

Federal Court



Cour fédérale

Date: 20100303

Docket: T-446-09

Citation: 2010 FC 250

Vancouver, British Columbia, March 3, 2010

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

DAN C. WILSON

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Commissioner of the Royal Canadian Mounted Police at Level II made January 14, 2009 denying a grievance brought by the Applicant in respect of his request for leave without pay. For the reasons that follow, I find that the application is allowed to the extent that the decision will be set aside, with costs.

[2] The Applicant Dan Wilson was, at the relevant time, a full-time member of the Royal Canadian Mounted Police (RCMP). In 1999 the Applicant was seconded to the International Police Task Force in Bosnia, Herzegovina, for a year. Upon his return to the RCMP in 2000, the Applicant

was contacted by the Office of High Representative in Bosnia and asked to help set up an anti-fraud unit there. The Applicant perceived this offer to be unique and challenging and requested that he be allowed to be absent from the RCMP on a leave without pay (LWOP) basis. This request was refused. The reason stated for the refusal was that personnel resource levels in the area in which the Applicant served were limited and the Applicant could not be spared at that time.

[3] On October 17, 2000, the Applicant commenced grievance proceedings within the RCMP in respect of the denial of his request for leave without pay. On or about December 6, 2000, the Applicant retired from the RCMP and took the posting in Bosnia that he had been offered. Counsel for both parties agreed that the Applicant's retirement does not affect the grievance procedure or his right to take these proceedings. In respect of the damages sought by the Applicant in these proceedings, his counsel has offered some calculations as to the Applicant's losses allegedly suffered but agrees that there is no evidence, for instance from an expert accountant, to substantiate such alleged losses.

[4] The grievance initiated by the Applicant on October 17, 2000, proceeded at a leisurely pace and was finally determined at Level I on September 10, 2004. The grievance was dismissed. The Applicant appealed to Level II which entailed a first hearing before an External Review Committee which made recommendations to the Level II decision-maker, the Commissioner, on September 13, 2007. On January 14, 2009, the Commissioner made a Level II decision denying the grievance. That decision was communicated to the Applicant on February 27, 2009. This is the decision under review.

[5] The Applicant seeks to have the Level II decision set aside and that certain damages be awarded. In the alternative, the Applicant requests that the Level II decision be set aside and the matter returned to the Commissioner for an assessment of damages. The Respondent submits that the application should be dismissed. Both counsel agreed that costs should be awarded to the prevailing party at the Column III level.

I. The Issues

[6] The principal issue in this case deals with the interpretation of the *Financial Administration Act*, R.S.C. 1985, c. F-11, and the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10 and various regulations, policy directives and the like in respect thereof. In short, does the Treasury Board or the Royal Canadian Mounted Police have jurisdiction to deal with leave without pay requests by RCMP Officers?

[7] A second issue has to do with the Applicant's request for disclosure of certain documents apparently refused by RCMP officials during the grievance proceedings. The Applicant ultimately made a request for such documents through the Access to Information process only to be told that they were not available. The Commissioner in the decision under review at paragraphs 129 to 133 agreed that such documents should have been provided to the Applicant but they were not available. In any event, the Commissioner determined that the grievance should not be allowed solely for that reason.

A. *Issue #1: Treasury Board or Royal Canadian Mounted Police*

[8] Applicant's counsel argues that, as a matter of statutory construction, the Treasury Board not the Royal Canadian Mounted Police is the body empowered to deal with a request by an RCMP officer that he be allowed leave without pay. As such, the Applicant's counsel argues, the Level II decision by the Commissioner must be reviewed on a standard of correctness.

[9] Respondent's counsel argues that leave without pay is an administrative function within the RCMP and a decision of the Commissioner such as that at issue here is based on statutes, regulations, standing orders and guidelines pertinent to the RCMP and that decisions in respect thereof must be given considerable deference.

[10] Both counsel rely on *Dunsmuir v. New Brunswick*, [2008] S.C.R. 190, 2008 SCC 9. Since I will find that this issue turns on a question of law, the applicable standard is correctness.

[11] The *Financial Administration Act supra*, sets out a number of respects in which the Treasury Board may act for the Queen's Privy Council in Canada. Section 7(1)(e):

7. (1) The Treasury Board may act for the Queen's Privy Council for Canada on all matters relating to

...

(e) personnel management in the public service of Canada, including the determination of the terms and conditions of employment of persons employed therein;

[12] Section 11(1) of the *Financial Administration Act* provides a definition of “public service” by referencing the *Public Service Staff Relations Act*:

11. (1) In this section and sections 12 and 13,

“public service” has the meaning given the expression “Public Service” in the Public Service Staff Relations Act and includes any portion of the public service of Canada designated by the Governor in Council as part of the public service for the purposes of this section and sections 12 and 13;

[13] The *Public Service Staff Relations Act*, R.S.C. 1985, c. P.35 defines “public service” in section 2 as that specified in Schedule I. That Schedule includes the Royal Canadian Mounted Police:

2. (1) In this Act,

...

“Public Service” means the several positions in or under any department or other portion of the public service of Canada specified in Schedule I;

...

SCHEDULE I

(Section 2)

PART I

Departments and other portions of the public service of Canada in respect of which Her Majesty as represented by the Treasury Board is the employer

Departments named in Schedule I to the Financial Administration Act

...

*Royal Canadian Mounted Police
Gendarmerie royale du Canada*

[14] Returning to the *Financial Administration Act*, section 11(2)(a) empowers the Treasury Board to act in respect of human resources and section 11(2)(d) gives the Treasury Board power expressly with respect to leave of those persons:

(2) Subject to the provisions of any enactment respecting the powers and functions of a separate employer but notwithstanding any other provision contained in any enactment, the Treasury Board may, in the exercise of its responsibilities in relation to personnel management including its responsibilities in relation to employer and employee relations in the public service, and without limiting the generality of sections 7 to 10,

(a) determine the requirements of the public service with respect to human resources and provide for the allocation and effective utilization of human resources within the public service;

...

(d) determine and regulate the pay to which persons employed in the public service are entitled for services rendered, the hours of work and leave of those persons and any matters related thereto;

[15] Section 11(3) of the *Financial Administration Act* is critical to the determination of the present proceedings since it provides for an exemption of the power of the Treasury Board in respect of matters expressly determined by any other Act:

(3) The powers and functions of the Treasury Board in relation to any of the matters specified in subsection (2) do not extend to any such matter that is expressly determined, fixed, provided for, regulated or established by any Act otherwise than by the conferring of powers or functions in relation thereto on any authority or person specified in that Act, and do not include or extend to any power or function specifically conferred on, or any process of personnel selection required or authorized to be employed by, the Public Service Commission by or under the authority of the Public Service Employment Act. [Emphasis added.]

[16] At this point, I turn to the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10 (*RCMP Act*). Section 5(1) of that Act gives to the Commissioner control and management of the Force and all matters connected therewith:

5. (1) The Governor in Council may appoint an officer, to be known as the Commissioner of the Royal Canadian Mounted Police, who, under the direction of the Minister, has the control and management of the Force and all matters connected therewith.

[17] Section 21 of the *RCMP Act* provides for Regulations and Rules to be made including, in subsection (2)(b), rules in respect of administration or good government of the Force:

21. (1) The Governor in Council may make regulations
(a) respecting the administrative discharge of members;
(b) for the organization, training, conduct, performance of duties, discipline, efficiency, administration or good government of the Force; and
(c) generally, for carrying the purposes and provisions of this Act into effect,
(2) Subject to this Act and the regulations, the Commissioner may make rules
(a) respecting the administrative discharge of members; and
(b) for the organization, training, conduct, performance of duties, discipline, efficiency, administration or good government of the Force.

[18] Section 21 of the *RCMP Act* makes provision that the Treasury Board may establish pay and allowances to be paid to the members and reduction or elimination of pay and allowances in certain instances. It does not expressly deal with leave without pay.

Pay and Allowances

22. (1) The Treasury Board shall establish the pay and allowances to be paid to members.

(1.1) Where, pursuant to this Act, a member is demoted, the rate of pay of that member shall be reduced to the highest rate of pay for the rank or level to which the member is demoted that does not exceed the member's rate of pay at the time of the demotion.

(2) No pay or allowances shall be paid to any member in respect of any period during which the member is serving a sentence of imprisonment.

(3) The Treasury Board may make regulations respecting the stoppage of pay and allowances of members who are suspended from duty.

[19] The Applicant's counsel argues that we can stop right here since the *RCMP Act* does not "expressly" deal with leave without pay. That matter, because of section 11(3) of the *Financial Administration Act*, counsel argues remains with the Treasury Board.

[20] The Respondent's counsel argues that included in the general powers conferred by section 5(1) and 21 of the *RCMP Act* is the power in the Commissioner to deal with leave without pay and that such power is sufficiently "explicit" to satisfy the conditions of section 11(3) of the *Financial Services Act*.

[21] Applicant's counsel refers to the *Leave without Pay Policy* published by the Treasury Board during the relevant time period to illustrate that the Treasury Board has taken control of leave without pay issues. That Policy states, in part:

Policy objective

To provide an equitable and consistent application of leave without pay.

Policy statement

It is the policy of the government to permit employees to take unpaid absences from work for personal or other reasons while maintaining continuity of their employment.

Application

This policy applies to all department and other portions of the Public Service listed in Part I of Schedule I of the Public Service Staff Relations Act.

Policy requirements

Leave without pay must be authorized in accordance with the relevant authority, that is, the collective agreement or the appropriate terms and conditions of employment.

For the following leave without pay situations, departments must adhere to the standards in Appendix A of this policy:

- *illness or injury;*
- *employment in the office of a minister;*
- *Reserve Forces training.*

[22] The Policy further states that an employee other than certain staff of a minister may return after leave, implying Applicant's counsel argues that all others may return without problem.

Employment in the office of a minister

Leave without pay to accept employment on the exempt staff of a minister, or a leader of the Opposition must only be granted for a specified period if the deputy minister is satisfied that the individual's subsequent re-employment in the department will not be prejudiced.

[23] Respondent's counsel argues that the Policy in referring to "appropriate terms and conditions of employment" means that the Treasury Board, as a matter of policy, has enabled employers such as the RCMP to deal with leave without pay. Applicant's counsel argues that a policy statement cannot override a statutory provision such as section 11(3) of the *Financial Administration Act* and, in any event, the "authorization" of leave does not extend to refusal of leave, but deals only with matters in respect of administrative terms and conditions respecting such leave.

[24] Respondent's counsel points out an administrative directive issued to regional human resources officers of the RCMP dated December 15, 1999, restricting approval to all applications for leave without pay. It says:

*RE: LEAVE WITHOUT PAY AND SELF FUNDED LEAVE
WITHOUT PAY*

As you will recall from discussions held at the last Cos/Directors/DSRRs conference in Ottawa a few weeks ago, the R.C.M.P. currently faces a severe lack of human resources to meet its contractual agreements with different stakeholders.

We are currently addressing this severe vacancy pattern that is affecting all Divisions. Until the situation has been corrected, I would ask that approvals of Leave Without Pay and Self Funded Leave Without Pay for Regular Members be restricted to all but exceptional cases.

Your anticipated cooperation in this regard is appreciated.

[25] Applicant's counsel argues that such a directive cannot create jurisdiction where none exists.

[26] An important decision in respect of this issue is that of the Federal Court of Appeal in *Gingras v. Canada*, [1994] 2 F.C. 734. That case dealt with a bilingual bonus plan instituted by the Treasury Board and whether RCMP members were employees of Treasury Board for purposes of that plan. The unanimous decision of that Court was given by Mr. Justice Décarý. He described the *Financial Administration Act* as the centerpiece of the organization of the federal government at page 748:

The centerpiece of the organization of the federal government is the Financial Administration Act. It sets up a committee of the Queen's Privy Council for Canada which it calls the "Treasury Board" (subsection 3(1)). The Treasury Board may act for the Privy Council in any matter relating to, inter alia, "(a) general administrative policy in the public service of Canada"; "(b) the organization of the public service or any portion thereof"; "(c) financial management"; and "(e) personnel management in the public service, including the determination of terms and conditions of employment of persons employed therein" (subsection 5(1)).

[27] Mr. Justice Décarý recited certain provisions of the *Financial Administration Act*. It is important to note that the words of section 7(1)(d) are essentially the same as section 11(2)(d) of the version of that Act at issue here, as is section 7(3) of the former Act essentially the same as section 11(3) that we are dealing with here.

[28] Mr. Justice Décarý drew a number of conclusions in respect of that Act commencing at page 753 of the reported decision including:

A careful reading of these provisions leads me to make the following observations:

1. In the executive branch of the federal government there is only one "employer" and that is Her Majesty the Queen in right of Canada;

2. As a general rule, Her Majesty does not exercise her functions of employer herself or through the Governor in Council: instead she delegates the exercise thereof either to the Treasury Board, when a department or portion of the public service specified in Part I of Schedule I is concerned, or to a separate employer when a portion of the public service specified in Part II of Schedule I is concerned;

3. Parliament has adopted an objective, simple and easily verifiable test to determine those persons in respect of whom Her Majesty will be represented as employer by the Treasury Board and those in respect of whom she will be represented as employer by a separate employer; it has drawn up two lists in legislation and not in a regulation, namely Schedules I and II; although these lists are given in a schedule to the Public Service Staff Relations Act, they serve purposes other than those of that Act: thus the Financial Administration Act (see subsection 7(9)) and the Public Service Employment Act (see the definition of "Public Service" in subsection 2(1)) refer expressly or by necessary implication to Schedule I; a reference made to Schedule I therefore does not necessarily imply a reference to the Act with which it is associated;

4. Parliament has chosen to indicate by legislation rather than by regulation the persons for whom the Treasury Board, on behalf of Her Majesty, will be the employer and those for whom it will not: any change of status in this regard therefore can only be made by legislation;

5. The RCMP is a division or a section of the public service of Canada within the meaning of the Financial Administration Act and is a department within the meaning of that Act; its members are therefore for the purposes of the Act "persons employed in the public service of Canada"; further, the definition of "employee" in section 2 of the Public Service Staff Relations Act, by excluding members of the RCMP from the definition "person employed in the Public Service" for the purposes of that Act, confirms that the latter are in any case "persons employed in the Public Service";

6. *The RCMP (and not merely its civilian personnel) is listed in Part I of Schedule I among the departments and other portions of the public service of Canada for which Her Majesty, represented by the Treasury Board, is the employer;*

7. *CSIS is listed in Part II of Schedule I among those portions of the public service of Canada which are separate employers;*

8. *A comparison of Parts I and II of Schedule I indicates that Parliament took great care to determine exactly what "portions" of the public service it would list in that Schedule and there is nothing to suggest that the reference to the RCMP made in Part I of Schedule I should be interpreted as a reference only to the civilian staff of the RCMP; Schedule I designates "portions" in their entirety and when it intends to refer only to part of a portion it does so expressly ("Staff of the Exchequer Court" and "Staff of the Supreme Court" in Part I, in 1970; "Staff of the Federal Court" and "Staff of the Supreme Court" and "Staff of the Non-Public Funds, Canadian Forces" in Parts I and II, respectively, in 1985); it would in any case be somewhat unusual for Parliament to have listed the RCMP in Part I solely on account of its civilian personnel when as we know the RCMP is essentially an institution made up of officers and members-as if Parliament had given priority to the assistant over the principal; it would also be strange if, after taking care in the Public Service Staff Relations Act to exclude the RCMP from the word "employee", Parliament had failed to make this same exclusion when the time came to prepare Schedule I; further, the fact that, despite excluding both RCMP members and "non-civilian" employees of CSIS from the definition of an "employee", Parliament persisted in including the RCMP in Part I and CSIS in Part II indicates that inclusion in either Parts I and II of Schedule I has nothing to do with the definition of an "employee" in the Act;*

9. *A member of the RCMP is therefore a person employed in the public service, in a portion thereof, the employer of whom is Her Majesty represented by the Treasury Board, which also makes him a person employed in the Public Service; the fact that such a member is not an employee for the purposes of the Public Service Staff Relations Act does not in any way alter his status as a public service employee; I entirely concur in the approach taken by the Trial Judge, who considered that "the exclusion of non-civilian, non-unionized members of the RCMP for the purposes of application of the general provisions of the Public Service Staff*

Relations Act is solely and specifically related to the purpose of that Act, namely setting out collective labour relations in the Public Service. This exclusion does not have the effect of placing these members of the RCMP outside the definition of public service";

[29] At page 758, Mr. Justice Décary wrote:

I am not saying that members of the RCMP are employees like any others. It is clear that both in the ordinary law and in Canadian statutory law, as a consequence of their method of appointment, their oath and their code of discipline, they form a class apart. I am simply saying that this special status does not deprive them of their status as employees for the purposes of statutes relating to the organization of the federal Government: they may be special employees, but they are still employees.

[30] I gather from this analysis that members of the RCMP are employees of Her Majesty, that Her Majesty's functions are delegated to the Treasury Board in respect of the RCMP except to the extent otherwise assigned by legislation rather than regulation or otherwise.

[31] In *Gingras* just as in the present case, counsel for the Crown argued that section 5 of the *RCMP Act* was sufficiently broad so as to give the necessary powers to the Commissioner, not the Treasury Board. Justice Décary said so at page 754 and 760 of the reported decision:

The appellant relied heavily on section 5 of the Royal Canadian Mounted Police Act, which provides that the Commissioner "under the direction of the Minister, has the control and management of the force and all matters connected therewith."

The fact that such authority is vested in the Commissioner does not make him an employer in place of the Treasury Board. The latter's powers are scrupulously protected by subsection 7(6) of the

Financial Administration Act and it is only in exceptional cases, and by some means other than a mere assignment of those powers to some other authority, that such other authority will exercise them in its place. In the case at bar, section 5 of the Royal Canadian Mounted Police Act is a simple assignment of power to the Commissioner which accordingly does not in itself confer any actual authority on the Commissioner over matters which are specified in subsection 7(1) of the Financial Administration Act and as to which the Treasury Board appears to have exercised its powers.

In any case, whatever the Commissioner's powers may be under the Royal Canadian Mounted Police Act, it is clear that they do not extend to the powers and duties listed in paragraphs (a), (c), (d) and (i) of subsection 7(1) of the Financial Administration Act, which are significant attributes of the status of employer, since under subsections 6(2), 7(2) and sections 11 and 22 of the Royal Canadian Mounted Police Act those powers and duties will continue to be exercised by the Treasury Board. Subsection 22(1) in particular provides that "The Treasury Board shall establish the pay and allowances to be paid to the members of the force." It is true that the Treasury Board does not enjoy the power to appoint members of the RCMP, but it does not have that power in the departments either and yet it remains the employer (as Her Majesty's representative): that power belongs to the Public Service Commission. The power to make appointments is therefore not an essential attribute of the status of employer for the purposes of the legislation at issue.

[32] In the present case, I find *Gingras* to be persuasive if not binding authority. That case states that legislation has given powers to the Treasury Board that can only be taken away by legislation. Section 11(3) states that those powers can only be taken away by express legislation. I find no express legislation in the *RCMP Act* that takes away from the Treasury Board its powers respecting leave without pay.

[33] Respondent's counsel argues that the Policy Statement issued by the Treasury Board constitutes a conferral of power upon the Commissioner of the RCMP to deal with "appropriate terms and conditions of employment" which includes leave without pay. Reference is made to *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component*, 2009 SCC 31 where the Supreme Court of Canada, in its majority decision, found that in certain circumstances a policy stated can be binding "law". Justice Deschamps for the majority wrote at paragraphs 64 and 65:

[64] *Where a policy is not administrative in nature, it may be "law" provided that it meets certain requirements. In order to be legislative in nature, the policy must establish a norm or standard of general application that has been enacted by a government entity pursuant to a rule-making authority. A rule-making authority will exist if Parliament or a provincial legislature has delegated power to the government entity for the specific purpose of enacting binding rules of general application which establish the rights and obligations of the individuals to whom they apply (Denys C. Holland and John P. McGowan, Delegated Legislation in Canada (1989), at p. 103). For the purposes of s. 1 of the Charter, these rules need not take the form of statutory instruments. So long as the enabling legislation allows the entity to adopt binding rules, and so long as the rules establish rights and obligations of general rather than specific application and are sufficiently accessible and precise, they will qualify as "law" which prescribes a limit on a Charter right.*

[65] *Thus, where a government policy is authorized by statute and sets out a general norm or standard that is meant to be binding and is sufficiently accessible and precise, the policy is legislative in nature and constitutes a limit that is "prescribed by law".*

[34] I find that even if the Policy Statement made by the Treasury Board is of the type dealt with by the Supreme Court, the terms "appropriate terms and conditions of employment" are not

“sufficiently accessible and precise” so as to fall within the requirement stipulated by that Court, particularly in view of the provisions of section 11(3) of the *Financial Administration Act* that an exclusion to the powers of the Treasury Board must be “expressly” made.

[35] Therefore, as to the first issue I find that the Treasury Board, not the Commissioner of the RCMP, has power to determine whether leave without pay should or should not be granted. The Commissioner’s decision denying a request for leave without pay is without jurisdiction and must be set aside.

B. Issue #2: Documents

[36] In view of my determination as to Issue #1, the issue respecting documents is not necessary. In any event, it appears that such documents are not “available”. Whether that means that they once existed and no longer exist is unclear.

[37] Applicant’s counsel points to certain places in the Commissioner’s decision where the Commissioner finds that the Applicant has failed to discharge certain burdens of proof. Counsel argues that the documents may have assisted in this regard. This is speculation. I have no evidence to permit me to find or even infer that the documents may have been helpful.

[38] I decline to make any determination in respect of the documents. The matter is moot.

B. Remedy

[39] I am setting aside the Commissioner's decision for lack of jurisdiction.

[40] Applicant's counsel asks that I make an award of damages and recommends a sum of money based on counsel's assertions and calculations alone. There is no evidence on the point.

[41] In *Canada v. Grenier*, [2006] 2 F.C.R. 287, the Federal Court of Appeal determined that an action for damages was separate from a judicial review of a decision relating to the same subject matter. I appreciate that the Ontario Court of Appeal has taken a different view and that the Supreme Court of Canada may, at some point, come to grips with the issue. At present, however, I am bound by *Grenier* and find that I cannot make an award of damages in the context of the present proceedings.

[42] As an alternative, Applicant's counsel asks that I sent the matter back to the Commissioner for a determination of damages and an award thereof in the context of the grievance proceedings. I decline to do so. If the Commissioner had no jurisdiction to deal with the matter in the first place, the Commissioner has no jurisdiction now.

[43] The record indicates that there are proceedings by way of an action in the Alberta courts in which the Applicant, as plaintiff, is seeking damages in respect of matters raised here. I say no more about that so as not to prejudice that action or any defence. It is clear that I have declined to award damages here or to refer the matter to the Commissioner for that purpose.

[44] As a result, I set aside the Commissioner's decision with costs to the Applicant to be assessed at the Column III level.

JUDGMENT

FOR THE REASONS GIVEN:

THIS COURT ORDERS AND ADJUDGES that:

1. The application is allowed;
2. The Commissioner's Level II grievance decision is set aside; and
3. Costs are awarded to the Applicant to be assessed at the Column III level.

"Roger T. Hughes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-446-09

STYLE OF CAUSE: DAN C. WILSON
v. ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: Vancouver, BC

DATE OF HEARING: March 2, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT:** HUGHES J.

DATED: March 3, 2010

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