

Federal Court



Cour fédérale

Date: 20170914

Docket: T-128-17

Citation: 2017 FC 832

Ottawa, Ontario, September 14, 2017

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

ANDRE LAFRAMBOISE

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review, pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of a decision made by the Director General of Aviation Security on behalf of the Minister of Transport (the “Delegate”), to refuse to grant airport security clearance to the Applicant, pursuant to the *Aeronautics Act*, RSC 1985, c A-2.

II. Background

[2] The Applicant, Andre Laframboise, was employed at the Fort McMurray International Airport from 2009-2016 (the "Airport"). During the course of his employment, the Airport achieved international status and therefore the Applicant was required to apply for a security clearance and Restricted Area Identity Card ("RAIC"). The Applicant submitted his application in April 2015, was issued a temporary pass and continued to work at the Airport.

[3] During the screening process, Transport Canada received a Law Enforcement Records Check (the "LERC Report") from the Royal Canadian Mounted Police ("RCMP"). The LERC Report detailed a complaint made to the RCMP by the Applicant's former employer (the "Complainant"). The Complainant suspected that the Applicant had defrauded it of approximately \$35,000. The complaint included the following information:

- The Complainant supplied marine retail outlets with materials;
- The Applicant was employed by the Complainant for approximately 20 years;
- The Applicant was a branch manager for approximately 2 years;
- An annual audit revealed a \$35,000 inventory variance;
- This variance amounted to 40% of inventory;
- A normal variance was between 5-10%;
- A witness provided a cancelled cheque and sales slip from a purchase made at the branch managed by the Applicant;
- The cheque was made payable to the Applicant but should've been made payable only to the Complainant; and
- The witness' copy of the sales receipt showed \$4,600 total, but the office copy showed a sale of only \$22.77.

[4] The LERC Report stated that, following the complaint, the RCMP obtained information from the Applicant's bank. The information included several cheques from the Complainant's clients, written directly to the Applicant, for amounts totalling approximately \$38,000. The

RCMP obtained witness statements and determined that the Applicant had used the Complainant's inventory to do work "on the side" and charge customers directly.

[5] The LERC Report also stated that the RCMP charged the Applicant with theft over \$5,000; however, the charge was dismissed in November 2011, because the file was not produced by police in time for the trial.

[6] On March 31, 2016, Transport Canada sent a letter to the Applicant advising him of concerns regarding his suitability to obtain security clearance. The letter described the information contained in the LERC Report. The letter also encouraged the Applicant to provide additional information about the circumstances of the incidents described in the LERC Report, or to provide any other relevant information or explanation, including extenuating circumstances, within 20 days.

[7] On April 7, 2016, the Applicant responded to Transport Canada with an email explaining that:

- The charge was dropped because it was not true and there was no evidence;
- He sold lobster traps to a witness but they were second-hand and he had done minor repairs and resold them for a profit of about \$200;
- When the Crown discovered that the traps were second-hand, the witness was not asked to appear;
- At the time the charge was brought, he was able to show that the money he received from other customers was for work done outside of work time as well as fishing as a crew member on their boats;
- The sales receipt in question was not in his hand-writing nor did he know of its existence;
- The same scenario occurred with two other managers, and each scenario ended in the same way;
- The inventory shortages had started over 10 years prior, and were from overseas shipment shortages that were not investigated by management after being reported;

- If he knew this would be an issue so long after the charges were dropped, he would've kept the "mountain" of proof and statements he had at the time; and
- He has never been charged with anything else other than two speeding tickets from when he was younger.

[8] The Applicant also emailed a reference letter to Transport Canada from the Airport's Vice President of Operations. The letter stated that during the Applicant's time of employment at the Airport, "[...] he has been situated in positions that have exposed him to confidential and sensitive information. There have been no situations or incidents of concern and he has the complete trust and confidence of Management. I can attest with conviction that Andre is trustworthy and see no impediments or flags to prevent him being [granted security clearance]."

A. *The Decision under Review*

[9] On June 22, 2016, Transport Canada's Transportation Security Clearance Advisory Body (the "Advisory Body") recommended refusing the Applicant's security clearance. The Advisory Body noted:

- The details of the LERC Report;
- The Applicant's submission that he only made a profit of about \$200 from the selling of lobster traps, and that the scope of that work did not match the amount of money he received;
- The Advisory Body felt the information did not add up;
- The incidents raised serious concerns regarding the Applicant's judgement, trustworthiness and reliability;
- The incidents required a level of sophistication and were deliberate, organized and premeditated; and
- Although the charge was dismissed; the Advisory Body was not convinced of his inculpability.

[10] The Advisory Body concluded:

An in-depth review of the information on file led the Advisory Body to reasonably believe, on a balance of probabilities, that the

applicant may be prone or induced to commit an act, or assist or abet any person to commit an act that may unlawfully interfere with civil aviation. Furthermore, the Applicant's submission did not provide sufficient information to dispel the Advisory Body's concerns.

[11] On November 30, 2016, the final decision to refuse the Applicant's security clearance was made by the Delegate. She noted:

- The details of the LERC Report;
- The Applicant was in a position of trust while performing the acts of theft;
- The incident raised serious concerns regarding the Applicant's judgement, trustworthiness and reliability; and
- Although the charge was dismissed, the Minister's Delegate was not convinced of the Applicant's inculpability.

[12] The Delegate concluded:

An in-depth review of the information on file led me to reasonably believe, on a balance of probabilities, that the applicant may be prone or induced to commit an act, or assist or abet any person to commit an act that may unlawfully interfere with civil aviation. I considered the statement the application provided; however, the information presented, specifically not addressing the difference in sales receipts as explained above was not sufficient to address my concerns.

[13] On January 25, 2017, the Applicant applied for judicial review of the Delegate's decision.

III. Issues

[14] The issues are:

- A. Was the Applicant afforded procedural fairness?
- B. Was the Delegate's decision to refuse a security clearance reasonable?

IV. Standard of Review

[15] As agreed to by the parties, the standard of review on questions of procedural fairness is correctness (*Clue v Canada (Attorney General)*, 2011 FC 323 [*Clue*] at para 14). The standard of review for the Delegate's decision is reasonableness.

V. Analysis

A. *Was the Applicant afforded procedural fairness?*

[16] The Applicant submits that the revocation of a security clearance engages a higher level of procedural fairness than a situation involving issuance. Furthermore, the Applicant submits that this situation is analogous to a revocation, because he had been issued a temporary pass and was performing duties at his employment with that pass. Therefore, the Respondent was required to allow him to respond to the concerns raised and make a decision that was not based on an erroneous finding of fact and with due regard to the material available on review.

[17] The Respondent submits that the level of procedural fairness required in matters involving an application for security clearance is minimal. Even in cases where an existing security clearance is being revoked, the procedural safeguards are limited to the right to know the facts alleged and the right to make representations about those facts. Furthermore, the Applicant only held a temporary pass and is not entitled to level of procedural fairness owed where an existing security clearance is revoked.

[18] In *Pouliot v Canada (Transport)*, 2012 FC 347 [*Pouliot*] at paragraph 10, the Court held:

In cases in which an existing security clearance was either being revoked or not renewed, the standard has been found to be slightly higher, but still on the lower end of the spectrum. In *Rivet v Canada (Attorney General)*, 2007 FC 1175 (CanLII) at para 25, the Court held:

With these factors in mind, I agree with the respondent that the duty of procedural fairness in this case is more than minimal but does not require a high level of procedural safeguards (see, for example, *DiMartino v. Minister of Transport*, 2005 FC 635 (CanLII), [2005] FCJ No 876 (FC) (QL), at paragraph 20). Thus, the procedural safeguards available to the applicant in this case are limited to the right to know the facts alleged against him and the right to make representations about those facts. These procedural guarantees do not include the right to a hearing.

[Emphasis added]

[19] Therefore, the Applicant was entitled to know the facts alleged against him and the right to make representations about those facts. After allowing the Applicant to respond, the Delegate only had to render a decision that was not based on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before her (*Motta v Canada (Attorney General)*, 2000 CanLII 14801 (FC) at para 13).

[20] The Applicant was advised in the letter dated March 31, 2016, that there were concerns regarding his suitability to obtain security clearance. The letter set out the details of the LERC Report. The Applicant was afforded an opportunity to respond and did respond via the email dated April 7, 2016, as well as the reference letter. In the letter dated November 30, 2016, the

Delegate made it clear in her reasons that she considered the Applicant's explanations and found them inadequate to convince her of his inculpability.

[21] I find that the Applicant was afforded procedural fairness.

B. *Was the Delegate's decision to refuse a security clearance reasonable?*

[22] The Applicant submits that the Delegate's decision was unreasonable. He argues that the evidence provided by the RCMP was presumed to be reliable and contradictory evidence was ignored, that the Delegate failed to consider the reference letter, and that the basis for the decision is unintelligible because the Delegate made an equivocal "either/or" finding.

[23] The Respondent submits that the Delegate reasonably refused to grant the security clearance. The Delegate was entitled to prefer the evidence of the RCMP and find the Applicant's explanation insufficient. Further, the Delegate's reasons did not need to refer to every piece of evidence and the reference letter was not highly relevant to the Delegate's analysis. Finally, the basis for the decision is clear: suspected involvement in a theft is a reasonable basis for concern regarding judgement, reliability and trustworthiness.

[24] In my opinion, the Respondent's first two arguments fail. First, the Delegate unreasonably relied on the LERC Report to the extent that she stated the Applicant had committed the theft, and this raises concerns about her state of mind when reviewing the Applicant's file. Second, the reference letter speaks directly to the Applicant's character and it was unreasonable for the Delegate to not address this at all in her reasons.

[25] For these reasons, the Delegate's decision was unreasonable. While counsel for the parties directed my attention to apparently conflicting decisions concerning the Applicant's argument related to ambiguity surrounding the disjunctive decision of whether the Applicant was induced or prone to commit or assist or abet an unlawful act (the "either/or" argument) (*Britz v Canada (Attorney General)*, 2016 FC 1286; and *Ng v Canada (Attorney General)*, 2017 FC 376), it is unnecessary to consider whether the Delegate's "either/or" finding is a reviewable error.

(1) The Delegate's Reliance on the LERC Report

[26] The Applicant submits that the Delegate's decision was unreasonable because the evidence provided by the RCMP was presumed to be reliable and contradictory evidence was ignored.

[27] The Respondent submits that the Delegate was entitled to prefer the evidence of the RCMP and find the Applicant's explanation insufficient.

[28] In my opinion, the Delegate was entitled to rely exclusively on the LERC Report, but only to the extent that it raised concerns about the Applicant. The Delegate erred by stating that the Applicant had committed the theft when in fact there is no evidence to support such a finding: this raises concerns about her state of mind and a possible apprehension of bias when reviewing the Applicant's file.

[29] The Minister's exercise of discretion in granting security clearance has been reviewed by this Court on many occasions. In *Sargeant v Canada (Attorney General)*, 2016 FC 893

[*Sargeant*] at paragraphs 26-29, the Court summarized three principles from the jurisprudence:

- a) Section 4.8 of the *Aeronautics Act* confers on the Minister broad discretion and empowers him to take into account any relevant factor when granting, suspending or cancelling a security clearance.
- b) The Minister, in exercising his discretion under section 4.8, is entitled to err on the side of public safety rather than the interests of the affected individual.
- c) In such matters, the focus is on the propensity of airport employees to engage in conduct that could affect aviation safety. As such, the denial or cancellation of a security clearance requires only a reasonable belief, on a balance of probabilities, that a person may be prone to or induced to commit an act that may interfere with civil aviation. Any conduct which causes the Minister to question a person's judgment, reliability and trustworthiness is therefore sufficient ground to refuse or cancel a security clearance.

[30] In exercising this broad discretion, the Delegate was entitled to rely on the LERC Report.

In *Singh Kailey v Canada (Transport)*, 2016 FC 52 at paragraph 29, the Court stated:

This Court has held that information obtained from the RCMP is sufficient for the purposes of the checking process of a security clearance (*Fontaine v Canada (Transport)*, 2007 FC 1160 (CanLII) at para 75 [*Fontaine*]). Moreover, this Court has held that the Minister may rely exclusively on a LERC Report or RCMP report to assess whether an applicant should be granted a security clearance (*Brown v Canada (Attorney General)*, 2014 FC 1081 (CanLII) at para 65; *Henri v Canada (Attorney General)*, 2014 FC 1141 (CanLII) at para 40).

[31] The Delegate was under no obligation to verify or cross-check the accuracy of the information contained in the LERC Report (*Sargeant*, at para 31). Furthermore, it was not necessary for a criminal conviction to be made in respect of the underlying criminal charge in order for the allegations to be relevant to the Delegate's decision (*Clue*, at para 20).

[32] Despite the broad discretion of the Delegate described in the cases above, the Delegate had no reasonable basis to make a finding of theft based on the concerns raised in the LERC Report.

[33] In her reasons for decision, the Delegate states:

I also note that as you were the branch manager, you were in a position of trust while performing the acts of theft.

[Emphasis added]

[34] At best, the Delegate could have questioned trustworthiness based on the Applicant's course of conduct, but went further and found he was guilty of theft – there is no justification or intelligible rationale for this error.

[35] The Delegate's finding of theft also raises concerns about the state of mind of the Delegate during her analysis. Rather than assessing the Applicant's character with regard to the investigation and subsequent dismissal, her statement suggests that she assessed his character under the assumption that he committed the theft. This significantly prejudiced the Applicant and likely made his submissions futile.

[36] As stated above, the Delegate has broad discretion to rely on LERC Reports, err on the side of public safety and be satisfied by only a reasonable belief on a balance of probabilities that she has concerns about the Applicant. However, it was unreasonable for her to find he had actually committed theft, a fact that was not borne out by the evidence, and this calls into question the rest of her analysis.

(2) The Delegate's Failure to Mention the Reference Letter

[37] The Applicant submits that the Delegate ignored the reference letter from the Airport's VP of Operations. He argues that the Court may intervene in the fact-finding process if they conclude that the decision-maker did not take a necessary step in weighing the evidence or did not consider all of the evidence.

[38] The Respondent argues that the Delegate was not under an obligation to specifically address each piece of evidence in the file, and the reference letter was not highly relevant to her primary concern.

[39] I agree with the Applicant. The reference letter spoke directly to the character of the Applicant, and this is central to the Delegate's analysis.

[40] A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*] at para 16). Nor is a decision-maker required to refer to every piece of evidence they received that is contrary to their finding, and to explain how they dealt with it (*Hassan v Canada (Minister of Employment and Immigration)* (1992), 147 NR 317 (FCA)).

[41] However, the more important the evidence that is not mentioned specifically and analyzed in the decision-maker's reasons, the more willing the Court may be to infer from the

silence that the decision-maker made an erroneous finding of fact without regard to the evidence (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] 157 FTR 35 (FC) at para 17). In other words, the decision-maker's burden of explanation increases with the relevance of evidence in question to the disputed facts (*ibid* at para 17).

[42] Here, the Delegate's primary concern was the Applicant's character, that is, whether he may be prone or induced to commit an act that may unlawfully interfere with civil aviation. The Delegate's reasons for decision note her "...serious concerns regarding [the Applicant's] judgement, trustworthiness, and reliability..."

[43] The reference letter speaks directly to the Applicant's character. It states that the Applicant has the "...complete trust and confidence of Management..." and "I can attest with conviction that Andre is trustworthy and see no impediments or flags to prevent him from being [granted security clearance]." It is signed by the VP of Operations, a person of significant importance at the Airport, who appears to be speaking for Airport management as a whole. These are individuals who have worked directly with the Applicant during his six-years' of employment in the very position he now requires clearance to maintain.

[44] Therefore, it was unreasonable for the Delegate to not mention the letter in her reasons. It speaks directly to the Applicant's character and therefore was highly relevant to her primary concern and final decision.

VI. Conclusion

[45] The Delegate's decision lacks justification, transparency and intelligibility. The Delegate erred in finding that the Applicant had performed the act of theft. That finding calls into question her state of mind when assessing the Applicant's character. Furthermore, her reasons failed to mention evidence that was highly relevant to her primary concern. For those reasons, her decision was unreasonable and must be sent back for reconsideration.

JUDGMENT in T-128-17

THIS COURT'S JUDGMENT is that:

1. The Applicant's application is allowed and the matter is remitted back to a different Delegate for reconsideration;
2. No costs are awarded.

"Michael D. Manson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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GENERAL OF CANADA

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