

Federal Court



Cour fédérale

Date: 20210218

Docket: T-737-20

Citation: 2021 FC 159

Ottawa, Ontario, February 18, 2021

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

MICHAEL MULLER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Mr. Muller is a member of the Royal Canadian Mounted Police [RCMP] with the Kamloops detachment. On April 18, 2016, he was involved in an incident at the McDonald's restaurant in Kamloops, which led to him being charged with three breaches of the RCMP Code of Conduct.

[2] A video of the incident is available and was reviewed by all decision-makers, including the Court. It does not have any sound. The incident unfolded as follows:

- i. Mr. Muller, who is off-duty, enters the McDonald's and places his order at the counter.
- ii. He appears to be irritated by the time it is taking to get the order, which is handed to him in a bag approximately 11 minutes after it was ordered.
- iii. On receiving the bag from the server, he immediately opens it and unwraps the burger. He says something to the server and then tosses the opened burger and its wrapper on the counter. His evidence is that the meat pattie is under-cooked. There is no evidence that it was not.
- iv. Mr. Muller takes his cell phone out of his pocket and moves the burger, which is open in its wrapper, towards him. He is obviously preparing to take a picture of it.
- v. Mr. Muller reaches towards the manager, does not touch him, but moves the wrapper and burger away from the manager and towards himself. He is now holding the burger in place with his right hand and has his cell phone in his left hand preparing to take a photo of the burger pattie. The manager enters from behind the counter and with his left hand touches the burger wrapping and moves it and the burger towards him.
- vi. The manager, using his left hand, picks up the burger from its wrapping, brings it to his side of the counter, and transfers the burger into his right hand. As he does that, Mr. Muller takes his right hand, grabs the manager's left wrist for no more than a second, and pulls the manager towards him. The manager drops the pattie onto the floor immediately behind the counter.

- vii. Mr. Muller moves from the customer side of the counter to the kitchen side and retrieves the pattie. He places it on the counter and takes a picture of it.
- viii. There is discussion throughout. The McDonald's manager refunds Mr. Muller for the burger and he chooses to leave but then returns to the counter and has an animated discussion with the staff.
- ix. The incident from receiving the burger to taking a picture of it prior to being refunded the cost takes less than two minutes.

[3] A letter was served on Mr. Muller by his superiors on April 27, 2016. It outlines the three alleged breaches of the Code of Conduct, as follows:

Allegation 1: On April 18, 2016, at or near Kamloops, in the Province of British Columbia, while off duty, you treated employees of McDonald's Restaurant in a disrespectful manner, contrary to Section 2.1 of the Code of Conduct.

Allegation 2: On April 18, 2016, at or near Kamloops, in the Province of British Columbia, while off duty, you inappropriately used your position as a police officer in your communications with employees of McDonald's Restaurant, contrary to Section 3.2 of the Code of Conduct.

Allegation 3: On April 18, 2016, at or near Kamloops, in the Province of British Columbia, while off duty, you used inappropriate and unwanted force on [the manager], contrary to Section 7.1 of the Code of Conduct.

[4] In keeping with the provisions of the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10 [Act], the alleged breaches were first assessed by a conduct board [Conduct Authority] established to decide whether Mr. Muller had contravened the Code, as alleged.

[5] Based on an admission by Mr. Muller, the Conduct Authority found that the first allegation was established, and penalized Mr. Muller by imposing the loss of one day of pay.

The Conduct Authority had this to say about that breach:

In response to allegation # 1, you stated that during your conversations with the staff you never directed any of your profanity at [the manager] or the staff. You did not name call or insult the staff. You were using profanity in your sentences. Looking back at this incident, you wish you had not gotten this upset over this incident and the way it unfolded. You regret the outcome of the situation which lead to the police being called over an incident involving you. You accept responsibility for your actions in this allegation.

[6] Mr. Muller was subsequently charged with assault; however, those charges were stayed by the Crown.

[7] The Conduct Authority decided that the second alleged breach was not established on a balance of probabilities.

[8] The only active issue remained Allegation 3. The decision-maker was required to first determine whether the force used by Mr. Muller was “inappropriate and unwanted” and then if it was, to determine whether, on the balance of probabilities, the conduct was likely to discredit the RCMP. The legal test is “how the reasonable person with knowledge of all relevant circumstances, including the realities of policing generally and the realities of RCMP policing in particular, would view the conduct.”

[9] At the hearing, Mr. Muller explained his action in grabbing the manager’s wrist. It is described in the decision of the Conduct Authority, as follows:

You stated in your written submission that you "reacted to this incident by grabbing his wrist trying to stop [the manager] from taking away my product and I did so with the least amount of force necessary to prevent that action. I did not cause any injury to [the manager]. I would never have intended to cause any harm to [the manager]. I simply reacted to him taking away my product I had paid for. Had he not taken away the pattie I would have never grabbed his wrist.

[10] The Conduct Authority made several important findings of fact, as follows:

- i. It agreed that Mr. Muller's intention in grabbing the manager's wrist was to stop the manager from throwing out the burger before Mr. Muller could take a picture of it;
- ii. There is merit in Mr. Muller's position that the manager did not want him taking a picture of the burger;
- iii. Mr. Muller's use of force was "minor in nature" and was in reaction to the manager's attempt to throw out the burger.
- iv. There were other options available to Mr. Muller if he wished to take a picture of the burger, such as moving it to another location; and
- v. It was Mr. Muller's inability to control his emotions that escalated the situation to the point that he felt "compelled" to use force on the manager.

[11] The Conduct Authority's finding on the merits of Allegation 3, reads as follows:

Based on review of all the investigative materials, in particular your statement, the statement of the employees of McDonalds, and the video surveillance, there is *prima facie* evidence that you

conducted yourself in the manner described in the allegation summary.

During the conduct meeting you admitted to this allegation.

Accordingly, I find that Allegation #3 is established on a balance of probabilities in that you used inappropriate and unwanted force on [the manager].

[emphasis added]

[12] It imposed a penalty of forfeiting two days' pay.

[13] Mr. Muller appealed the decision that Allegation 3 had been established. As required by section 45.15(1) of the *Act*, the Commissioner referred the case to the External Review Committee [ERC] for its review and recommendation. After its report, the Commissioner referred the appeal to an Adjudicator for decision.

[14] The ERC found that the Conduct Authority erred in stating that Mr. Muller had admitted to Allegation 3.

[15] The ERC also concluded that the “finding that Allegation 3 was established is clearly unreasonable.” It found that the Conduct Authority failed to apply the proper legal test for ascertaining if the conduct was likely to bring discredit to the RCMP, contrary to section 7.1 of the Code of Conduct. It noted that the Conduct Authority was required to determine how the “reasonable person” with knowledge of all the relevant circumstances, including the realities of policing generally and the realities of the RCMP policing particularly, would view the conduct.

[16] The ERC recommended that the appeal should be allowed due to this error and recommended that the Commissioner should impose the finding that the Conduct Authority should have made. The ERC concluded that the use of force on the manager was both unwanted and inappropriate and would likely bring the RCMP into disrepute.

[17] The Adjudicator agreed that the Conduct Authority erred in holding that Mr. Muller admitted to Allegation 3. It disagreed with the ERC that the Conduct Authority had failed to apply the proper legal test. Despite its failure to state the test or describe how it applied, the Adjudicator found that the test was implicitly applied after reading the decision as a whole. Accordingly, the Adjudicator ultimately held that he would dismiss the appeal and confirm the Conduct Authority's finding that Allegation 3 was established.

[18] At paragraph 68 of the decision, the Adjudicator stated: "In the alternative, even if I upheld the Appeal and rendered my own decision based on the Record, I would agree with the ERC recommendation to find that the allegation was established and would adopt the ERC rationale for this recommendation (Report, paras 109-114)."

[19] I do not need to analyze whether it is correct that the Conduct Authority implicitly used the proper legal test (which I seriously question), as the decision of the Conduct Authority, that Allegation 3 was established is clearly unreasonable because it was based on the error that Mr. Muller admitted to it. For that reason alone, the appeal ought to have been allowed.

[20] When an appeal is heard by the Commissioner, the remedial options are set out in subsection 45.16(2) of the *Act*:

(2) The Commissioner may dispose of an appeal in respect of a conduct authority's finding by

(a) dismissing the appeal and confirming the finding being appealed; or

(b) allowing the appeal and making the finding that, in the Commissioner's opinion, the conduct authority should have made.

[21] Mr. Muller submitted that the Adjudicator's interpretation of subsection 45.16(2) was unreasonable as he held that if the appeal is allowed, he is then required to make the finding that the Conduct Authority should have made. He notes that the provision uses the permissive term "may" and as such, the Adjudicator was not required to make the finding that should have been made if he allowed the appeal. In my view, nothing turns on this alleged error, as clearly the *Act* permits the Adjudicator to make the finding that should have been made if he allows the appeal. That is what was done here when he stated that he "would agree with the ERC recommendation to find that the allegation was established and would adopt the ERC rationale for this recommendation (Report, paras 109-114)." However, it is my finding that the recommendation the Adjudicator adopts is unreasonable.

[22] The ERC concluded that the use of force on the manager was both unwanted and inappropriate. It is of note that Mr. Muller does not dispute that the use of force was unwanted.

The ERC finds the action to also have been inappropriate:

I also find that the Appellant's use of force on the McDonald's Manager was "*inappropriate*". The Appellant initially explained that his use of force was justified, minimal, not intended to cause injury and harmless (Material, page 218). Yet he later says in his

apology letter to the McDonald's Manager that "you should have never been treated this way by a customer and I am sorry for my actions" (Appeal, page 55). That perspective is consistent with the evidence of three McDonald's employees, who all felt uncomfortable with the Appellant's use of force, which they deemed to be unnecessary (Material, pages 89-90, 113, 139-140). Indeed, upon viewing the use of force, which begins at the 20:49.51 mark of the CCTV recording entitled "McDonald's CCTV-I6.04.18 204843 hrs". I observed the abrupt and aggressive nature of the Appellant's grabbing and pulling of the McDonald's Manager, for which no clear justification was evident from the recording. While I accept that the McDonald's Manager was removing food the Appellant wished to photograph at the time, there were much more appropriate ways for the Appellant to handle the situation, including asking or even insisting that the McDonald's Manager place the food back on the service counter. The evidence plainly illustrates that the Appellant's use of force was both wrong and unacceptable. [emphasis added]

[23] The Conduct Authority did not describe the use of force as “aggressive” and “grabbing and pulling.” Rather it wrote: “I am in agreement that your use of force was minor in nature, and I would agree that it was in reaction to [the manager’s] attempt to throw out the burger.” It further found that Mr. Muller’s “position that [the manager] did not want you to photograph the burger is acknowledged and not without merit.” I concur with these statements.

[24] While in hindsight, there may have been alternatives open to Mr. Muller, that fact alone does not make his reaction to the manager forcefully removing the burger, which was Mr. Muller’s property and which prevented him from taking a picture of it, inappropriate. Mr. Muller’s reaction was immediate and instinctual, and the force used was indeed minor in nature.

[25] Contrary to the finding of the ERC, there was a “justification” offered by Mr. Muller.

Counsel for Mr. Muller is correct in his submission that but for erroneously stating that his client had admitted to Allegation 3, the Conduct Authority might have reached a different finding.

[26] The reasoning of the ERC as to whether this inappropriate and unwanted behaviour was likely to bring discredit to the RCMP raises several concerns. It writes:

In my opinion, the reasonable person with knowledge of the relevant circumstances, including the realities of policing in general and in the RCMP in particular, would construe the Appellant's use of force against the McDonald's Manager as likely to bring discredit to the Force, contrary to section 7.1 of the Code of Conduct. The reasonable person would extend to an off-duty police officer some leeway in raising concerns over a restaurant order being undercooked. However, this leeway would almost certainly not include tolerating the police officer grabbing the restaurant manager and pulling him against his will, even if that unwanted force lasted for only one second. The reasonable person would be uneasy if the police officer, immediately after using force on the restaurant manager, went behind the service counter directly where the manager worked. The reasonable person would also be troubled if the RCMP, having considered the evidence, determined that the police officer's use of force was serious enough to warrant bringing a criminal charge of assault against him, regardless of whether that charge was eventually stayed by a Crown prosecutor. Finally, the reasonable person, aware of the principles of the Conduct Measures Guide, would concede that, while the officer's use of force was a "relatively minor use of force, such as simple shoving, which [did] not lead to a criminal conviction or injury", it fell within the scope of conduct likely to bring discredit to the RCMP, contrary to section 7.1 of the Code of Conduct, as described in the Guide (see pages 47-48).

[27] Concerns with this rationale include the following: (i) it ignores the reason for the “grabbing”, namely that the manager was removing the burger as Mr. Muller was attempting to photograph it; (ii) it ignores that the manager never offered any explanation for so doing nor did he make any offer of a refund before removing it; (iii) it raises the fact that Mr. Muller went

behind the counter – to retrieve his burger – which is irrelevant to the use of force allegation; and (iv) it raises the criminal charge being laid, and is in error in stating that it is not relevant that the Crown decided to stay that charge.

[28] There is no question that Mr. Muller was upset having been served an undercooked burger. It is that fact that begins the sequence of events. However, it cannot be overlooked or discounted that it was the manager grabbing the burger away that was the immediate cause of the incident. On any reasonable view of the evidence, Mr. Muller's reaction was involuntary – it was minor and of short duration. Had he continued to hold onto the manager longer, then it might reasonably be said that the action was inappropriate; however, I am unable to see how any reasonable person knowing all of the facts would view his involuntary reaction to having his burger removed, as inappropriate

[29] For these reasons, the application must be allowed, and the decision under review set aside. If the penalty imposed has been extracted, it must be repaid to Mr. Muller. For the reasons enunciated, I see no value in remitting the matter back for redetermination. The parties advised the Court that they agreed that if this application were allowed, Mr. Muller would be awarded his costs, fixed at \$5,000.00.

JUDGMENT in T-737-20

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended forthwith to name as the proper respondent Attorney General of Canada;
2. The application is granted and the Conduct Appeal decision dated March 23, 2020, is set aside; and
3. The applicant is awarded his costs fixed at \$5,000.00.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-737-20

STYLE OF CAUSE: MICHAEL MULLER v ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: HELD BY VIDEOCONFERENCE BETWEEN OTTAWA, ONTARIO AND VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: JANUARY 18, 2021

JUDGMENT AND REASONS: ZINN J.

DATED: FEBRUARY 18, 2021

APPEARANCES:

J. Barry Carter FOR THE APPLICANT

Susanne Pereira FOR THE RESPONDENTS
Tasneem Karbani

SOLICITORS OF RECORD:

Mair Jensen LLP FOR THE APPLICANT
Barristers & Solicitors
Kamloops, BC

Attorney General of Canada FOR THE RESPONDENTS
Department of Justice
British Columbia Region
Vancouver, BC