Federal Court  Cour fédérale

Date: 20110609

Docket: T-1545-10

Citation: 2011 FC 661

Ottawa, Ontario, June 9, 2011

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

JAMIE BOSTON

Applicant

and

ATTORNEY GENERAL OF CANADA, CBSA AND CBSA LEARNING CENTRE

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision that the Applicant employed excessive force during his final evaluation of the Control and Defensive Tactics (CDT) portion of Port of Entry Recruit Training (POERT). As a result, the Applicant did not successfully complete the POERT program, which is a condition of employment for all new Border Services Officers. The Applicant seeks full time employment with all of the entitlements of a full time employee including, but not limited to, seniority, benefits, pensions and back pay at the Sault Ste Marie Port of

Entry; restitution for the undue stress, embarrassment, and pain and suffering caused by the entire process; a full review of the operations at the Canada Border Service Agency Training Centre in Rigaud Quebec; and his costs.

[2] Based on the reasons that follow, this application is dismissed.

I. Background

A. *Factual Background*

[3] The Applicant, Jamie Boston, participated in the Learning Centre course portion of the Canada Border Services Agency (CBSA) POERT program from May to July of 2010 at the CBSA Training Centre in Rigaud, Quebec.

[4] This 11 week course at the training centre follows a four-week online learning module and precedes an in-service learning component. Collectively these three stages make up the POERT program, which must be completed in order to be appointed as a Border Services Officer with the CBSA.

[5] Use of Force is covered in the CDT portion of the POERT. The aim of the CDT program is to educate officers about the proper response options available to deal with situations in which the use of force is acceptable. Candidates receive CDT instruction throughout the POERT program,

and participate in learning simulations. CDT is assessed in one dynamic simulation in which the candidate interacts with a classmate who plays the role of an individual at a border-crossing.

B. *Impugned Decision*

[6] The Applicant's CDT assessment simulation consisted of a scenario in which a truck-driver allowed the Applicant to examine the cargo, but not the cab of his truck. Adam Alldridge, a classmate of the Applicant, played the role of the truck-driver subject. The subject behaved in a non-cooperative manner and used phrases such as, "It's not going to happen today" and "you are not searching my cab," while standing with his feet planted outside the truck. The Applicant chose to arrest the subject and control him by deploying Oleoresin Capsicum Spray (OC Spray), an Intermediate Device.

[7] The assessors, Michael McBride and Jean Kiathavisack, both RCMP-certified instructors, considered the behaviour of the subject to be clearly "non-cooperative" as evidenced by the subject standing still, using a calm voice, and stating that he "respectfully decline[d]" to cooperate with the search. The use of OC Spray is only permitted where a subject is "resistant", "combative" or where there is risk of death or grievous bodily harm to the Officer or the public. The assessors noted that at no time did the subject demonstrate behaviour that they would classify as "resistant". The Applicant therefore used a level of force that was not consistent with the law or the Incident Management Intervention Model (IMIM). As a result, the assessors determined that the Applicant's performance during the CDT assessment simulation was "Unacceptable" and that he should not be certified in Control and Defensive Tactics.

[8] This result was reviewed at two levels. First the result was discussed with the National Training Administrator and subsequently with the POERT Manager. The assessment process was reviewed to ensure that the decision was well-founded and justified. This process took two days, after which the Applicant was informed of his result. Consequently, the Applicant was not able to complete the POERT program.

II. Issues

[9] The issues raised in this application are:

(a) Should the Application be dismissed because it is out of time?

(b) Was the decision of the assessment officers reasonable?

III. Standard of Review

[10] The Applicant makes no submission on the appropriate standard of review.

[11] The Respondent submits that the decision is discretionary in nature and far more factual than legal. As per the Supreme Court's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, where the standard of review has not been determined in a particular context the pragmatic and functional test continues to apply. In the present matter, the Respondent argues that the nature of the question at issue and the expertise of the decision maker suggest the proper standard of review is reasonableness.

[12] The question at issue in the present matter involves as assessment of the Applicant's performance during the CDT simulation. The question is factual in nature, and the assessors were in the best position to evaluate the Applicant's conduct vis a vis the subject. The assessors are RCMP-trained and certified and have significant expertise in teaching CDT and evaluating CDT simulations. Accordingly, the Court ought to defer to their findings, as long as they are shown to be reasonable.

[13] As set out in *Dunsmuir*, above, a review on the standard of reasonableness requires consideration of the existence of justification, transparency, and intelligibility in the decision-making process. It is also concerned with whether the decision falls within a range of acceptable outcomes that are defensible in respect of the facts and law.

IV. Argument and Analysis

A. *Should this Application be Dismissed Because it is Out of Time?*

[14] The Respondent submits that this Application is out of time and ought to be dismissed on this basis alone.

[15] The Applicant makes this Application pursuant to Rule 18.1 of the *Federal Courts Act*, RSC 1985, C F-7. Subsection 18.1(2) states that an application for judicial review shall be made within 30 days after the decision or order was first communicated to the party. The decision at issue

was communicated to the Applicant on July 12, 2010. The Notice of Application was filed on September 22, 2010, 72 days after the decision was first communicated to the Applicant.

[16] The Court has discretion to grant an extension of time. The exercise of this discretion should be with a view to ensuring that justice is done between the parties. Regard should be had to the reasons for the delay and whether there is an arguable case for setting aside the decision (*Grewal v Canada (Minister of Employment & Immigration)*, [1985] 2 FC 263, 63 NR 106 (CA)).

[17] The Applicant states in his Notice of Application that he was "misdirected" by the CBSA to file a complaint with the Public Service Commission. He only realized that he could file an application for judicial review in the Federal Court after his complaint was rejected because the Public Service Commission found no breach of the *Public Service Employees Act*, (S.C. 2003, c. 22, ss. 12, 13).

[18] The Applicant did not address the out of time issue in his submissions. While it is understandable that the legal system is not easily navigated by those unfamiliar with the practice and procedures required by law, ignorance alone is never a good enough excuse when other parties are prejudiced by delays. There are no details of the "misdirection" that is responsible for the delay.

[19] The Respondent takes the position that the Applicant erroneously implies that the CBSA is under a duty to inform him of his legal rights.

[20] It is true that the CBSA cannot be held responsible for passing on legal advice to disgruntled almost-employees, and this Court has held that receiving bad legal advice does not justify granting an extension of time (*Cove v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 266, 104 ACWS (3d) 761). However, those cases largely deal with an applicant entrusting the management of their legal affairs to a lawyer or consultant.

[21] The 30-day limit for commencing judicial review applications exits in the public interest. Administrative decisions require finality in order to be effectively implemented without delay. The time limit provides security to those who comply with the decision or who enforce compliance (*Berhad v Canada*, 2005 FCA 267, 338 NR 75 at para 60). The Court should not disregard limits set in the rules without good reason. However, given the circumstances of this case, I will exercise my discretion in favour of the Applicant and consider the merits of the application.

B. *Was the Decision Reasonable?*

[22] The Applicant submits that the assessors erred in characterizing the subject's behaviour during the simulation as non-cooperative, when in his view the subject's use of the phrases "it's not going to happen today" and "you are not searching my cab" clearly moved him into the "resistant" category. In support of this position he includes in his record a letter from Adam Alldridge. Mr. Alldridge explains that he was instructed to act "non-cooperative" but he made a mistake during the simulation and accidentally used the phrase, "it's not going to happen today." He agrees with the Applicant that the use of this phrase suggests his behaviour was better characterized as "resistant." The Applicant argues that this clear escalation from "cooperative" to "non-cooperative"

and finally to “resistant” justified the use of the OC Spray as supported by the IMIM. The Applicant explains that he prioritized officer and public safety in acting as he did.

[23] The Applicant further submits that it is unfair to base a candidate’s CDT knowledge on one “flash” scenario, and that other inconsistencies in the training and testing of candidates on CDT make the entire process unfair.

[24] The Respondent submits that the decision reached by the assessors was reasonable in that they properly applied the policies and materials provided to the Applicant when assessing his performance in the CDT simulation. The Respondent argues that while it is true that Section One of the CDT Guide states that officer safety is a priority, the Applicant was never threatened by the non-cooperative subject in a manner that would necessitate the Applicant’s response. Section One also states that the best strategy is to employ the minimum intervention necessary to manage risk and the best intervention causes the least damage.

[25] I wholly accept the Respondent’s submissions on this point.

[26] The Applicant would have been justified in using his OC Spray if the subject had been “resistant” or “combative” or if there was a risk of “death or grievous bodily harm” to the officer or to the public.

[27] Resistant is defined at p 4 of the CDT materials as:

> The subject resists control by the officer. The subject displays signs of resistance such as: pulling away, pushing away with the intent of

> not being controlled, running away, open and angry verbal refusal to respond to verbal commands.

[28] Combative is defined at p 4 of the materials as:

> The subject attempts or threatens to apply force to anyone, eg. Punching, kicking, clenching fists with intent to hurt, resist, threats of an assault

[29] Death or Grievous Bodily Harm is defined at p 5 of the materials as:

> The subject exhibits a behaviour that leads the officer to believe grievous bodily harm or death to the public or the officer may result. For this level of risk to exist, the presence of a weapon is not an essential element, as long as the fear of grievous bodily harm or death exists. This threat level would be present in the case of most weapons attacks, and of course, would include the threat of use of such weapons, eg. knife, baseball bat, firearm, any weapon of opportunity. Throughout the management of an incident, an officer should be alert to threat cues such as body tension, tone of voice, body position and facial expression to ready them to use an appropriate response option. These threat cues may indicate the potential for a suspect to display more or less resistant behaviours described under "categories of resistance", that would justify the use of different "response options".

[30] The assessors noted no such behaviour. Jean Kiathavisack's testing sheet noted that the subject "respectfully" declined the search, and there was no escalation. This observation is echoed by Michael McBride's testing sheet on which he noted that the subject was non-cooperative and used a calm voice when refusing to consent to the search.

[31] The Respondent also notes that the Applicant admits in his own affidavit that the subject displayed no intent to harm him, rather, he was worried about losing control of the situation. As a

result, the assessors concluded that he used excessive force and did not use the intervention that constitutes the least amount of force required to control the situation.

[32] In his submission, the Applicant explains why he chose to deploy the OC Spray. However, it is not the role of this Court to re-weigh evidence and come to factual conclusions which are better left to the assessors who have the necessary expertise to make these decisions. The assessors' findings are justified by the comments made on their testing sheets. Contrary to the Applicant's submission, the assessors did note that the Applicant chose to arrest the subject for hindering a search. It seems that the Applicant and the assessors have a difference of opinion. Absent some indication that the assessors behaved capriciously, or without regard for the evidence before them, this Court is powerless to intervene.

[33] Understandably, the Applicant is upset and disappointed. The Applicant raises many criticisms of the POERT learning centre course and in particular the method by which CDT is assessed. However, an application for judicial review is not the proper venue by which to debate the wisdom of internal policy decisions. Reference letters in the record paint the Applicant's professional experience as blemish-free and speak to his capabilities. However, the Court is not in a position to substitute its view of a more preferable outcome for one that is shown to be reasonable.

[34] The assessors' decision regarding the Applicant's CDT assessment was justified, transparent and intelligible, and therefore reasonable. The intervention of this Court is not warranted.

V. Conclusion

[35] In consideration of the above conclusions, this application for judicial review is dismissed and no costs will be awarded in this matter.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed and no costs will be awarded in this matter.

" D. G. Near "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**T-1545-10**
STYLE OF CAUSE:	**JAMIE BOSTON v. AGC ET AL.**
PLACE OF HEARING:	**OTTAWA**
DATE OF HEARING:	**APRIL 12, 2011**
REASONS FOR JUDGMENT AND JUDGMENT BY:	**NEAR J.**
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APPEARANCES:

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Max Binnie	FOR THE RESPONDENTS

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