Federal Court  Cour fédérale

Date: 20210825

Docket: T-499-20

Citation: 2021 FC 877

Ottawa, Ontario, August 25, 2021

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

DYMTRO FIRSOV

Applicant

and

CANADA (ATTORNEY GENERAL)

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Dymtro Firsov, (Cst. Firsov) is a member of the "V" Division Relief Unit in the Royal Canadian Mounted Police (RCMP). He is challenging a Conduct Appeal Decision made by the RCMP Commissioner's Delegate, Adjudicator Miller, (the Adjudicator) on March 26, 2020 (the Decision).

[2] The Adjudicator dismissed the appeal of an earlier Conduct Authority decision by Inspector Warr (the Conduct Authority) that determined, Cst. Firsov had contravened section 4.2 of the *Commissioner's Standing Orders (Conduct)* found in *Royal Canadian Mounted Police Regulations*, 2014, SOR/2014-281 (*Code of Conduct*) which is part of the RCMP's internal conduct process. Section 4.2 addresses Diligence and Aid.

[3] Cst. Firsov had alleged the Conduct Authority decision was reached in a manner that contravened the principles of procedural fairness, and that it was clearly unreasonable.

[4] Cst. Firsov seeks to have the Court set aside the Decision and grant his appeal of the Conduct Authority decision. In the alternative, Cst. Firsov seeks to have the matter returned for reconsideration by a new adjudicator.

[5] The Respondent, the Attorney General of Canada (AGC), argues the application for judicial review should be dismissed as Cst. Firsov has not demonstrated that the Adjudicator committed a reviewable error in dismissing his appeal of the Conduct Authority decision.

[6] Both parties are seeking costs. They have agreed that costs should be fixed in the amount of $1800, all in, payable to the successful party.

II. **Relevant Facts**

[7] Cst. Firsov was Acting Detachment Commander at Coral Harbour when the Detachment Commander left for training from April 22 to May 6, 2017. The former girlfriend of Cst. Firsov, Cst. Drouin, was assigned to Coral Harbour during this time. At that time, Cst. Firsov and Cst.

Drouin (collectively “the officers”) were the only two members who handled calls for service in the community and conducted subsequent investigations.

[8] Cst. Drouin returned to her home unit on May 7, 2017. At that time, she spoke with her supervisor and raised four specific operational/officer safety concerns related to Cst. Firsov.

[9] On May 19, 2017, an investigation was initiated into four allegations that Cst. Firsov contravened section 4.2 of the *Code of Conduct* which requires that “[m]embers are diligent in the performance of their duties and the carrying out of their responsibilities, including taking appropriate action to aid any person who is exposed to potential, imminent or actual danger.” Cst. Firsov was contemporaneously issued an Order of Temporary Reassignment, restricting him to working only at the Iqaluit Detachment.

[10] Allegations #1 and #2 related to a mental health visit the officers attended on May 1, 2017 at the home of a man who had left the health centre and stated, in front of his spouse and children, that he would kill himself. These allegations are not part of this application as they were determined by the Conduct Authority to be ‘not founded’.

[11] At the first stage of the RCMP conduct process, the Conduct Authority determined that Allegations #3 and #4 against Cst. Firsov had been established on a balance of probabilities.

[12] The Conduct Authority found Cst. Firsov breached the *Code of Conduct* by failing to back up a fellow member at a domestic violence call (Allegation #3) and failing to appropriately follow up on a separate domestic violence call (Allegation #4).

[13] Allegation #3 states:

> On or about May 2, 2017, at or near Coral Harbour, Nunavut, while secondary on call to respond to complaints as backup, Constable Dmytro Firsov refused to attend as backup to a complaint of domestic violence (PROS tile 2017-518925) with Constable Gabrielle Drouin, contrary to RCMP backup policy, Operations Manual chapter 16.9. It is therefore alleged that Constable Dmytro Firsov has contravened Section 4.2 of the Code of Conduct: Diligence and Aid.

[14] This allegation is being challenged by Cst. Firsov both as to the finding that it was proven and the penalty that was imposed.

[15] Allegation #4 states:

> On or about May 5, 2017, at or near Coral Harbour, Nunavut, during the course of his duties, Constable Dmytro Firsov failed to give adequate attention to a duty he was required to perform in relation to PROS tile 2017-534162. It is therefore alleged that Constable Dmytro Firsov has contravened Section 4.2 of the Code of Conduct: Diligence and Aid.

[16] Cst. Firsov has accepted the finding in Allegation #4 that he failed to attend but challenges the penalty imposed saying his behaviour did not rise to the level of discipline that was imposed.

III. **Decision Under Review**

[17] The Adjudicator identified that in order to successfully appeal a Conduct Authority decision, an appellant must establish on a balance of probabilities that the decision either a) contravened the principles of procedural fairness; or, b) was based on an error of law; or c) is clearly unreasonable. This is set out in subsection 33(1) of *Commissioner's Standing Orders*

(Grievances and Appeals), found in the *Royal Canadian Mounted Police Regulations*, 2014, SOR/2014-289 (*CSO Appeals*).

[18] The Adjudicator set out both the procedural history that led to the appeal and the details of the allegations made against Cst. Firsov.

[19] Cst. Firsov appealed the Conduct Authority's decision on the grounds that the decision was reached in a manner that contravened the applicable principles of procedural fairness and it was clearly unreasonable.

[20] After noting that the RCMP conduct process is governed by principles of administrative law, the Adjudicator found that questions of procedural fairness are considered on the basis of correctness.

[21] The Adjudicator identified *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*] as establishing the framework for reviewing issues of procedural fairness. It was noted that the importance of a decision to the affected individual is a significant factor affecting the content of the duty of procedural fairness.

[22] The Adjudicator considered the impact of a decision on Cst. Firsov and found that his employment was never at stake as the Conduct Authority did not possess the authority to consider dismissal or an order to resign. The Adjudicator noted that the Conduct Authority was satisfied that the conduct measures they had available were sufficient to appropriately address the conduct at issue.

[23] The Decision then outlined the four remaining elements identified in *Baker* that constitute procedural fairness: the right to notice, the right to be heard, the right to an impartial decision maker, and the right to a decision with reasons.

[24] The Adjudicator reviewed each of the four elements separately. The Adjudicator found all four elements were respected by the Conduct Authority and concluded that there was no breach of procedural fairness.

[25] The Adjudicator also found that to be considered "clearly unreasonable" as stipulated in subsection 33(1**)** of the *CSO Appeals*, the decision by the Conduct Authority would have to contain a palpable and overriding error and that considerable deference is owed to the decision maker.

[26] The Adjudicator reviewed the findings made by the Conduct Authority on Allegations #3 and #4 and concluded that the decisions of the Conduct Authority were reasonable as they fell within the recommended range provided by the *Conduct Measures Guide*.

[27] With respect to the conduct measures imposed, the Adjudicator considered whether they fell within the range of possible acceptable outcomes for violations of section 4.2 of the *Code of Conduct*. The Adjudicator turned to the factors set out in the *Conduct Measures Guide* to help in assessing the seriousness of a failure to be diligent in the performance of a member's duties.

[28] The Adjudicator also referred to section 4 and subsection 3(1) of the *Code of Conduct* in considering the corrective measures and the remedial measures imposed. The Adjudicator found

that the measures imposed fell within the recommended range provide in the *Conduct Measures Guide* and as such, they were reasonable.

[29] Cst. Firsov's appeal was dismissed by the Adjudicator.

IV. **Issues and Standard of Review**

[30] Cst. Firsov raises two issues:

1. Whether the Adjudicator failed to observe principles of the procedural fairness.
2. Whether the Decision was reasonable.

A. *Procedural Fairness review*

[31] The question of whether the Decision was procedurally unfair raises the issue of whether Cst. Firsov was denied natural justice.

[32] The presumption of reasonableness does not apply to an issue involving a breach of natural justice: *Vavilov* at para 23.

[33] In fact, whether the duty of procedural fairness has been met does not require a standard of review analysis, although it is often referred to as a correctness review. The ultimate question to be answered by a reviewing Court is whether an applicant knew the case to be met and had a full and fair chance to respond: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*CPR*] at para 56.

[34] In the case of an RCMP disciplinary matter it has been held that the statutory scheme requires a higher degree of procedural fairness because subsection 45.16(9) of the *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10, (*RCMP* Act) states that a Commissioner's decision on an appeal is final and binding: *Smith v Canada (Attorney General)*, 2019 FC 770 (*Smith)* at para 40.

B. *Reasonableness Review*

[35] There is now a presumption that, subject to certain exceptions which do not apply in this instance, the standard of review of an administrative decision is reasonableness: *Vavilov* at paras 16 and 17.

[36] The burden is on the party challenging a decision to show that it is unreasonable. Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision: *Vavilov* at para 100.

[37] A reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision: *Vavilov* at para 99.

[38] The jurisprudence of this Court and the Court of Appeal has recognized that RCMP adjudicators have a specialized expertise in maintaining the integrity and the professionalism of the RCMP. Therefore, their decisions in such matters are entitled to a considerable amount of deference: *Calandrini v Canada (Attorney General)*, 2018 FC 52 at para 97 and cases cited therein.

[39] A decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis. A reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up": *Vavilov* at paras 103 and 104.

V. **Cst. Firsov was not denied procedural fairness**

[40] Cst. Firsov submits that he was denied procedural fairness due to the bias of the Conduct Authority.

[41] To support this submission, Cst. Firsov pointed to two events: (1) the investigation of a shooting incident in which he was involved took place concurrently with the investigation of the *Code of Conduct* allegations; and, (2) an initial impression that Allegation #4 raised a performance issue, rather than a conduct issue, was changed after the Conduct Authority met with a Conduct Advisor.

[42] The test for a reasonable apprehension of bias is "[w]hat] would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether

consciously or unconsciously, would not decide fairly.": *Oleynik v Canada (Attorney General)*, 2020 FCA 5 (*Oleynik*), at para 56.

[43] Once there is an allegation of an apprehension of bias, the onus is on the alleger to show there was a real likelihood or probability of bias by the decision-maker. It is a high threshold to meet. The grounds put forward to prove the apprehension must be substantial. The threshold for a finding of a reasonable apprehension of bias is a high one, and the burden on the party seeking to establish a reasonable apprehension is correspondingly high: *Oleynik* at para 57.

[44] For the reasons that follow, I find the Adjudicator did not err in finding that Cst. Firsov failed to establish a breach of procedural fairness. The Adjudicator found that Cst. Firsov knew the case to be met and that he had a full and fair chance to respond.

A. *There was no conflict of interest or bias by the Conduct Authority*

[45] The basis for this ground by Cst. Firsov is that the Conduct Authority authorized the investigation of the shooting incident. Cst. Firsov alleges such involvement by the Conduct Authority while he was charged with determining whether the related allegation should proceed to a conduct meeting raised a reasonable apprehension of bias. He says the Conduct Authority was overly frustrated with having to deal with him.

[46] Cst. Firsov did not raise bias as a ground of appeal. In his statement of appeal to the Adjudicator, Cst. Firsov framed the shooting incident as being a conflict of interest by the Conduct Authority. Although it would have been better to also state bias as a ground, the reference to conflict of interest is sufficient to include bias as a ground. The Court of Appeal has

held that "[i]t is through the concept of reasonable apprehension of bias that the common law of procedural fairness addresses alleged conflicts of interest.": *Oleynik* at para 54.

[47] In specifying the redress he was seeking on appeal, Cst. Firsov asked that the Conduct Authority be found to be in a position of conflict by virtue of being his line officer and also dealing with the aftermath of the shooting. Cst. Firsov says that is the reason that the Conduct Authority imposed "unreasonably harsh measures".

[48] The Adjudicator addressed the conflict of interest argument when discussing whether the Conduct Authority was an impartial decision maker. Considering *Oleynik,* as cited above, I am satisfied that this incorporates both the notions of bias and conflict of interest.

[49] The record before the Adjudicator shows that the Conduct Authority did not take part in the investigation of the shooting incident. His involvement was to direct the Ottawa Police Service (OPS) to investigate the shooting. Cst. Firsov was subsequently absolved of any wrongdoing by the OPS.

[50] One of the legal constraints on the Adjudicator is found in subsection 40(1) of the *RCMP Act*:

Investigation	**Enquête**
40 (1) If it appears to a conduct authority in respect of a member that the member has contravened a provision of the Code of Conduct, the conduct authority shall make or cause to be made any investigation that the conduct authority considers necessary	40 (1) Lorsqu'il apparaît à l'autorité disciplinaire d'un membre que celui-ci a contrevenu à l'une des dispositions du code de déontologie, elle tient ou fait tenir l'enquête qu'elle estime nécessaire pour lui permettre

to enable the conduct authority to determine whether the member has contravened or is contravening the provision.	d'établir s'il y a réellement contravention

[51] As can be seen, subsection 40(1) specifically enables the Conduct Authority to take the very action that Cst. Firsov says is procedurally unfair. The Conduct Authority can both conduct an investigation and determine whether the member contravened the *Code of Conduct*.

[52] In this case, the record shows and it is not disputed, that Sergeant Duvall of the Iqaluit Detachment conducted the investigation into the allegations against Cst. Firsov.

[53] There is no evidence in the record, and in particular, no substantial evidence, that the Conduct Authority did more than authorize the investigation of the shooting incident in the usual course of performing his duties. As that is permitted by the legislation, it cannot ground an allegation of procedural unfairness.

[54] Given this finding I will only briefly comment upon the Ontario case of *Rutigliano v Commissioner, O.P.P.,* 2011 ONSC 98 [*Rutigliano*] relied upon by Cst. Firsov. It is submitted that at the time of the *Code of Conduct* investigation, the Conduct Authority was familiar with Cst. Firsov and aspects of his record as a member of the RCMP, including the shooting in Igloolik. Cst. Firsov submits that such previous involvement in a concurrent investigation into his conduct prohibits the Conduct Authority from presiding over the *Code of Conduct* allegations.

[55] I begin by noting that the "involvement" of the Conduct Authority in the investigations of the shooting incident and the conduct allegations was minimal. It involved authorizing the OPS and a detachment sergeant to conduct those separate investigations. Once again, that falls within subsection 40(1) of the *RCMP Act*.

[56] In addition, I am not persuaded that *Rutigliano* is helpful to Cst. Firsov.

[57] The facts in *Rutigliano* were very different than they are in this matter. There, in a previous hearing involving Mr. Rutigliano, the adjudicator had commented on his character and conduct. The Ontario Divisional Court found that an informed person would conclude that the pre-existing information, which was extraneous to the matters to be adjudicated, was such that those factors could impact the adjudicator's decision and would support an apprehension of bias whether or not one existed.

[58] Here, there is no evidence that the Conduct Authority made any negative comments about any aspect of Cst. Firsov's character or conduct either when authorizing the shooting investigation or when authorizing investigation of the allegations. The Conduct Authority made no negative comments about any aspect of Cst. Firsov's character when addressing the four allegations at issue in this matter. Any comments about the conduct of Cst. Firsov were appropriately made within the analysis of his culpability or lack thereof on each of the allegations.

[59] As the determinative facts supporting the removal of the adjudicator in question in *Rutigliano* are not present here, I find that *Rutigliano* is inapplicable.

[60] More on point is *Smith*, which also involved an RCMP discipline matter. There, Justice Favel found that the adjudicator was correct in determining that there was no reasonable apprehension of bias when the conduct authority also conducted an investigation into another member of the RCMP related to the same sequence of events.

[61] Justice Favel noted the changes implemented in 2014 allowed contraventions of the *Code of Conduct* to be dealt with at the unit, branch, or divisional level and found that "[i]t is clear that the procedural changes were meant to facilitate the prompt determination of conduct hearings within RCMP units. It would be inconsistent with this purpose [to] require a different Officer to investigate each individual alleged to have breached the *Code of Conduct* in a particular set of circumstances.": *Smith* at para 52.

[62] The finding in *Smith* is consistent with the provisions of subsection 40(1) of the *RCMP Act*.

[63] In a similar vein, Cst. Firsov alleges there was a breach of procedural fairness because the Conduct Authority was familiar with aspects of his record as a member of the RCMP. This submission is also caught by the logic in S*mith*. In addition, it is speculative and based on a bald allegation with no supportive evidence.

[64] The Adjudicator concluded there was no evidence that the Conduct Authority acted in a manner that exhibited partiality. The Adjudicator also referred to the fact that two allegations against Cst. Firsov had been dismissed as evidence. Cst. Firsov says that is irrelevant and an unreasonable conclusion to draw in the circumstances.

[65] I disagree. I accept the submissions of the AGC that no indication is found on the record that the Conduct Authority acted with partiality. In fact, the finding prior to the conduct meeting that two of the allegations were determined to not be established is to the opposite effect.

[66] Cst. Firsov finally alleges the Adjudicator failed to consider the proper test for bias. This allegation puts form over substance.

[67] The Adjudicator cannot be faulted for failing to articulate the test for an issue not put forward by Cst. Firsov in the Statement of Appeal.

[68] In conducting the impartiality analysis addressing the conflict of interest allegation, the Adjudicator considered, explained and reasonably made findings upon all the *Baker* factors. In substance, that addressed the bias argument as well as the other procedural unfairness arguments that Cst. Firsov raised.

B. *The right to be heard was met*

[69] Cst. Firsov alleged in his Statement of Appeal that he was not heard.

[70] He provided two reasons for that allegation: (1) no further investigation was ordered even though he had produced evidence that Cst. Drouin had lied; (2) his answer to the question by the Conduct Authority of what is the difference in policing between the North and the South was interrupted by the Conduct Authority.

[71] Cst. Firsov sought redress for the alleged lies by Cst. Drouin in the form of a further investigation of Allegation #3. His reason was that “based on the information that I provided

both prior to and during my conduct hearing, had the information been adequately considered, allegation #3 would not be substantiated based on the balance of probabilities."

[72] In his Statement of Appeal, Cst. Firsov stated that his right to be heard had been violated because the Conduct Authority did not "truly [consider] my submissions", which included new evidence. He says that if his submissions had been considered the evidence from Cst. Drouin would have been revisited and a subsequent investigation ordered based on Cst. Drouin providing false information.

[73] Cst. Firsov went on to state that it was his word versus Cst. Drouin's and the Conduct Authority took her word for it therefore he felt that he was not listened to although he was entitled to be heard.

[74] I cannot agree that the Adjudicator erred in rejecting this submission.

[75] It is not evidence of bias or an example of not being heard when a fact-finder prefers one version of events over another. Cst. Firsov is suggesting that the right to be heard includes a right to a particular outcome in his favour. This suggestion amounts to a request to the Adjudicator to re-weigh the evidence before the Conduct Authority and come to a different conclusion.

[76] The Adjudicator is applying the palpable and overriding error standard to the Conduct Authority decision. A palpable and overriding error "is one which is obvious and apparent, the effect of which is to vitiate the integrity of the reasons.": *Maximova v Canada (Attorney General)* 2017 FCA 230 at para 5. The application of the palpable and overriding error standard

of review is “a highly deferential standard that would be difficult hurdle to overcome”: *Smith v Canada (Attorney General)*, 2021 FCA 73 at para 55.

[77] In other words, the palpable and overriding error standard requires the Adjudicator to defer to the Conduct Authority unless Cst. Firsov can show there was an obvious and apparent error of such a magnitude that the integrity of the reasons are vitiated.

[78] The Adjudicator was not persuaded any such error had been shown. Nor have I been so persuaded. Cst. Firsov has not shown that either the Adjudicator or the Conduct Authority erred in any of the findings they made in arriving at their respective decisions.

[79] Cst. Firsov additionally surmises that he was not given the right to be heard because there was no discussion of his response to the Conduct Authority concerning the differences in policing between the North and the South. Cst. Firsov adds that the Conduct Authority “clearly did not get the answer that he wanted because the measure was still applied and I’m not promotable.”

[80] Cst. Firsov did provide an answer to the question posed by the Conduct Authority and therefore, he did avail himself of the right to be heard. His supposition that the conduct measure imposed was the result of the Conduct Authority “not getting the answer he wanted” is entirely speculative and is not borne out by the record.

[81] In discussing Allegation #3, the reasons of the Conduct Authority list several aggravating and mitigating circumstances that were considered. Those factors are then followed by an

acknowledgement that the conduct measure of the forfeiture of 4 days pay is at the high end of the normal range. An explanation for that is provided which need not be repeated here.

[82] The Conduct Authority had the advantage of seeing and hearing Const. Firsov present his case. The Adjudicator identified the applicable law, noted the Conduct Authority respected the conduct process, then reviewed the facts on the record. The reasons relied upon by the Conduct Authority were clearly set out by the Adjudicator.

[83] The Adjudicator acknowledged the deference requirement and applied it appropriately, giving deference to the Conduct Authority's findings.

[84] An administrative decision maker may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis: *Vavilov* at para 301.

[85] Considering the foregoing, I find the Adjudicator did not err in rejecting the submission that Cst. Firsov was not heard by the Conduct Authority.

C. *The consultation with the Conduct Advisor does not support a finding of bias*

[86] After a discussion between the Conduct Authority and the Conduct Advisor, the Conduct Authority made a handwritten comment stating "[f]urther discussion with Conduct Advisor convinced me that #4 supported." Cst. Firsov says this is an example of operational bias. He also complains that he was not present during the meeting nor was he advised that it was taking place.

[87] The essence of Cst. Firsov's concern is, in his words, that "[t]his meeting appears to have dramatically altered [the Conduct Authority's] conclusion." The result he says is "clear evidence of operational bias."

[88] Cst. Firsov submits that he was not given the right to respond to the Conduct Advisor's position or the evidence against him – there was a closed door decision that he was not a part of and it was a blatant breach of his procedural fairness rights.

[89] The handwritten comment was not part of the Conduct Authority's decision. It was a notation made by the Conduct Authority at the preliminary stage when he was determining whether or not there was a *prima facie* case against Cst. Firsov.

[90] In the Certified Tribunal Record the next page contains the reasons for that finding: "[Cst. Firsov] was the A/NCO in charge. He did not go. He should have verified the information. Someone need (sic) help. He did not do that. He was senior call member on duty."

[91] To support his position Cst. Firsov relies on *Dickhout v The Police Complaint Commissioner*, 2011 BCSC 880 [*Dickhout*] which is a case from the British Columbia Supreme Court decided on June 30, 2011. The case involved a BC Transit Authority Police Officer who injured a person when he deployed a conductive energy weapon while arresting the person.

[92] The finding upon which Cst. Firsov relies for his argument of operational bias was made not in *Dickhout* but in an unreported related decision made earlier in the discipline process - an excerpt of which is set out in *Dickhout*. That decision ordered the removal of the then-appointed

discipline authority because they had independently contacted and met with a retired use-of-force trainer to gather further information related to the key issue for determination.

[93] The finding in *Dickhout* was that the discipline authority had stepped outside of the role of an impartial adjudicator by gathering further information for consideration at the discipline hearing.

[94] The facts in Cst. Firsov's case are not at all similar to those in *Dickhout*. Here, the Conduct Authority did not seek out or receive additional, extraneous evidence, to use in the conduct meeting.

[95] Cst. Firsov has not put anything forward to this Court, other than his allegation, to support his position that he was entitled to be part of the internal consultation by the Conduct Authority with the Conduct Advisor or that he was entitled to an opportunity to respond to the Conduct Advisor's position. Nor was any authority for such a right to participate brought to the attention of the court by Cst. Firsov.

[96] Based on all of the foregoing, I find that Cst. Firsov has not met his burden to prove that the consultation with the Conduct Advisor created a perception of bias or actual bias on the part of the Conduct Authority.

D. *Conclusion*

[97] There is a presumption that a decision-maker will act impartially: *Zündel v Citron*, [2000] FCJ No 679 at paragraph 37. To rebut this presumption, a real likelihood or probability of bias must be demonstrated, mere suspicion is not enough: *R v S (RD)*, [1997] 3 SCR 484.

[98] Cst. Firsov did not adduce evidence of bias. For the most part, he provided speculation and evinced suspicion.

[99] The Adjudicator noted that the Conduct Authority addressed each of the four elements that constitute procedural fairness. The Adjudicator determined that:

1. Cst. Firsov received proper notice of the case to be met. He had received the Notice of Conduct Meeting containing the four allegations and the particulars of each. He made submissions both orally and in writing and no decision was made before he could respond.

2. Cst. Firsov was heard. The Conduct Authority indicated that he had reviewed the information in the investigation package and had considered Cst. Firsov's written submissions provided on September 29, 2017 and the oral representations he made during the conduct meeting on October 2, 2017.

3. The summary provided by the Conduct Authority showed that Cst. Firsov made representations on the merits of the allegations and they were heard.

4. The right to a decision and reasons was met on October 12, 2017 when Cst. Firsov was served with a copy of the Record of Decision by the Conduct Authority. The Record of Decision noted that allegations 3 and 4 were established and it included the points which the Conduct Authority considered to arrive at that conclusion.

5. Regarding the right to an impartial decision maker, the Adjudicator indicated the question was whether the Conduct Authority was impartial. After stating that a member of senior rank would be dealing with several issues involving various members concurrently the Adjudicator determined from his review of the underlying record that there was no indication the Conduct Authority acted in a manner exhibiting partiality.

[100] I find the Adjudicator reasonably concluded on the facts, after considering the evidence and Cst. Firsov's Statement of Appeal that "the Conduct Authority respected the conduct process and carried out a reasoned analysis which resulted in a transparent decision."

[101] On this basis, for all of the reasons set out above, I find that the allegations of bias and conflict of interest made against the Conduct Authority grounded on the basis of their prior involvement with Cst. Firsov and meeting with the Conduct Advisor, were not made out by Cst. Firsov. The grounds were not supported by evidence meeting the high threshold established to show a reasonable apprehension of bias.

[102] To summarize, Cst. Firsov knew the case to be met, he was heard and he presented his case to an impartial decision maker in writing and in person. He received a decision and reasons from an impartial decision maker.

[103] I conclude that the Adjudicator was correct in finding that Cst. Firsov had not demonstrated there had been a breach of procedural fairness.

VI. **The Decision is reasonable**

A. *Allegation #3 findings were reasonable*

[104] Cst. Firsov submits that it was unreasonable for the Adjudicator to conclude that he had refused to attend a domestic complaint as backup and in doing so violated the Domestic Violence Policy. He says that neither conclusion is supported by the facts.

[105] The basis for that allegation is that Cst. Firsov was contacted while he was off-duty. The domestic dispute was over. The complainant had been removed from the assailant, was safe, and at the residence of a relative. Cst. Firsov was advised the altercation was minor in nature and alcohol was not involved.

[106] Cst. Firsov determined that they would deal with the assailant upon Cst. Firsov's arrival at work. He notes that as the ranking officer, this was a determination he was entitled to make. In the meantime, Cst. Drouin was to meet the complainant and take a statement.

[107] Cst. Firsov says that Cst. Drouin did not attend a domestic dispute – she was collecting a statement *following* a domestic dispute. He says that the distinction is critical. The Domestic Violence Policy does not require that two members attend to take a statement following a domestic dispute.

[108] The Adjudicator again noted that the question he was to determine was whether the decision was clearly unreasonable which means it evinces a palpable and overriding error, and that the decision maker is entitled to considerable deference from the Adjudicator.

[109] The Adjudicator correctly, and therefore reasonably, determined the standard of review he was to apply to the Conduct Authority decision. It has been noted in this court that on judicial review the Commissioner's Delegate - the Adjudicator - is also entitled to a broad margin of deference: *Kalkat v Canada (Attorney General)*, 2017 FC 794 at para 52.

[110] The Adjudicator identified that there might be some debate as to whether Cst. Firsov's actions amounted to misconduct or should have been dealt with by way of performance

management. The Adjudicator identified though that he was not to substitute his preference for the one selected by the Conduct Authority. Rather the Adjudicator was responsible for assessing whether the decision by the Conduct Authority fell within the range of possible and acceptable outcomes.

[111] Cst. Firsov provided a synopsis of his actions and rationale for making the decisions he did. The Conduct Authority accepted his statement, based on the Conduct Measures Guide, that members are often placed in situations where they have to make quick decisions based on the available information and that a well-reasoned "mistake" does not amount to misconduct.

[112] In assessing the argument that there was no domestic call in progress, the Adjudicator indicated he was troubled that after receiving a telephone call from Cst. Drouin concerning a domestic assault and, knowing that she resolved to attend alone after insisting that they attend together, Cst. Firsov failed to respond to the complaint. The Adjudicator noted that this was a particular problem since Cst. Firsov was supervising Cst. Drouin.

[113] The Adjudicator considered that throughout their service, members of the RCMP are impressed with the inherent danger in attending domestic violence complaints. It was concluded that even though Cst. Firsov disagreed with Cst. Drouin's proposal to attend alone, "the mere fact that she was going to attend **alone**, regardless of where [Cst. Firsov] might have believed the subject of the complaint to be, is deeply concerning." (emphasis in original)

[114] The need for members to be able to depend on each other for support and officer safety was found by the Adjudicator to be particularly important, in fact vital, in small remote communities.

[115] Cst. Firsov argued that Cst. Drouin did not attend a domestic dispute alone because she was collecting a statement following a domestic dispute. This was considered by the Conduct Authority, and then again by the Adjudicator. The Conduct Authority acknowledged Cst. Firsov's explanation of the events and the argument that he did not overtly state that he refused to attend the complaint but it was found, on a balance of probabilities, that Allegation #3 was established.

[116] Both decision-makers expressed concerns about Cst. Firsov's decision to allow Cst. Drouin to respond to the complaint alone. In coming to their respective conclusions, they each emphasized the importance of supporting fellow members in small remote communities.

[117] The Conduct Authority had consulted the RCMP Operational Manual 16.9 Backup policy. It was noted that "calls of violence or where violence is anticipated" and "a domestic dispute" are said to "require a multiple member response". The reference to the anticipation of violence appears to indicate that an ongoing dispute is not required to send multiple members in response to a call.

[118] Having reviewed the Backup policy, the Conduct Authority found in relation to Allegation #3 that "these types of calls are to be addressed immediately as per policy and a three hour wait is unacceptable." As Const. Firsov failed to attend, the Conduct Authority found *prima facie* that he had contravened subsection 4.2 of the *Code of Conduct.* The Conduct Authority concluded that if it was proven, it would support a finding under subsection 42(1) of the *RCMP Act*.

[119] Just as the Adjudicator owed deference to the Conduct Authority, this Court owes deference to the Adjudicator. I can find no indication that the Adjudicator erred in finding the Conduct Authority's decision on Allegation #3 was reasonable.

[120] The treatment by the Adjudicator of Allegation #3 in the Decision, and the justification offered for it, is transparent, intelligible, and justified as required by *Vavilov* at paragraphs 15 and 86. The reasons "add up".

[121] The relevant factual and legal constraints imposed by the *Code of Conduct* and the other documents mentioned in the Decision were considered and applied with an internally coherent and rational chain of analysis. I could discern no fatal flaw or shortcoming. As such, I am required to defer to the Decision: *Vavilov,* para 85.

[122] For all the foregoing reasons, I find that the Adjudicator's determination that Allegation #3 was made out is reasonable.

B. *Allegation #4 findings were reasonable*

[123] Cst. Firsov argues that neglect of duty is not an absolute liability disciplinary offence. He says that the Decision is unreasonable in that it neglects to adequately consider his explanation in relation to Allegation #4. He admits he made a mistake but says there is no reason to elevate "a mere performance consideration" to a matter of misconduct.

[124] The mistake in question was that Cst. Firsov believed the calls received were a prank. His basis for that belief was that he was not told that the complainant had reported that she had been choked or was unable to breathe and he was not given the correct address for the complainant.

[125] Cst. Firsov, who had only been in the community for three weeks at that time, said he was also not aware that the assailant, who was not identified, was a "violent and prolific" offender.

[126] Cst. Firsov submitted to the Conduct Authority that he did attempt to investigate the matter. He contacted Cst. Drouin to obtain the phone number of an occupant at the address provided to him. He subsequently contacted the occupant and when informed they did not need assistance, he provided her with a code word to use in the event that she was unable to speak candidly. She did not use the code word.

[127] The Conduct Authority stated that the direction Cst. Firsov provided to Cst. Drouin was sound - as it relates to the taking of a statement. He also gave Cst. Drouin very good advice that she should not visit the residence alone as it was something they should do together.

[128] The Conduct Authority noted though that it was not a routine call for service. It was found that the Operational Communications Centre Standard Operating Procedures "would have placed this at a **PRIORITY 2**- Urgent - Dispatch as soon as possible." (emphasis in the original)

[129] Cst. Firsov submits that the Adjudicator unreasonably judged his conduct with the benefit of hindsight. Relying on *Allen v Alberta (Law Enforcement Review Board)*, 2013 ABCA 187

(*Allen*) he submits that mere errors in judgment should not constitute disciplinary offences; there must be some meaningful level of moral culpability.

[130] I find that *Allen* is no assistance to Cst. Firsov's position that the events were not a matter of misconduct.

[131] *Allen* involved a *Charter* breach giving rise to a disciplinary matter. It found that a Charter breach is not an *ipso facto* disciplinary offence. Cst. Firsov is accused of contravening the *Code of Conduct*. This triggers possible disciplinary action following an investigation.

[132] *Allen* also acknowledges that negligence may, in some instances, amount to a disciplinary offence.

[133] The Adjudicator noted the following regarding Allegation #4:

1. Cst. Firsov knew that a call had been received on the emergency line from a female requesting police attend "right now" and was aware the complainant called back to determine if assistance was coming;

2. It was disturbing that Cst. Firsov attempted to resolve this type of complaint by phone, especially if he thought the call was from someone who had suffered domestic violence just three days earlier;

3. Cst. Firsov was provided a number for the complainant and elected to consider it a prank call; he did not call her back because he believed her to be intoxicated;

4. There is an expectation from the public that when they call the police, especially the emergency line, help will be rendered. Cst. Firsov's conduct is a marked departure from the standard of service that the public expects and that the RCMP strives to provide

[134] The Conduct Authority had noted that "[w]hile I don't think you had any malicious intent by not attending, your actions fell below what I consider the bare minimum".

[135] The Adjudicator referred to the *Conduct Measures Guide* comment that "[r]esponding to emergency calls for service is a core aspect of police work. When citizens call for help, police are expected to arrive as soon as possible." and that "neglect occurs when the quality of the investigation is so poor that it can bring discredit upon the Force".

[136] The Adjudicator agreed with the Conduct Authority that Cst. Firsov's conduct was a marked departure from the standard of service that the public expects and that the RCMP strives to provide.

[137] Both the Conduct Authority and the Adjudicator considered the arguments raised by Cst. Firsov such as information that was not relayed to him by the Operational Communications Centre. They each found he had enough information at the time to support the need for a physical patrol.

[138] The Adjudicator considered the Conduct Authority's reasons and Cst. Firsov's submissions in the Statement of Appeal, after which he reasonably found that the Conduct Authority decision should be upheld. The Decision, and the reasons provided therein, appropriately considered and took into account the factual and legal constraints in the various documents in the record and those governing the RCMP discipline process.

[139] With respect to Allegation #4, I find that the reasons in the Decision "add up". They are transparent, intelligible and justified. Once again, the relevant factual and legal constraints imposed by the *Code of Conduct* and the other documents mentioned in the Decision were considered and applied with an internally coherent and rational chain of analysis. I could discern no fatal flaw or shortcoming. As such, I am required to defer to the Decision: *Vavilov*, para 85.

[140] For all the foregoing reasons, I find that the determination by the Adjudicator that Allegation #4 was made out is reasonable.

VII. **The Conduct Measures are reasonable**

[141] The Decision upheld the Conduct Authority's decision to impose a forfeiture of 32 hours (4 days) of annual leave for each of Allegations #3 and #4, as well as ineligibility for promotion for one year, a requirement to review RCMP policy and to take online Domestic Violence courses.

[142] In finding these conduct measures reasonable, the Adjudicator noted:

- Factors which assist in assessing the seriousness of a failure to be diligent in the performance of duties are found at pages 20 to 23. The Guide at page 21, states that for circumstances of clear neglect that are not aggravated by serious consequences, the proposed normal range of recommended measures would vary between a reprimand and 5 days forfeiture of pay;
- The *Code of Conduct* allows a conduct authority to impose corrective measures in addition to remedial measures.
- Subsection 3(1) provides a non-exhaustive list of remedial measures including a direction to undergo training and to complete a program or undergo an activity.
- Section 4 grants authority to, among other measures, impose an ineligibility for promotion for a period of not more than one year, and forfeiture of annual leave for a period of not more than 80 hours.

[143] The Adjudicator found that the measures ordered by the Conduct Authority fell within the range recommended by the Guide and were within the Conduct Authority's authority to impose. The Adjudicator therefore found the conduct measures as imposed were reasonable.

[144] Cst. Firsov submits that the discipline is clearly excessive. He refers to the 2014 Annotated *Code of Conduct, which* he says states that in circumstances of clear neglect not aggravated by serious consequences, the proposed normal range of recommended measures varies between a reprimand and 5 days forfeiture of pay.

[145] The record contains a rebuttal by the Conduct Authority to the submissions in the Statement of Appeal. Amongst other matters, the record explains why he determined that the conduct measures were within range:

> To remove someone from the promotion process was a difficult decision but my confidence in Cst Firsov was lost. He was a Sr. Cst in an acting Cpl position. He failed to respond appropriately. Nunavut is a very dangerous location. In fact we have the highest crime severity index then any other province or territory. This was a two person detachment and to allow a member to deal with a domestic violence situation on their own is completely unacceptable given the environment of Nunavut.

[146] Cst. Firsov submits that neither Allegation #3 or #4 shows clear neglect. Each had exculpatory factors weighing in Cst. Firsov's favor. Based on the range above, Cst. Firsov says his discipline for behaviour cannot reasonably be 4 days for each established allegation.

[147] Cst. Firsov also argues that section 4 of the *Code of Conduct* entitles a Conduct Authority to impose an ineligibility for promotion for a period of not more than one year. This means that Cst. Firsov received the maximum discipline available for this form of remedial measure. He says that this outcome is patently unreasonable in the circumstances.

[148] The AGC submits that Cst. Firsov is seeking to reweigh the evidence and replace the Conduct Authority's decision. Noting that the conduct meeting measures are near the upper end of the spectrum does not illustrate an error, it expresses a preferred outcome.

[149] The AGC also submits that it was not unreasonable for the Adjudicator to find the Conduct Authority's conduct measures – even if not what he would have imposed – are within the range of what is justifiable, transparent, and intelligible. The Conduct Authority sought to impress upon Cst. Firsov the importance of proper responses in cases of domestic violence and the risks it poses to the public, members, and the force. As that was done within the scope permissible under the regime and on the basis of considerations properly before him, the Conduct Authority can do so.

[150] I agree with the AGC that noting the conduct meeting measures were near the upper end of the spectrum does not illustrate an error. It expresses a preferred outcome.

[151] The decision of the Conduct Authority shows that he considered the Guide as well as mitigating and aggravating factors. For example, he found that while there were no serious consequences, Cst. Firsov chose not to attend. For that reason, the Conduct Authority decided to impose the 4 days of forfeiture of annual leave, acknowledging that it was at the high end of the range.

[152] The Conduct Authority explained he imposed other corrective conduct measures because he felt it was important that Cst. Firsov not be promoted until he had taken steps to rectify his actions and ensure they do not occur again. The additional measures were imposed with the

intent of impressing upon Cst. Firsov, the importance of responding to domestic violence complaints appropriately.

[153] Two aggravating factors were specifically identified by the Conduct Authority for Allegation #4.

[154] The Conduct Authority found that although Cst. Firsov took some steps and did not blatantly refuse to attend the complaint, his actions "fell well below what is expected of a member with your years of service". He also found that "it was not a routine call so the suggested mitigated range was not considered."

[155] The Adjudicator considered section 4.2 of the *Code of Conduct* with respect to factors that assist in assessing the seriousness of a failure to be diligent in the performance of duties.

[156] The Adjudicator also noted that section 4 of the *Code of Conduct* permits a conduct authority to impose corrective measures, in addition to remedial measures. It was noted that subsection 3(1) of the *Code of Conduct* contained a non-exhaustive list of remedial measures and section 4 provided the Conduct Authority with the authority to impose the measures he did.

[157] I cannot see that in this matter the Adjudicator erred in finding the imposed conduct measures were reasonable. Nor does it appear that the Adjudicator overlooked any important fact or legislative provision.

[158] The Adjudicator found the imposed measures were within the recommended range provided in the *Conduct Measures Guide*. As a result, the conduct measures as imposed were

found to be reasonable. The reasons for doing so are justified, intelligible and transparent. The reasoning "adds up" and contains no fatal flaws or shortcomings.

VIII. **Summary and Conclusion**

[159] Cst. Firsov has not demonstrated that a conflict of interest or a reasonable apprehension of bias was displayed by the Conduct Authority due to their instruction to begin an investigation into the shooting incident or their consultation with a conduct advisor. I am satisfied that an informed person, viewing the matter realistically and practically, and having thought the matter through would not think it more likely than not that the Adjudicator, consciously or unconsciously, would not decide fairly.

[160] Cst. Firsov has not met his burden to demonstrate that the Decision was unreasonable or procedurally unfair. This is the case whether considering that the Adjudicator upheld the Conduct Authority's decision regarding allegations #3 and #4, or the conduct measures imposed.

[161] Cst. Firsov has, in effect, simply disagreed with the assessment and weighing of the evidence by both the Adjudicator and the Conduct Authority. His arguments largely amount to asking the court to reweigh the evidence and substitute his views for the decision-maker's conclusions.

[162] That is not the proper role of the court on judicial review. It is trite law that a decision maker may assess and evaluate the evidence before it and, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from

"reweighing and reassessing the evidence considered by the decision maker": *Vavilov* at para 125.

[163] I understand Cst. Firsov's argument that his unblemished record has now vanished. I accept that it is his view that this occurred as the result of the actions of what he says is a vindictive ex-girlfriend. Nonetheless, the role of the court is to consider whether the Decision, including the rationale for the decision and its outcome, was unreasonable: *Vavilov* at para 83.

[164] Both the Conduct Authority and the Adjudicator considered the arguments raised by Cst. Firsov, such as information that was not relayed to him by the Operational Communications Centre, and found he had enough information at the relevant time to support the need for a physical patrol.

[165] They were both aware of Cst. Firsov's views of Cst. Drouin.

[166] The Decision was made after consideration of the Conduct Authority's reasons and Cst. Firsov's submissions. I could discern no "fatal flaws" in the logic and rationale of the Decision. The reasons clearly set out how and why the Adjudicator found the decision of the Conduct Authority was neither procedurally unfair nor clearly unreasonable.

[167] For all the foregoing reasons, I find the Decision is reasonable and the Adjudicator correctly identified there was no procedural unfairness by the conduct Authority.

[168] This application is dismissed with costs of $1800 to the AGC.

JUDGMENT in T-499-20

THIS COURT'S JUDGMENT is that:

1. This application is dismissed with costs of $1800 to the AGC.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-499-20
STYLE OF CAUSE:	DYMTRO FIRSOV v CANADA (ATTORNEY GENERAL)
PLACE OF HEARING:	HELD BY WAY OF VIDEOCONFERENCE
DATE OF HEARING:	FEBRUARY 3, 2021
JUDGMENT AND REASONS:	ELLIOTT J.
DATED:	AUGUST 25, 2021

APPEARANCES:

Marco Baldasaro	FOR THE APPLICANT
James Elford	FOR THE RESPONDENT

SOLICITORS OF RECORD:

McLennan Ross LLP Barristers and Solicitors Calgary, Alberta	FOR THE APPLICANT
Attorney General of Canada Edmonton, Alberta	FOR THE RESPONDENT