Federal Court  Cour fédérale

Date: 20220405

Docket: T-1421-20

Citation: 2022 FC 474

Ottawa, Ontario, April 5, 2022

PRESENT: Madam Justice Sadrehashemi

BETWEEN:

SHAUN WANOTCH

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This judicial review is about Mr. Wanotch's discharge as a member of the Royal Canadian Mounted Police [RCMP] because of his alleged poor performance. The central poor performance allegation related to his lack of diligence in conducting investigations, preparing and completing paperwork, assembling evidence and testifying in court.

[2] At the time of Mr. Wanotch's discharge, there were a series of steps involved before a RCMP member could be discharged. After Mr. Wanotch was served with a Notice of Discharge, his case was referred to the Discharge and Demotion Board ("Board"), a panel made up of three officers designated to hear the allegations. After an 11-day hearing, the Board ordered that Mr. Wanotch be discharged from the RCMP on the basis of poor performance - in the language of the RCMP discharge proceedings, the Board found that the ground of unsuitability had been established.

[3] Mr. Wanotch appealed this decision to the Commissioner of the RCMP ("Commissioner"). The Commissioner dismissed Mr. Wanotch's appeal. It is the Commissioner's decision that is being challenged in this judicial review.

[4] Mr. Wanotch's application raises two grounds for judicial review.

[5] First, Mr. Wanotch argues that the Commissioner unreasonably relied on an outdated, inapplicable and recently overturned decision (*Ahmad v Canada (Public Service Commission Appeal Board)*, [1974] FCJ No 169 (CA) [*Ahmad*]) in setting out that the Board owed deference to management's assessment of a RCMP Member's competence, instead of relying on more recent jurisprudence which held that the Board's role is to objectively assess the evidence and make its own findings on a RCMP Member's performance and competence (*Canada (Attorney General) v Ménard*, 2019 FCA 297 [*Ménard (FCA)*]).

[6] On this first issue, the Respondent does not dispute that the Commissioner referenced outdated jurisprudence in setting out the deference owed by the Board to Mr. Wanotch's managers. The core issue is whether this deferential standard was *actually* applied in either the Commissioner's decision or by the Board. The Respondent argues that there is no evidence of this sort of deference in either decision and therefore the Commissioner's reference to the standard in *Ahmad* does not render their decision as a whole unreasonable.

[7] Mr. Wanotch's second ground of review alleges that the Board breached the requirements of procedural fairness on the basis of a reasonable apprehension of bias due to its short deliberation before providing an oral decision.

[8] As I will explain in more detail below, I do not find that there is a basis to interfere with the Commissioner's decision on the bias issue, given the comments of the Board on the final day of the hearing, the extended breaks between sittings, and the Board's reasons. In this context, the relatively short deliberation of the Board is not a sufficient basis for a reasonable apprehension of bias finding.

[9] However, I agree with Mr. Wanotch that it was unreasonable for the Commissioner to indicate that the deferential standard in *Ahmad* applied to the Board's review of managerial assessments. I have carefully reviewed the Commissioner's decision and the Board's decision with a view to determining, aside from the Commissioner's reference to the *Ahmad* standard, whether there was evidence in the reasoning of this type of deferential standard. While the *Ahmad* decision is not referenced in the Board's decision, there is some evidence of the same

type of deferential language in the Board's decision. I am therefore satisfied that sending the matter back for redetermination is not merely an academic exercise and that it may have an impact on the outcome. Given that I find that the result may have been affected by the Commissioner's view of the deference owed by the Board to management, and the serious interests at stake for Mr. Wanotch in this decision, I find that a redetermination is required.

[10] Accordingly, for the reasons below, I will grant the judicial review.

II. Background

A. *Events leading to discharge*

[11] Mr. Wanotch became a member of the RCMP in 2002. For approximately the first five years of his employment with the RCMP, Mr. Wanotch was posted in two separate detachments in Alberta ("K" Division). He was then transferred to the Municipal Unit of the Grande Prairie Detachment. It was there, with what Mr. Wanotch believed to be a higher volume of work, that Mr. Wanotch began to fall behind in his tasks. By the spring of 2008, he had a significant backlog of overdue tasks in his files. At around this time, Mr. Wanotch was transferred to a Rural Unit of the Detachment. He brought his open Municipal Unit files and also took on new Rural files.

[12] At the Rural Unit, Mr. Wanotch's supervisor, Sergeant Bennett, discussed his concern about a lack of proper documentation on some files and outstanding tasks needing to be actioned

on some older files. Mr. Wanotch was then moved to the Cell Block Unit for a nine-month period.

[13] In April 2010, Mr. Wanotch was moved to the Municipal Watch Unit. In this unit, he was under the supervision of Staff Sergeant Suleman. Staff Sergeant Suleman was the Assigned Officer who ended up engaging the formal Performance Enhancement Process (PEP) with Mr. Wanotch and eventually brought the notice to initiate the discharge proceedings.

[14] On October 1, 2010, Mr. Wanotch was advised that his performance was considered unsatisfactory. On October 26, 2010, Mr. Wanotch was provided a Letter of Expectations that explained his unsatisfactory performance and provided him with resources to assist with the performance of his duties.

[15] Around early November 2010, Mr. Wanotch's backlog of files were reassigned to other members. On November 25, 2010, Mr. Wanotch was advised that the formal PEP would begin. This meant that his work would be closely supervised over the next 90-day period by Staff Sergeant Suleman.

[16] Following the initial 90-day period of the PEP, Mr. Wanotch was informed through a report prepared by Staff Sergeant Suleman that his performance was unsatisfactory given his years of service. The report noted three problematic areas in performance: conducting investigations, preparing and completing paperwork, and assembling evidence and testifying in court.

[17] A second 90-day period ensued following the issuance of a Notice of Shortcomings to Mr. Wanotch. On June 28, 2011, Staff Sergeant Suleman issued a progress report where he acknowledged improvement, including a decrease in the lengthy delays in completing tasks. Despite these improvements, Staff Sergeant Suleman noted that two files required reassignment and he remained over the shift average for his overdue tasks. Staff Sergeant Suleman noted that Mr. Wanotch had received a level of guidance and supervision far exceeding that of any other member on the shift. Staff Sergeant Suleman concluded that Mr. Wanotch was not performing at a satisfactory level.

[18] In July 2011, Mr. Wanotch was removed from operational duties and placed in the Domestic Violence Unit where he performed administrative duties.

[19] On May 5, 2012, Mr. Wanotch was served with the Notice of Intention to Discharge, indicating that the RCMP was seeking his discharge on the ground of unsuitability.

[20] On October 30, 2012, Mr. Wanotch requested a review of his case by a Discharge and Demotion Board ("Board").

B. *Discharge and Demotion Board hearing*

[21] The hearing before the Board ran over the course of 11 days in 2014 - from March 3-7, April 14-17 and May 7-8, 2014. The Board heard testimony from numerous witnesses, including Mr. Wanotch, his various supervisors, and other members who worked in the same units as Mr. Wanotch.

[22] On the last day of the hearing, the Board heard from two witnesses for approximately 40 minutes and then heard the closing submissions of the parties. After approximately one and a half hours of deliberation, the Board returned and rendered its oral decision. The Board concluded that the case for discharge had been established and ordered Mr. Wanotch's dismissal from the RCMP.

C. *Discharge and Demotion Board's decision*

[23] The parties had agreed on the applicability of a seven-part test to be considered by the Board in deciding whether the ground of unsuitability had been established under s 45.18(1) of the former *Royal Canadian Mounted Police Act*, RSC 1985, c R-10, Part V as repealed by the *Enhancing Royal Canadian Mounted Police Accountability Act*, SC 2013, c 18 [*RCMP Act*].

[24] The Board held that the seven-part test had been met and the ground of unsuitability had been established. The Board found that although Mr. Wanotch was able to perform certain functions in an entirely satisfactory manner, there were many deficiencies in his files. Ultimately, the Board determined that Mr. Wanotch was not held to a higher standard than a reasonably able member of similar service.

[25] The Board also found that Mr. Wanotch had been given reasonable assistance and supervision by both Sergeant Bennett and Staff Sergeant Suleman. The Board noted that while there was improvement in Mr. Wanotch's performance towards the end of the PEP period, he was still showing a troubling tendency to neglect documentation of his files in a thorough, accurate and timely fashion. The Board also noted that Mr. Wanotch had been given

opportunities in the Rural Unit, Cell Block and Municipal Unit to address his shortcomings, which it determined were reasonable steps to move him to other duties within his qualifications and competence.

[26] The Board further considered whether the relationship between Mr. Wanotch and Staff Sergeant Suleman was a key factor in his unsatisfactory performance and determined that other than Mr. Wanotch, no witnesses had reported any tension or unease between them or recalled him requesting a transfer from Staff Sergeant Suleman's supervision.

D. *Appeal Proceedings*

[27] Mr. Wanotch appealed the Board's decision to the RCMP Commissioner, raising both procedural and substantive grounds.

[28] As required by s 45.25 of the former *RCMP Act*, the Commissioner referred the case to the External Review Committee ("ERC") for a recommendation. The ERC recommended that the appeal be dismissed.

[29] On October 20, 2020, the Commissioner dismissed the appeal.

III. Issues and Standard of Review

[30] There are two issues raised by Mr. Wanotch on judicial review. First, Mr. Wanotch argues that the Commissioner unreasonably reviewed the Board's decision through a lens that

understood, based on the reasoning of *Ahmad*, that the Board owed deference to decisions of management. Second, Mr. Wanotch argues that the Commissioner erred in concluding that the Board did not demonstrate a reasonable apprehension of bias when it delivered its oral decision an hour and a half after the conclusion of the 11-day hearing.

[31] The parties agreed that the first issue, a matter relating to the substance of the Commissioner's decision attracts a review on a reasonableness standard (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 10 [*Vavilov*]).

[32] There appears to be a dispute between the parties as to whether the second issue, the bias claim, should be reviewed on a correctness standard. Neither party made extensive submissions on this issue. Mr. Wanotch argues that because the bias allegation does not go to the merits or substance of the Board's decision but rather its process, it is properly characterized as a procedural fairness issue and therefore this Court must conduct its own analysis of the fairness claim—functionally the same analysis required when applying a correctness review (Canada (Citizenship and Immigration) v Khosa, 2009 SCC 12 at para 43; Canadian Pacific Railway Co v Canada (Attorney General), 2018 FCA 69 at para 54). The Respondent agreed with this approach in its written materials. In oral submissions, however, the Respondent argued that because the breach of fairness was not in relation to the Commissioner's process but rather the Board's process, a reasonableness review should be applied to evaluate the Commissioner's treatment of Mr. Wanotch's claim that the requirements of procedural fairness were not met at the Board level.

[33] I need not resolve this issue because no matter which standard I apply, as I will set out in more detail below, I do not find that the reasonable apprehension of bias claim is a basis to overturn the decision. In other words, I find that whether I apply a reasonableness review to the Commissioner's reasons on the bias allegation or whether I consider the bias claim afresh and make my own determination on whether there was a breach of fairness, the result would be the same.

IV. Analysis

A. *Legal framework for Commissioner's decision*

[34] Mr. Wanotch's discharge proceedings are governed by Part V of the former *RCMP Act* and *Regulations*. The *Enhancing Royal Canadian Mounted Police Accountability Act*, SC 2013, c 18 repealed Part V of the *RCMP Act* on November 28, 2014, after Mr. Wanotch's discharge proceedings had already commenced. The procedures that apply to discharge proceedings are now set out in the *Commissioner's Standing Orders (Employment Requirements),* SOR/2014-292, but do not apply to Mr. Wanotch because his discharge proceedings commenced prior to the *RCMP Act*'s amendment.

[35] Under the former *RCMP Act*, a member of the RCMP could be discharged on the "ground of unsuitability" where they have "repeatedly failed to perform [their] duties under this Act in a manner fitted to the requirements of [their] position, notwithstanding that [they have] been given reasonable assistance, guidance and supervision in an attempt to improve the performance of those duties" (s 45.18 (1)).

[36] Where the Board finds that the ground of unsuitability has been established, a member can appeal that decision to the Commissioner. The Commissioner can dispose of the appeal either by dismissing it and confirming the decision or by allowing the appeal (*RCMP Act*, ss 45.24-45.26).

[37] As recognized by the Commissioner, their decision has serious consequences for Mr. Wanotch. The decision involves an evaluation of whether he should be discharged from the profession that he has trained for and spent a significant part of his life working in. As referenced by Justice Bell in *Ménard v Canada (Attorney General)*, 2018 FC 1260 [*Ménard (FC)*], this type of dismissal decision has been described as "capital punishment" in the employment law context (at para 33). Given the serious impact of the decision on Mr. Wanotch, the procedural fairness owed is high, as is the duty to provide robust reasons (*Vavilov* at paras 13, 77, 135; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 21).

[38] The parties agreed, as a statutory appeal, the standard of review that the Commissioner was to apply to the substance of the Board's decision, on questions of mixed fact and law, was that of palpable and overriding error.

B. *Deference owed by the Board to management*

[39] There is no dispute between the parties that the Commissioner set out the wrong view of the degree of deference owed by the Board to Mr. Wanotch's managers. The Commissioner used very similar, if not identical, language in their decision to describe the deference owed by the Board to managers as the Commissioner in the *Ménard* decision. This view on the level of

deference owed by the Board to an officer's/member's managers was overturned by the Federal Court of Appeal in the 2019 decision of *Ménard (FCA)*.

[40] The Commissioner stated at the outset of their reasons that "it is important to discuss the degree of deference owed by the Board to the decisions of the Appellant's managers…". The Commissioner then referenced the 1974 *Ahmad* decision and reproduced a passage from that decision. Then, the Commissioner referenced a 2007 decision from the ERC (R-005) that had considered the application of the *Ahmad* decision to the Demotion and Discharge Board context and cited this portion of the decision:

> However, the Board's role is not to re-examine the Appellant's performance. Rather, the Board's role is to conduct a review, by determining whether the supervisors followed in good faith the procedures set out in the Act and whether they arrived at their findings honestly and on the basis of relevant information.

[41] Similar to the Commissioner's position in *Ménard*, the Commissioner clearly took the view that the Board's role in evaluating whether the ground of unsuitability had been established was not to re-examine the officer's performance but instead to limit their review to whether managerial assessments had been made in good faith, honestly and on the basis of relevant information.

[42] In 2018, in *Ménard (FC)*, this Court specifically considered the appropriateness of relying on the 1974 *Ahmad* decision to discharge proceedings before the Board. This Court found that it was not relevant to these kinds of proceedings under the former *RCMP Act*, where the Board was conducting a *de novo* review and could hear new evidence. This Court determined

that *Ahmad* had been inappropriately relied upon in the RCMP discharge proceeding context (at paras 33-37).

[43] In 2019, the Federal Court of Appeal affirmed that the Board's role could not be limited to deferring to managerial assessments of competence and stated that instead the "Board's role was to objectively assess the evidence before it" and "there was no question of its deferring with regard to the evidence and testimony from the [member's] supervisors and evaluators" (*Ménard (FCA)* at para 2).

[44] Both the Federal Court and Federal Court of Appeal decisions were issued prior to the Commissioner's decision. Despite being directly on point with respect to the issue of the level of deference owed by the Board to Mr. Wanotch's managers, the Commissioner did not reference these decisions and relied on *Ahmad* and the view that deference is owed to Mr. Wanotch's managers by the Board.

[45] As noted above, there is no dispute between the parties that the Commissioner's view on the level of deference owed by the Board to Mr. Wanotch's managers was in error. The only issue on judicial review is whether this wrong view on deference made any practical difference in Mr. Wanotch's case. The Respondent argues it did not because there was no evidence of this sort of deference to managerial assessments in the Board's decision itself. I agree with the Respondent that if there is no evidence at the Board level of this sort of deference, and no finding by the Commissioner that there ought to have been, then there is no basis to grant the judicial review. The error being complained of would have no practical effect.

[46] I do not agree, however, that there is no evidence of this sort of deference in the Board's decision. For example, in evaluating whether a sufficient number of files had been presented for the Board to do their evaluation as to whether the ground of unsuitability had been established, the Board explained its view on the nature of the review it was conducting:

> The purpose of Part V of the *RCMP Act* must be kept in mind; these administrative proceedings are a "review" of the Appropriate Officer's decision to seek a member's discharge, with an eye to whether or not the supervisors of the Subject Member followed the procedures established under the *RCMP Act*, if the applicable criterion was used in good faith and if the opinion of supervisors was formed honestly on the basis of relevant observations.

[47] This language is very similar to the language in the *Ahmad* decision and the passage cited by the Commissioner from the ERC decision R-005 that noted that the review was limited to determining whether management acted in good faith, and based their discharge decision based on honest and relevant observations. The Board went on to note that its view that the "level of scrutiny" contemplated by Part V of the *RCMP Act* involved a "consideration […] of the overall circumstances under which the Appropriate Officer's decision to initiate discharge proceedings was made, and such consideration relies heavily on the approach taken by the direct supervisor, in this case, Staff Sergeant Suleman."

[48] Again, this suggests that the Board considered that it should rely heavily on the approach taken by Mr. Wanotch's manager, which would seem to be inconsistent with the description of its role as "objectively assess[ing] the evidence" without deference to the evidence or testimony of the member's managers (*Ménard (FCA)* at para 2).

[49] The Respondent argues that the situation would have been different if the Board, itself, had named the *Ahmad* decision. Given that the language used by the Board is very similar to the passages referenced by the Commissioner in the *Ahmad* decision and the ERC decision that applied *Ahmad* to the Board context, I do not find it particularly significant that the Board did not also reference the *Ahmad* decision. The issue is whether there is evidence of the Board inappropriately deferring to management's view.

[50] I am satisfied that there is some indication of this deferential approach to managerial assessments in the Board's decision. I acknowledge that there are also examples in the decision where the Board does not appear to be applying a deferential approach to management's evidence, but rather engages in a weighing of the evidence from the witnesses, including Mr. Wanotch and management, and then reaches its own conclusions.

[51] It may well be that the Commissioner reviews the evidence and the Board's treatment of it and finds that there is no palpable and overriding error. This is a question that the Commissioner will need to decide on redetermination. It is not appropriate for me to try to engage in this level of analysis on judicial review. It would require me to thoroughly evaluate the Board's decision and conduct the assessment the Commissioner is required to do.

[52] As noted by the Commissioner themselves, it is important to understand the degree of deference owed by the Board to managerial assessments in order to evaluate the Board's treatment of the evidence and decision. The Commissioner's view on the level of deference owed to management by the Board was not reasonable. I am satisfied that this may have had an

impact on the Commissioner's review of the Board's decision. Taking into account the serious consequences at stake for Mr. Wanotch, a redetermination is required in these circumstances.

C. *Reasonable apprehension of bias due to short deliberation*

[53] The reasonable apprehension of bias claim is based on the short deliberation of the Board before delivering their abbreviated oral decision to the parties. I do not find that there is a basis to find a breach of procedural fairness on this ground; nor do I find the Commissioner's assessment of the procedural fairness issue to be unreasonable.

[54] The Board held an 11-day hearing. The hearing was heard in three blocks of time. The first block was held from March 3-7, 2014; the next was held approximately a month later between April 14 and 17, 2014 and then the last block was held on May 7 and 8, 2014. On the last day of the hearing, the Board heard testimony from two witnesses that took approximately 40 minutes. Then closing submissions were heard from the parties. At the close of the final submissions, the Board indicated that they would recess for one hour and half and may return prepared to give an oral decision or may instead advise that they had to reserve their decision.

[55] The Board returned after one hour and a half and advised that they could provide an abbreviated version of their decision, with more developed written decision to follow. The Board then read their decision to the parties. This took approximately 18 minutes.

[56] The test for determining reasonable apprehension of bias is well known: whether a reasonable person, who is reasonably informed of the facts, viewing the matter realistically and

practically and having thought it through, would think it more likely than not that the tribunal was biased (*Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR 369 at 394). The burden of proof lies with the party who is making the claim of bias and the threshold to establish it is a high one, requiring that "substantial grounds" or a "real probability" of bias be demonstrated (*R v S (RD)*, [1997] 3 SCR 484 at paras 113, 114).

[57] Mr. Wanotch accepts that: i) the Board may have prepared in advance of the final hearing by reviewing and summarizing the evidence that was heard in previous sittings; and ii) that a short deliberation in and of itself is not a basis to find a reasonable apprehension of bias (*Stapleton v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1320 at para 30 [*Stapleton*]). Mr. Wanotch has not pointed to anything in the reasons to suggest that the Board had not fully considered the arguments and evidence that had been presented to them.

[58] Mr. Wanotch's claim of bias rests solely on the view that "it would have taken more than an hour and a half to consider the evidence and arguments presented on the last day, unless the Board had predetermined what the outcome was going to be before hearing the final evidence and argument." This assertion does not reach the high threshold required to establish a reasonable apprehension of bias.

[59] Mr. Wanotch attempted to distinguish *Stapleton*, a refugee decision rendered after the close of one day of hearing, by arguing the Board was faced with a more complex case with 11 days of hearing. I do not find the distinction to be compelling. As acknowledged by Mr. Wanotch, there were multiple breaks between sittings and time for the panel to review and

summarize the evidence. The final day of the hearing involved approximately 40 minutes of testimony and final submissions. Further, the Board specifically noted that it did not know whether it would be able to provide an oral decision that day, suggesting that it had not predetermined the issue but rather the Board needed time to deliberate.

[60] The Commissioner reviewed these same arguments about a reasonable apprehension of bias due to the Board's short deliberations. I do not find there is any basis to find their assessment unreasonable. The Commissioner considered the relevant legal tests and applied it to a thorough review of the applicable facts. I find the Commissioner's determination on this point to be transparent, intelligible and justified.

D. *Disposition and costs*

[61] Mr. Wanotch's application for judicial review is granted and sent back to the Commissioner for a redetermination in accordance with these reasons.

[62] The parties advised at the oral hearing that they had agreed for the costs awarded to the successful party to be fixed at $2,500.00. The Attorney General of Canada is ordered to pay costs in the amount of $2,500.00.

JUDGMENT in T-1421-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted;

2. The matter is sent back to the Commissioner of the RCMP to be re-determined; and

3. The Respondent shall pay to the Applicant lump sum all-inclusive costs fixed in the amount of $2,500.00.

"Lobat Sadrehashemi"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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