week two are on call, one as the primary contact and the other as the alternate. Critical Incident Commanders deploy the Emergency Response Team (ERT) and the Containment Team, if necessary, before the ERT arrives.

[11] The Applicants explained that they routinely submitted a list of who was on call to the Operational Communications Centre and the Criminal Operations Officer.

[12] Until 2009, Commissioned Officers were not entitled to stand-by pay for time "on call." In 2009, the Stand-by Policy was changed as a result of a TB decision and was replaced with the OR / OA Allowance. In 2010, an RCMP newsletter advised Members that, unlike the previous policy, the OR / OA Allowance applied to all Commissioned Officers.

[13] The Applicants then reviewed their records and submitted claims for the Allowance dating back to July 3, 2009.

The Initial Decision

[14] Superintendent Asp [Supt. Asp] replied to the Applicants on June 7, 2010, indicating that he had been advised by the Chief Human Resource Officer, D/Comm A. Nause, that a formal decision had not been made by TB to permit Officers to claim the OR / OA Allowance and that the matter was still under discussion. Supt. Asp concluded that "[a]s there is no authority, to date, to authorize OR/OA for members of the Officer Rank therefore I am unable to sign and approve your requests of 2010-05-15 and returning same to you."

The Grievance

[15] The Applicants submitted their grievance on July 4, 2010. The decision grieved is described as:

> Denial of payment of Operational Response/Operational Availability claims submitted by the "D" Division Incident Commanders who were on call for the period of 2009-07-03 to 2010-03-31 as well as for all future claims for OR/OA. Denial of placing Incident Commanders to the "Division list of those authorized for operational availability payment.

The Submissions to Level I Adjudicator

[16] The Applicants' (referred to as the Grievors by the Adjudicator) May 2011 submissions to the Level I Adjudicator set out the facts and noting:

- the findings of the 2007 Brown Task Force (i.e. Task Force on Governance and Cultural Change in the RCMP, *Rebuilding the Trust* (Government of Canada, 2007));

- the change in policy in 2009 regarding the OR / OA Allowance;

- the message dated July 31, 2009, from the Commanding Officer of the "D" Division stating his intention to ensure that employees are compensated fairly for their time being ready and available to respond;

- the March 2010 announcement from the Staff Relations Representative (SRR) Program regarding TB's approval of the Allowance for Commissioned Officers. The Grievors noted that the Commissioner did not rebut the comments made in the SRR announcement; and,

- responding to the grievance respondent's (Supt. Asp) claims that Commissioned Officers did not qualify for the OR / OA Allowance, citing various provisions of the OM and AM.

[17] Supt. Asp made brief submissions by email and attached a printout from the Treasury Board Secretariat (TBS) website that describes Cabinet Confidences. Supt. Asp stated:

> To date, no amendments to current policies or formal direction from the Commissioner has been forthcoming which would authorize any form of formal compensation for these Officers other than the current entitlement of "Management Compensation" upon their retirement from the Force.
>
> Throughout the Grievor's submission reference is made to information from the SRR's and other Management Philosophies, however none of these documents form formal Management Direction/Policies which would enable formal compensation as per their request.

The Level I decision

[18] The Level I decision was rendered on January 19, 2012 by Adjudicator, Jennie Greer.

[19] Ms. Greer summarized the evidence, noting that:

- the Grievors completed OR / OA Allowance Compensation forms (covering the period July 3, 2009, to March 31, 2010) following the March 30, 2010 SRR announcement that TB had confirmed that the Allowance applied to all members, including those at the Inspector and Commissioned Officer ranks;
- the grievance respondent (Supt. Asp) returned the claims stating that there was no authority as of that date for the payment of the allowance to members at the Officer rank and he was unable to sign and approve the claims;
- the Grievors presented a joint grievance;
- Supt. Asp informed the Grievors that he did not have the authority to determine the grievance and that their claims should have been submitted to the Commanding Officer;
- the parties entered into early resolution;
- the Grievors claims were submitted to the Commanding Officer who did not respond;
- the Grievors noted that they wished to pursue the grievance; and
- an "Outcome Document" was submitted by Supt. Asp to reflect what had been agreed to at the early resolution.

[20] The Outcome Document noted that Incident Commanders were on call and that they were officers at the Inspector Rank. It stated:

> Officers are on call as Incident Commanders, Officers are required to work overtime, management program is only form of

> compensation available. Incident Commanders believe they are entitled to an alternate form of compensation through monetary payment or LTO [lieu time off ("LTO")]. No policy/ process is currently in place to facilitate this belief.
>
> . . .
>
> As no authority / mechanism currently is inplace for consideration for an alternate form of payment I was and remain unable to process the submitted claims for OR/OA for payment.
>
> As SEC [Senior Executive Committee ("SEC")] was the deciding authority on the Management Program for the additional hours that all Officers are required to work, they infact are and will be recognized for their OR/OA payment in that manner. Anything alternative to this would be at the direction of the Commissioner.
>
> [*Sic* throughout]

[21] The Outcome Document notes that the following facts or issues remain outstanding for adjudication: "Officers are entitled to payment or LTO for [OR/OA]. No authority exist to allow for payment or LTO options for Officers" [*Sic* throughout].

[22] Ms. Greer noted that it is uncontested that Incident Commanders are identified on an "on call" list for contact in the event of a critical or major incident and that the Grievors were Incident Commanders at the Inspector Rank.

[23] She also noted that the Commanding Officer was required to designate off-duty members for OR or OA if required and to review all compensation claims for immediate OR or OA duty. She found that the grievance respondent did not follow this policy and denied the claims without having the authority to grant or deny the claims. As a result, she found that the Grievors had established on a balance of probabilities that the denial of their claims was inconsistent with

RMCP policy and that they were prejudiced. Ms. Greer found that the Grievors were entitled to a decision by the proper authority and remitted the decision to approve or deny the claims to the Commanding Officer in accordance with the applicable policies. She also noted that the Grievors had already submitted their claims to the Commanding Officer, but he had yet to approve or deny them.

The Submissions of the Parties to Level II Adjudicator

[24] The Applicants' submissions, dated April 8, 2012, addressed the history of their claim, preliminary and collateral issues, the lack of disclosure of material requested, and the substantive issues.

[25] The Applicants argued that the Level I Adjudicator erred by not addressing all the issues and that she should have determined whether they were entitled to the OR / OA Allowance. They referred to the RCMP Act, the *Financial Administration Act*, RSC 1985, c F-11, and the jurisprudence. The Applicants argued that only the TB has the authority to establish pay and allowances for the RCMP; therefore, the RCMP had no authority to deny the OR / OA Allowance once the TB had approved it.

[26] The Applicants submitted that they were entitled to the OR / OA Allowance from the time it was authorized by TBS and the RCMP policy on the Allowance was put into place.

[27] The submissions of the grievance respondent (now Inspector Garth Patterson) consisted of a brief email. Insp. Patterson stated that he had read the Level I Adjudicator's decision, and the Applicants' response, and he had no new information to add.

[28] Insp. Patterson agreed with the Level I Adjudicator's Direction that the grievance respondent should provide the claims to the Commanding Officer for his review and a decision to approve or deny payment.

The Relevant Regulatory Provisions

[29] The Relevant provisions of the CSOs (Grievances) 2003, the current version of the CSOs (Grievances) 2003 (i.e. Commissioner's Standing Orders (Grievances and Appeals), SOR/2014-289 [CSOs (Grievances and Appeals) 2014], and the AM and OM are set out at Annex A.

III. The Decision Under Review; the Level II Adjudication

[30] The Level II decision was rendered by Stephen Foster on March 23, 2016, four years after the submissions were made. The decision sets out the chronology of the grievance, including the early resolution Outcome Document and the submissions of the parties at Level I; describes the grievance process in general; and addresses several preliminary issues.

[31] In his decision, Mr. Foster noted that "due to the complexity of the circumstances, [he] considered issues which did not arise from the Grievance, as initially presented." He noted that his mandate was to consider the grievance on a *de novo* basis and that Level II adjudication is not

an appeal. He referred to sections 13 and 18 of the *CSOs (Grievances) 2003*, which were in effect at the time of the grievance, in support of his *de novo* approach.

[32] Mr. Foster agreed that the definition of "member" for the purposes of the RCMP Act includes the Inspector rank. However, he found that being a member is only part of the requirement to receive the Allowance, noting that:

> According to AM II.4 at part I.8.b., a member will be compensated "[w]here [such] member is designated" for either Immediate Operational Readiness (OR) or Operational Availability (OA) duty during off hours. Upon review of the Record, it does not appear that the Grievors included their designations to receive the Allowance, nor did the Grievors refer to their designations.

[33] Mr. Foster noted that the OM provides that Commanding Officers of the "D" Division authorize detachments and units to designate off-duty members for OR and OA. He found that a member must be "designated to be authorized to receive the Allowance," and again noted that the record does not contain evidence that the Grievors received a designation. He added that the email from the TB confirming that Inspectors and Superintendent ranks were eligible to receive the allowance was irrelevant to the question of whether the Grievors were entitled to the Allowance because a designation is required to be eligible.

[34] Mr. Foster noted that the Applicants' submissions stated that when the OR / OA Allowance was announced to replace the Stand-by Policy, the "D" division Incident Commanders were not on the list of those authorized for OA or OR. Mr. Foster found that they "also acknowledge that they were not included on the authorized list that would entitle them to the Allowance […]."

[35] Mr. Foster found that, to be eligible to receive the Allowance, the Applicants must satisfy two conditions: "being authorized by designation and being placed on the on-call list." He added: "[r]egardless of the Inspector rank being included in the definition of "member", for the purposes of the Allowance, the Grievors [the Applicants] failed to receive the required designation."

[36] Mr. Foster concluded that the grievance respondent could not have approved the Applicants' claims without contravening RCMP policy and, therefore, the grievance respondent did not contravene the policy by not approving the claims for the Allowance.

IV. The Applicants' Overall Position

[37] The Applicants submit that whether the adjudication is characterized as an appeal or a *de novo* hearing, the Level II Adjudicator erred in law and breached procedural fairness and made an unreasonable decision by raising a new issue that was not addressed by the Level I Adjudicator, for which no submissions were made, and for which there was no evidence on the record.

[38] The Applicants also submit that the Level II Adjudicator misinterpreted the policy (*i.e.* the OM and AM) and erred by dismissing the grievance on the basis that the Grievors had not been designated to receive the Allowance. The policy requires that the members be designated to perform their duty, not that they be designated to receive the Allowance.

[39] The Applicants note that the point of their grievance is that they were not on the list of those "designated" because Critical Incident Commanders were not previously entitled to the

Allowance. However, following the change in the TB policy, Critical Incident Commanders were entitled to the Allowance. The Applicants submit that the Level II Adjudicator's reliance on the fact they were not on a list of those designated to receive the allowance misses the point of the grievance.

[40] The Applicants submit that the Level II Adjudicator's decision should be quashed and remitted for redetermination with directions that will depend on the Court's reasons for granting their application. However, if the Court finds that the decision is not reasonable, the Court should direct that the Applicants are entitled to the OR / OA Allowance and that the RCMP should calculate the quantum.

[41] The Applicants further submit that the Court should direct that the redetermination be expedited and a decision should be rendered within 60 days, although they acknowledge that such a direction is unprecedented. The Applicants note that they have waited six years for a decision without explanation for the delay.

V. The Respondent's Overall Position

[42] The Respondent submits that the Level II decision, albeit brief, is reasonable and the process was procedurally fair.

[43] The Respondent's position is that the Level II decision is a *de novo* decision and that the adjudicator is not limited in the issues he or she may consider.

[44] The Respondent argues that there was no breach of procedural fairness arising from the Level II Adjudicator's decision which was based on different reasons than those articulated by the Level I Adjudicator because the Applicants were fully aware that the policy was the underlying issue.

[45] The Respondent's position is that the issue is not the change in the TB policy, but whether the RCMP policy provides for the Allowance. The Level II Adjudicator reasonably found that the Applicants were not entitled to be paid the OR / OA Allowance because the relevant policy required that members be first designated to receive the Allowance and the Applicants had not submitted evidence that they had been so designated.

[46] The Respondent submits that if the Court finds the decision to be unreasonable, it should not direct that the Applicants are entitled to the Allowance. Rather, the matter should be remitted for re-determination at Level II in accordance with reasons of the Court because the Court lacks the evidentiary record to order the RCMP to pay the Allowance to the Applicants. The Respondent adds that imposing a time limit for a new decision may not be feasible, as more evidence may need to be gathered and considered.

VI. The Issues

[47] The Applicants raised several issues, all of which relate to the two key issues: (i) whether the Level II Adjudicator breached procedural fairness by basing his decision on an issue that had not been raised by the parties or the Level I Adjudicator, and for which no notice or opportunity to respond was provided; and (ii) whether the Level II Adjudicator's decision is reasonable.

VII. The Standard of Review

[48] Issues of procedural fairness are reviewed on the correctness standard (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43). Where there is a breach of procedural fairness, no deference is owed to the decision-maker.

[49] The parties agree that the standard of review for grievance decisions under the RCMP Act regarding the interpretation of RCMP policy, and issues of mixed law and fact, are reviewed on the reasonableness standard (*Irvine v Canada (Attorney General)*, 2012 FC 1370 at para 27, aff'd 2013 FCA 286 [*Irvine FC*]).

[50] To determine whether a decision is reasonable, the Court looks for "the existence of justification, transparency and intelligibility within the decision-making process" and considers "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]).

[51] The inadequacy of the reasons for a decision is not an independent ground to allow an application for judicial review but is part of the assessment of reasonableness. In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*], the Supreme Court of Canada elaborated on the requirements of *Dunsmuir*, noting (at para 14) that the reasons are to "be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes." In addition,

where necessary, courts may "look to the record for the purpose of assessing the reasonableness of the outcome" (para 15).

[52] In *Komolafe v Canada (Minister of Citizenship and Immigration)*, 2013 FC 431 at para 10 [*Komolafe*], Justice Rennie noted that *Newfoundland Nurses* permits the Court to look to the record to uphold a decision, but not to the extent of re-writing the reasons:

> Where readily apparent, evidentiary *lacunae* may be filled in when supported by the evidence, and logical inferences, implicit to the result but not expressly drawn. A reviewing court looks to the record with a view to upholding the decision.

[53] Justice Rennie elaborated at para 11:

> *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking […] *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn.

VIII. Did the Level II adjudicator breach procedural fairness?

The Applicants' Submissions

[54] The Applicants argue that the Level II Adjudicator erred by raising a new issue and dismissing the grievance on that basis.

[55] The Applicants highlight that the grievance respondents had never argued that the Applicants were not entitled to the Allowance because they had not been designated. The early resolution process narrowed the issue to whether Commissioned Officers, as a class, are entitled

to the OR / OA Allowance. The RCMP, as grievance respondent, agreed that the TB decision regarding the allowance for commissioned officers and the overtime policy were the only issues. The Applicants argue that the grievance respondent is bound by the agreement reached at early resolution and nothing in the grievance respondent's very brief submissions to the Adjudicator detracted from this.

[56] The Applicants add that the Level II Adjudicator is simply a manager within the RCMP, as was the Level I Adjudicator. In the settlement process, there must be the capacity to bind the RCMP management; otherwise, the early resolution process is pointless.

[57] The Applicants point out that their submissions to the Adjudicator focussed on the issues identified at early resolution and the agreed facts.

[58] Alternatively, the Applicants submit that if the Level II Adjudicator was not bound by the agreement, he was still required to invite submissions on the issue of designation, as it had not been identified as a relevant issue or one in dispute.

[59] The Applicants also submit that the Level II Adjudicator erred by characterizing his mandate as a *de novo* process and stating that he was not conducting an appeal. Stronger and clearer language is needed in the RCMP Act / CSOs (Grievances) 2003 if the intent is to provide for a *de novo* decision (*Canada (Minister of Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 46).

[60] The Applicants note that the CSOs (Grievances) 2003 do not address the standard of review at Level II adjudication. Although section 13 states that the Level II Adjudicator shall decide all matters relating to it, section 18 provides that the Level II decision-maker shall return the grievance for reconsideration by the Level I decision-maker if there is new evidence that could have resulted in a different decision or if the Level I decision-maker erred in finding it did not have jurisdiction. The Applicants submit that returning the matter to the initial decision-maker is inconsistent with a *de novo* decision.

[61] The Applicants note that the current version of the CSOs (Grievances) 2003 (*i.e.* CSOs (Grievances and Appeals) 2014) specifies that the standard of review is reasonableness. This suggests that the Level II stage is an appeal of the Level I decision. The CSOs (Grievances and Appeals) 2014, at section 10, also include the same provision as in the previous version (*i.e.* the Level II Adjudicator can consider all matters related to the grievance).

[62] The Applicants submit that in performing an appellate function, the Level II Adjudicator erred by raising a new issue on his own and determining the grievance on the basis of this new issue (*R v Mian*, 2014 SCC 54 at paras 41, 51-52, 54-59 [*Mian*]).

[63] An appellate body may only address an issue not raised by the decision-maker below if the evidentiary record and the interests of justice support an exception to the general rule that a new issue cannot be raised on appeal (*Bernard v Canada (Attorney General)*, 2014 SCC 13 at para 93, Rothstein J, dissenting in part [*Bernard*]). The Applicants submit that this exception does not exist here, as there is no record to decide the issue of designation one way or the other.

[64] The Applicants further argue that even if Level II adjudication is a *de novo* process, there was a breach of procedural fairness because there was no opportunity for the Applicants to address the issue of designation.

The Respondent's Submissions

[65] The Respondent submits that the Level II Adjudicator was not bound by the early resolution agreement. The Outcome Document notes that the issue is that "[n]o authority exist[s] for payment or LTO options for Officers." The Respondent argues that the outstanding issue was the authority to allow for payment of Commissioned Officers and that this means more than just the TB policy and includes the RCMP policy (*i.e.* the OM and AM). The Respondent argues that although the TB had given the RCMP authority to pay the allowance, the RCMP chose not to exercise it.

[66] The Respondent submits that the Level II Adjudicator did not err by considering the grievance on a *de novo* basis. Section 13 of the CSOs (Grievances) 2003 provides that "the level considering a grievance shall decide all matters relating to it" and, as a result, the Adjudicator is not limited to issues that are identified in the decision below. The Respondent disputes that section 18 of the CSOs (Grievances) 2003 suggests that Level II is an appeal of the Level I decision, noting that section 18 only provides for the grievance to be returned to the Level I decision-maker in two specific circumstances.

[67] The Respondent acknowledges that the Level II Adjudicator relied on a different argument than that advanced by the Grievors and the grievance respondent, but submits that the interpretation of the policy and the issue of designation was not a new issue.

[68] The Respondent further submits that there was no breach of procedural fairness based on a failure to provide an opportunity for the parties to make submissions on the issue of designation, because both parties made submissions related to that issue.

[69] The Respondent points to the Applicants' submissions regarding TB's authority to set pay and allowances for the RCMP and to the Applicants' acknowledgement that they were not on the list of designated members in the "D" Division Operational Manual.

[70] The Respondent also points to the Outcome Document prepared by the grievance respondent (Supt. Asp), which noted that the issue was the lack of RCMP policies to authorize payment of the allowance to the Applicants. The Respondent also points to the grievance respondent's submissions, which raised issues involving the authority of the TB and the interpretation of relevant RCMP policies. The Respondent submits that these were the issues considered in the Level II Adjudicator's decision.

The Level II Adjudicator breached procedural fairness

[71] The CSOs (Grievances) 2003 do not set out a standard of review. On the one hand, they indicate that the Level considering the grievance can determine all matters relating to it. On the other hand, they permit the Adjudicator to remit the matter for redetermination at Level I if new

evidence could have resulted in a different decision or if the Level erred in finding no jurisdiction. The current version, CSOs (Grievances and Appeals) 2014, provides for remitting the matter in more circumstances, which is more akin to an appellate process.

[72] I am not convinced that the wording of the relevant provisions of the CSOs (Grievances) 2003 clearly signal that Level II adjudication is a *de novo* process to the extent that the Final Adjudicator can disregard the grievance as submitted, the early resolution agreement, and the Level I decision. I agree with the Applicants that clearer language is needed to clarify whether the Level II Adjudicator conducts an appeal or a *de novo* determination. However, it is not necessary to determine what function the Level II Adjudicator performed. Whether it is an appeal or a *de novo* process, similar principles apply and lead to the same conclusion; the Adjudicator breached procedural fairness by basing his decision on a new issue of which the Applicants had no notice and no opportunity to respond.

[73] In *Mian*, above, the Supreme Court defined a "new issue", in the context of an appeal, at para 30:

> An issue is new when it raises a new basis for potentially finding error in the decision under appeal beyond the grounds of appeal as framed by the parties. Genuinely new issues are legally and factually distinct from the grounds of appeal raised by the parties (see *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712, at para. 39) and cannot reasonably be said to stem from the issues as framed by the parties. It follows from this definition that a new issue will require notifying the parties in advance so that they are able to address it adequately.
>
> [Emphasis added]

[74] Although an appeal court may raise a new issue in appropriate circumstances, a balance must be struck. The Court added at para 41:

> The question then is how to strike the appropriate balance between these competing principles. Appellate courts should have the discretion to raise a new issue, but this discretion should be exercised only in rare circumstances. An appellate court should only raise a new issue when failing to do so would risk an injustice. The court should also consider whether there is a sufficient record on which to raise the issue and whether raising the issue would result in procedural prejudice to any party. This test is sufficiently flexible while also providing for an appropriate level of restraint to address the tensions inherent in the role of an appellate court.

[75] At paras 50-52, the Court noted that the considerations regarding the discretion of appellate courts to raise new issues include: the jurisdiction of the court to consider the issue, whether there is a sufficient basis in the record on which to resolve the issue, and whether there would be any procedural prejudice to either party. The Court also emphasized that notice and an opportunity to respond must be provided where an appellate court raises a new issue (paras 54-55).

[76] I agree with the Applicants that the Level II Adjudicator erred by raising a new issue on his own and determining the grievance on the basis of this new issue based on the principles set out in *Mian*. As I noted in *Ching v Canada (Citizenship and Immigration),* 2015 FC 725 at para 66, "[a]lthough *Mian* was a criminal case, the principles have been applied in other proceedings, including the administrative context." In addition, the same basic principles apply in the present circumstances if the Level II adjudication is a *de novo* process.

[77] In the present case, the Level II Adjudicator found that the Level I Adjudicator was wrong and that the claims should have been denied because the Applicants were not designated. This issue had not been raised in the grievance, in the Outcome Document, in the submissions of the parties, or at Level I. The Applicants submitted that they were entitled to the Allowance. They noted that they were not on the list of those designated, but did not concede that this disentitled them to the Allowance. Quite the contrary, the point of their grievance was that they were not placed on the designated list after the TB policy changed from stand-by pay to the Allowance and after the TB had approved the inclusion of Commissioned Officers despite the fact that they were on call for OR / OA and they were no longer excluded as Commissioned Officers.

[78] The Applicants did not make submissions on the interpretation of the OM / AM policy regarding a requirement for formal designation or on the two conditions that the Adjudicator seized on. Their submissions focused on the issues identified in the early resolution process, the Level I decision, and the grievance respondent's submissions.

[79] I disagree with the Respondent's submissions that the issue of formal designation was not a new issue and that the parties' submissions addressed the issue of entitlement to the Allowance, which included designation. I also disagree with the Respondent that the underlying issue was the policy which is broader than the TB policy and includes the RCMP's OM and AM policy and the requirement for designation. The Outcome Document does not identify the issue as the RCMP policy. The claims were denied on the basis that TB had not yet approved the change in

policy to include Commissioned Officers, not that the RCMP policy required further changes. In fact, the policy had already been changed from stand-by pay to the OR / OA Allowance.

[80] Nor did the grievance respondents make submissions on the interpretation of the OM / AM policy, as the Respondent now argues. The Level II Adjudicator referred to the submissions made at the Level I stage and the Level II stage by the grievance respondents, but only in his recitation of the history of the grievance. He did not acknowledge or interpret the Level I submissions as suggesting that the OM or AM policy did not permit payment to the Applicants. In their Level II submissions, the grievance respondents said nothing except to agree with the Level I decision.

[81] The Respondent now seeks to characterize the grievance respondent's submissions at Level I as raising the issue of the need for changes to both RCMP and TB policies. This is the Respondent's argument on judicial review, but was not the grievance respondent's submission made to the Level II adjudicator. The Respondent's argument that the Early Outcome reference to "No authority exist…" meant that there was a lack of RCMP policies to authorize payment is not what is stated, nor is it what the Level II adjudicator noted. Moreover, the Respondent cannot both argue that it is not bound by the Early Outcome identification of issues and facts and also argue that this document supports an interpretation that the RCMP policy was the issue.

[82] The Level II Adjudicator admitted that due to the complexity of the circumstances he considered different issues. I agree with the Applicants that their grievance was not that complex. As a practical matter, if the Adjudicator found it to be so, it was incumbent upon him to invite

and consider submissions on the issues he raised. The Adjudicator received submissions in 2011 and did not render his decision until 2016. He had ample time to seek further submissions to address the complexity.

[83] To summarize, the Level II Adjudicator raised a new issue, which he acknowledged to be new, without providing notice to the parties or inviting submissions on the new issue. Neither the grievance, the Outcome Document, the Level I decision, nor the parties' submissions addressed the issue of formal designation or the interpretation of the RCMP policies. This is a breach of procedural fairness.

IX. Is the Level II Adjudicator's decision reasonable?

The Applicant's Submissions

[84] The Applicants submit that the Level II Adjudicator erred in his interpretation of the policy, and in concluding that a member must be formally designated to receive the Allowance, and dismissing their grievance. The Applicants note that there were no submissions on the issue of formal designation and no evidence on the record before the Level II Adjudicator on the interpretation of the policy.

[85] The Applicants note that the Level II Adjudicator agreed that Commissioned Officers were eligible to receive the Allowance, that the grievance respondent had the authority to approve or deny the claims, and that the TB had approved payment of the Allowance to Commissioned Officers in 2009.

[86] The Applicants point to the Adjudicator's reliance on his erroneous statement that "TBS authorized the RCMP to compensate members for operational readiness/operational availability, but the amount and how the funds will be paid was an organizational decision-hence the implementation of AM II.4.I.8.". The RCMP Act provides that "Treasury Board shall establish the pay and allowances to be paid to Members." The amount is addressed in the AM which provides at II.4.8 B 1 and 2 that the Allowance depends on designation for OR or OA (*i.e.* one hour of pay for every four hours of OA and one hour or pay for every eight hours of OR). The Applicants argue that the RCMP cannot refuse to pay the Allowance.

[87] The Applicants submit that RCMP management had no discretion to decide whether they were eligible for the Allowance because the TB had already decided that they were. The Applicants note that the Respondent's submission that management can decide who will be paid the Allowance was not the argument made to the Level II Adjudicator, nor was it the basis for the denial of their claim. Supt. Asp denied their claim based on his mistaken view that the TB had not yet made a decision to include Commissioned Officers.

[88] The Applicants submit that eligibility for the Allowance does not depend on designation to receive the Allowance, but designation to perform the duty. The Level II Adjudicator misinterpreted the policy. There need not be designation to receive the Allowance – it flows from designation for duty. The Applicants were on the "on call" sheets approved by their Commanding Officers and submitted to the Operational Communications Centre and the Criminal Operations Officer, and this is sufficient.

[89] The Applicants submit that the Level II Adjudicator misinterpreted their acknowledgement that they were not on the list of those receiving the Allowance. The Applicants note that they were "on call" and required to respond if necessary, regardless of whether they were formally designated. A lack of designation would not have been an excuse for them not to respond as needed. The Applicants note that the whole point of their grievance is that they should have been on this list after the policy changed in 2009, but that they were not placed on this list.

[90] Alternatively, the Applicants submit that if a designation were required, they were in fact or by implication "designated" for duty. The Applicants submit that the notion of designation by implication, which arbitrators recognize, was endorsed by the Federal Court of Appeal in *Brooke v Canada (Royal Canadian Mounted Police, Deputy Commissioner)* (1993), 152 NR 231 at paras 7-10 (CA) [*Brooke*]. In *Brooke,* the Court of Appeal found that the perspective of the member who must act on the Order is determinative, not whether the Order was properly made and, consequently, compensation should not be denied.

[91] The Applicants argue that *Irvine FC,* relied on by the Respondent, is distinguishable because the members acknowledged that they did not meet the definition of "stand-by level II". *Irvine FC* does not support the Respondent's position. Contrary to the Level II Adjudicator's finding, they did not concede that they were not entitled to the Allowance. They acknowledged that they did not receive it and they were not on a list of those receiving it, although the policy had been changed to include Commissioned Officers.

The Respondent's submissions

[92] The Respondent submits that the Level II adjudicator is an expert in interpreting RCMP policy and his decision is owed deference. The Level II Adjudicator reasonably found that the grievance respondent had the authority to deny the claims and that the claims should have been denied because the Applicants were not designated to receive the Allowance. The Respondent submits that the Level II Adjudicator reasonably found that although the TB had confirmed that Inspectors and Superintendents were eligible to receive the Allowance, this does not mean that the Applicants were entitled to receive the Allowance.

[93] The Respondent acknowledges that both adjudicators accepted that the TB had authorized the RCMP to pay the Allowance to all members, but submits that the authorization of the TB is not enough. The RCMP has the discretion to restrict payment to designated members and designation is required by the relevant policy.

[94] The Respondent submits that the Level II Adjudicator based his decision on the relevant provisions of the AM and the OM. The policy reflects that designating for OR or OA must be based on need, consideration of alternatives, and financial implications / priorities. There are a limited number of designated officers and the Commanding Officer decides who to designate.

[95] The Respondent acknowledges that the Level II Adjudicator did not address the underlying rationale for the policy governing payment, but argues that this was not necessary. The policy states that a designation by the Commanding Officer is required before the Allowance

can be paid and this is consistent with the need for the RCMP to control its budget by exercising discretion regarding who receives the Allowance. The Level II Adjudicator reasonably found that payment to the Applicants was not in accordance with the policy.

[96] The Respondent notes that a similar issue was addressed in *Irvine FC*, above at paras 12, 33, and 73. In that case, the Court found that the adjudicator reasonably determined that a formal designation for stand-by pay was consistent with the need for management to consider the impact of stand-by pay on the budget.

[97] The Respondent submits that *Brooke* does not support the view that no designation is needed or that it can arise by implication. In *Brooke,* the order authorizing the member's stand-by pay was improperly made, but the member was otherwise eligible to be on stand-by.

[98] The Respondent also submits that the grievance respondent (Supt. Asp) made submissions at Level I indicating that the policies had not been amended and no direction had been provided by the Commissioner to authorize compensation other than "management compensation" at the time of their retirement. The Respondent reiterates that the grievance respondent's position was that payment of the Allowance required RCMP management policies or directions, in addition to the TB authorization. Therefore, there were submissions on policy in the record before the Level II Adjudicator.

The Decision is not reasonable

[99] The Applicants made focused and comprehensive submissions at each stage of the grievance. The grievance respondents, on the other hand, made very brief and inconsistent submissions. The grievance respondent (Supt. Asp) first denied the claims because, in his view, no decision had yet been made by TB to authorize the Allowance for Officers. This view was inaccurate as the decision had been made and communicated to the RCMP in 2009. At the Level I adjudication, the grievance respondent again stated that no changes had been made to current policies to authorize compensation to the Grievors. Finally, at the Level II adjudication, the grievance respondent agreed with the Level I Adjudicator that the claims should be submitted for consideration by the Commanding Officer.

[100] As found above, the Level II Adjudicator breached procedural fairness by raising a new issue and not providing an opportunity for the parties (particularly the Applicants) to make submissions in response and then by basing his decision on the new issue in the absence of any evidence on the record. The finding of a breach of procedural fairness, therefore, leads to the finding that the decision is also unreasonable.

[101] The Respondent's arguments on judicial review in support of the Level II decision seek to bootstrap that decision with reasons other than those articulated by the Adjudicator. As the Respondent acknowledged, it is not the most intelligible decision. The Court has struggled to make sense of the decision in the absence of a record to support the Adjudicator's findings regarding his interpretation of the policy.

[102] The Court cannot determine, in the absence of an evidentiary record, whether the Adjudicator's decision is reasonable. The reasons provided by the Adjudicator, which simply conclude that members must be designated to receive the Allowance, do not explain how the Adjudicator reached this decision. In addition, the finding that the Applicants provided no evidence of their formal designation misses the point of their grievance.

[103] The Respondent has offered a rationale for the decision on this application for judicial review, noting the OM and AM policy and the budget and other considerations a Commanding Officer should consider before designating a member, but these are the submissions of the Respondent and are not the reasons of the Adjudicator.

[104] The Respondent acknowledged that the Level II adjudicator did not address the underlying rationale for the policy governing payment.

[105] The Respondent also submitted that if the Court were to allow the application for judicial review it should not direct that the Applicants are entitled to the Allowance because the record does not include evidence regarding the purpose of the relevant policies or the RCMP's rationale for refusing to exercise its authority or discretion to pay the Allowance. In my view, this further confirms that the Adjudicator did not have any record to reach a conclusion on the rationale or interpretation of the policy, assuming the OM and AM policy is even the key issue. This further confirms the finding that the decision is not reasonable, as it is not based on the evidence on the record.

[106] As noted in *Komolafe*, above at para 10, a Court can look to the record to uphold a decision, but can only go so far and cannot re-write the reasons. The Level II Adjudicator's decision reflects the situation noted by Justice Rennie at para 11: "*Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn. Here there were no dots on the page."

[107] I do not find that *Irvine FC* or *Brooke* provide guidance, as the facts are not analogous.

[108] The Level II Adjudicator noted that the Applicants submitted that when the Allowance was announced to replace the Stand-by Policy, the "D" division Incident Commanders were not on the list of those authorized for OA or OR. He regarded this as an acknowledgement that "they were not included on the authorized list that would entitle them to the Allowance […]." However, this was only part of the summary of facts set out in the Applicants' submissions, which added in the next lines: "[i]t is uncontested that the Grievors are identified on an 'on call' list provided to the OCC in order that an incident commander can be contacted in case of a critical/major incident or in those instances when they are requested to respond to calls and/or inquiries, despite the fact that they have not been included on DOM Appendix 16-12-1. This was also agreed to by the Respondent in the Early Resolution Outcome Document." Not only did the Level II Adjudicator take this statement out of context, he appears to have missed or misunderstood the whole point of the grievance.

X. The Remedy

[109] The application for judicial review is allowed. The grievance should be remitted for redetermination by a different Level II Adjudicator in a process that is procedurally fair. The Respondent should make every effort to determine the grievance expeditiously. Although it may be impractical to require a decision within 60 days, as proposed by the Applicants, a decision should be rendered no later than four months from the receipt of any additional submissions of both parties. No explanation was provided by the Respondent for the inordinate delay in determining the Level II adjudication and this situation can only be avoided in the future by imposing some time limit.

[110] The Respondent shall bear the costs of this Application for Judicial Review, which the parties have agreed are $5,500.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.
2. The grievance should be remitted for redetermination by a different Level II Adjudicator in a process that is procedurally fair.
3. A decision should be rendered no later than four months from the receipt of any additional submissions of both parties.
4. The Applicants are awarded costs in the amount of $5,500.

"Catherine M. Kane"
Judge

ANNEX A

The Relevant Parts of the AM and OM

Administration Manual

AM II.4

I.8 ***Operational Response Allowance***

I.8.a. ***Definitions***

*1****. Immediate Operational Readiness (OR)****: means designated responders for operational policing duties where an immediate response is required.*

*2****. Operational Availability (OA)****: means designated standby or availability for any operational or operational support function where an immediate operational response is not required.*

. . .

I.8.b ***General***

1. Where a member is designated for Immediate Operational Readiness (OR) duty during off hours, the member will be compensated at a rate of one hour at straight time rate of pay for every four hours. This time will be accumulated to the end of each 28-day work schedule for which the member has been designated for Immediate Operational Readiness duty.

. . .

2. Where a member is designated for Operational Availability (OA) duty during off hours, the member will be compensated at a rate of one hour at straight time rate of pay for every eight hours. This time will be accumulated to the end of each 28-day work schedule for which the member has been designated for Operational Availability duty.

. . .

Operational Manual

The OM includes the same definitions for OA and OR.

2. ***General***

2.1 Where all feasible alternatives have been considered and when a need remains to provide coverage by having off-duty members available, a CO/delegate may authorize immediate operational readiness or operational availability duty designations.

Section 3 guides the Commander to avoid using OR or OA unless all other alternatives are impractical. If no other alternatives, Commanders are directed to request authorization to designate off duty members from the CO/ delegate.

Section 4 guides the CO/delegate to consider other alternatives to avoid designating off duty members for OA or OR, and where alternatives are impractical, to authorize OR and OA if an emergency exists or the requirement is anticipated.

In addition, the CO/ delegate is directed to review all compensation claims for immediate operational readiness or operational availability duty.

Commissioner's Standing Orders (Grievances and Appeals), SOR/2014-289

Adjudicator

Adjudicator's powers

10 An adjudicator, when considering a grievance, has the power to decide all matters related to the grievance, including the power

- **(a)** to dismiss it if it is moot, frivolous, vexatious or an abuse of process, or has already been adjudicated;
- **(b)** to render a single decision in respect of the grievance and any other substantially similar grievance that is being considered by the adjudicator;
- **(c)** to consolidate the grievance of a grievor with the grievance of any other grievor that is being considered by the adjudicator, with the consent of the grievors, and to designate the respondent for the consolidated grievance;
- **(d)** to consolidate the grievance with any other grievance of the grievor that is being considered by the adjudicator and to designate the respondent for the consolidated grievance;
- **(e)** to sever the grievance into two or more distinct grievances; and
- **(f)** to decide whether any written or documentary information to which the grievor has requested access is a standardized test or the information referred to in section 5.

. . .

Decision

Decision at initial level

16 (1) An adjudicator may dispose of a grievance at the initial level by rendering a decision

- **(a)** dismissing the grievance and confirming the decision, act or omission that is the subject of the grievance; or

(b) allowing the grievance and

(i). remitting the matter, with directions for reconsidering the decision, act or omission, to the respondent or to the person who is responsible for the reconsideration, or

(ii). directing any appropriate redress.

Considerations

(2) An adjudicator, when rendering the decision, must consider whether the decision, act or omission that is the subject of the grievance is consistent with the relevant law, or the relevant Treasury Board or Force policy and, if it is not, whether it has caused a prejudice to the grievor.

Non-compliance with direction
(3) Despite subsection (2), the adjudicator may, subject to the principles of procedural fairness, dispose of a grievance against the interests of a party that has failed to comply with any of their directions.

. . .

Decision at final level

18 (1) An adjudicator may dispose of a grievance at the final level by rendering a decision

(a) dismissing the grievance and confirming the decision rendered at the initial level; or

(b) allowing the grievance and

(i). remitting the matter, with directions for reconsidering the decision, act or omission, to the respondent or to the person who is responsible for the reconsideration,

(ii). remitting the matter, with directions for rendering a new decision to the adjudicator at the initial level or to another adjudicator, or

(iii). directing any appropriate redress.

Considerations

(2) An adjudicator, when rendering the decision, must consider whether the decision at the initial level contravenes the principles of procedural fairness, is based on an error of law or is clearly unreasonable.

Non-compliance with direction

(3) Despite subsection (2), the adjudicator may, subject to the principles of procedural fairness, dispose of a grievance against the interests of a party that has failed to comply with any of their directions.

Opportunity to make submissions

19 (1) The adjudicator at the final level must, before rescinding or amending a decision under subsection 32(3) of the Act, give the parties an opportunity to make submissions.

Service

(2) If the adjudicator rescinds or amends the decision, they must cause a copy of the notice of rescission or a copy of the amended decision to be served on the parties.

Return of evidence

20 After the disposition of a grievance, the OCGA must cause to be returned to a party anything that the party tendered as evidence.

Previous version

Commissioner's Standing Orders (Grievances), SOR/2003-181 [Repealed].

Level I

2 (1) The member who constitutes level I is

- **(a)** in the case of a grievance in respect of a stoppage of pay and allowances under section 2 of the *R.C.M.P. Stoppage of Pay and Allowances Regulations*, a Deputy Commissioner;
- **(b)** in the case of a grievance in respect of a decision, act or omission made by a Deputy Commissioner, another Deputy Commissioner designated by the Commissioner;
- **(c)** in the case of a grievance in respect of a decision, act or omission made in a region, other than a grievance referred to in paragraphs (a) or (b), an officer or a senior manager for that region designated by the Commissioner;
- **(d)** in the case of a grievance in respect of a decision, act or omission made in headquarters, other than a grievance referred to in paragraphs (a) or (b), an officer or a senior manager designated by the Commissioner for headquarters; and
- **(e)** in any other case, an officer or a senior manager designated by the Commissioner.

(2) If the member who constitutes level I under subsection (1) is unable to act, the member who constitutes level I is the officer or senior manager designated by the Commissioner to act in the place of that member.

. . .

13 The level considering a grievance shall decide all matters relating to it, including the level's jurisdiction to consider the grievance.

. . .

17 (1) If the level considering the grievance determines that they have jurisdiction over the grievance under subsections 31(1) and (2) of the Act, the level shall determine if the decision, act or omission that is the subject of the grievance is consistent with applicable legislation and Royal Canadian Mounted Police and Treasury Board policies.

(2) If the level considering the grievance determines that the decision, act or omission is not consistent with applicable legislation or Royal Canadian Mounted Police or Treasury Board policies, and that it has caused a prejudice to the grievor, the level shall determine what corrective action is appropriate in the circumstances.

18 (1) Level II shall return a grievance to level I for reconsideration if

(a) the level receives evidence that could have resulted in a different decision by level I if the evidence had been presented at that level; or

(b) level I erred in determining that it did not have jurisdiction over the grievance.

(2) Subsection (1) does not apply to grievances that are referred to the Committee under section 33 of the Act.

19 A grievor may withdraw a grievance by providing notice in writing to the level considering the grievance.

20 Every grievance presented under section 31 of the Act that is pending immediately before the coming into force of these Standing Orders shall be continued under the *Commissioner's Standing Orders (Grievances)*, 1990.

21 *The Commissioner's Standing Orders (Grievances)*, 1990, are repealed.

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	DENNIS MCGUFFIN, MARK LEMAISTRE and CHARLES SCOTT v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	WINNIPEG, MANITOBA
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APPEARANCES:

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