Federal Court  Cour fédérale

Date: 20130313

Docket: T-2038-11

Citation: 2013 FC 267

Ottawa, Ontario, March 13, 2013

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

STAFF SERGEANT WALTER BOOGAARD

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks judicial review to set aside a decision of Royal Canadian Mounted Police Assistant Commissioner (A/Commissioner) McNeil dated October 31, 2011. A/Commissioner McNeil decided that the applicant's allegation of workplace harassment was unfounded. For the reasons that follow this application is dismissed.

Background

[2] The applicant is a member of the Royal Canadian Mounted Police (RCMP) holding the rank of Staff Sergeant. In 2004 he successfully competed in an officer candidate selection process and was placed on a candidate list for senior commissioned positions.

[3] At the relevant time the Director for Executive/Officer Development and Resourcing (EODR) was Inspector Gaudet. In April 2005, shortly after being placed on the list for promotion, Staff Sergeant Boogaard met with Inspector Gaudet. As a result of that meeting, Staff Sergeant Boogaard believed that Inspector Gaudet was supportive of his promotion from the pool of eligible officers. Staff Sergeant Boogaard recalls that Inspector Gaudet told him that he "had all the background and experience that EODR was looking for". Inspector Gaudet also asked Staff Sergeant Boogaard if he was interested in a position in Toronto at the rank of Inspector.

[4] When Staff Sergeant Boogaard subsequently met with Inspector Gaudet in May of 2005 to follow up on the Toronto position, he felt that Inspector Gaudet's demeanour towards him had changed. Staff Sergeant Boogaard's evidence is that Inspector Gaudet was curt and abrupt, and that he denied offering the Toronto position to him.

[5] By 2009, Staff Sergeant Boogaard had not been appointed to the commissioned ranks. Of the 146 candidates placed on the officer candidate list in 2004, 122 have been appointed to the rank of Inspector. There is no information as to whether the remaining 23, excluding Staff Sergeant Boogaard, retired or otherwise left the force.

[6] Staff Sergeant Boogaard made an access to information request for information regarding his potential promotion and received disclosure in March of 2010.

[7] The disclosure included the records of Rose Gallo, an RCMP lawyer who had prosecuted an internal disciplinary proceeding against Staff Sergeant Boogaard in 2001, nine years earlier. In that proceeding, Staff Sergeant Boogaard admitted to improper storage of a firearm and was disciplined by a three member Adjudication Board in accordance with the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10. Superintendent John Reid was the Chairperson of that Adjudication Board. Ms. Gallo's records indicated that in May of 2005 Inspector Gaudet spoke to Superintendent Reid regarding the disciplinary proceedings.

[8] On April 19, 2010 Staff Sergeant Boogaard filed a harassment complaint against Superintendent Reid pursuant to the RCMP's policy on the *Prevention and Resolution of Harassment in the Workplace* (Harassment Policy). Staff Sergeant Boogaard alleged that Superintendent Reid discredited and damaged his career by telling Inspector Gaudet that there may be more to the disciplinary matter than disclosed by the decision and record before the Adjudication Board.

Evidence

[9] Corporal Salomao was assigned to investigate the harassment complaint in March of 2011. To be clear, it took 11 months for a human resource officer to screen the complaint and reach the conclusion that Superintendent Reid's comment to Inspector Gaudet that there may have been more

to the case than meets the eye could constitute harassment. Corporal Salomao then interviewed Staff Sergeant Boogaard, Superintendent Reid, Ms. Gallo and Inspector Gaudet.

[10] Inspector Gaudet confirmed that at the time he was the acting Director General for EODR. He conducted reference and background checks on potential candidates as part of his responsibilities and also attended the Officer Orientation Development Course. During one such lecture given by Superintendent Reid, he learned of a disciplinary proceeding that closely resembled Staff Sergeant Boogaard's case. After the presentation he approached Superintendent Reid to ask for the details about the case. After this conversation he contacted Ms. Gallo but she did not provide him with further information. Inspector Gaudet told Corporal Salomao that he had previously heard rumours about the case but he could not remember who told him this information and when.

[11] Superintendent Reid told Corporal Salomao that he lectured at the Officer Orientation and Development Course. During one lecture a question was asked about a disciplinary proceeding involving an unnamed member. The officer asked why the unnamed member had not been dismissed for his involvement with two prostitutes who were said to have stolen a service weapon and traded it for cocaine. Superintendent Reid states that he told the candidate that the disciplinary proceeding related only to unsafe storage of a weapon.

[12] Superintendent Reid remembered that sometime later Inspector Gaudet called him to ask about the disciplinary proceedings in respect of Staff Sergeant Boogaard, saying that he had heard it also involved two prostitutes and wanted further information. Superintendent Reid recalled telling

Inspector Gaudet that he could not confirm whether the information was true and directed him to speak to Ms. Gallo if he required more information.

[13] Ms. Gallo made a note to file contemporaneous with the call she received from Superintendent Gaudet. In a memorandum dated June 9, 2005, she recorded that Inspector Gaudet requested from her information regarding the applicant's disciplinary hearing in 2001. Inspector Gaudet explained that Superintendent Reid told him that there may be more to the disciplinary matter than was in the record before the Adjudication Board. In response, Ms. Gallo told Inspector Gaudet that she would not provide additional information because it was not in the record before the Board and could not be considered for promotional purposes.

[14] Ms. Gallo's notes indicate:

> Insp. Gaudet learned from the then Chair, on a social basis, that there may have been more to the disciplinary matter than met the eye and while it is not the Chair's place to go beyond what was presented at the hearing proper, the Chair likely told Insp. Gaudet to contact me. The concern specifically centers around prostitutes who were interviewed as part of the CIIS investigation but who did not form part of the particulars at the hearing proper.
>
> …As an aside I recall the then Chair John Reid calling me after the hearing to say that he had heard through the grapevine that there were prostitutes involved and concerned about it [sic]. I recall advising him something to the effect that a principled approach had been followed. […]
>
> …I am not comfortable disclosing information which was not relied upon in the hearing and does not form part of the record. You will note that the matter concerning the prostitutes was considered and discounted. […]

[15] Corporal Salomao delivered an investigation report on May 30, 2011 summarizing the relevant facts. He reviewed the above evidence and noted that, because of the passage of time, the witnesses were unable to remember details surrounding the allegation. Corporal Salomao concluded that Inspector Gaudet had learned about the rumours from someone other than Superintendent Reid.

[16] This report was reviewed by Superintendent Enright who determined that the allegation of harassment was unfounded. Superintendent Enright forwarded this recommendation to the A/Commissioner McNeil for final decision.

Decision Under Review

[17] In a decision dated October 31, 2011, the A/Commissioner agreed with Superintendent Enright's recommendation.

[18] The A/Commissioner considered it reasonable for Inspector Gaudet to have contacted Superintendent Reid to discuss his concerns about the rumour as part of his role as the EODR. This is permissible under the RCMP Administration Manual.

[19] The A/Commissioner also accepted the investigator's finding that Inspector Gaudet had already heard about the rumours before speaking to Superintendent Reid and that Superintendent Reid did not tell Inspector Gaudet anything new. Additionally, Superintendent Reid did not initiate the conversation, Inspector Gaudet approached him.

[20] The A/Commissioner concluded that the mere fact that Superintendent Reid confirmed that he had also heard the rumours in not sufficient to constitute harassment. Therefore, the A/Commissioner decided that the complaint was unfounded.

[21] Staff Sergeant Boogaard commenced his application for judicial review of this decision on December 15, 2011. He also filed an internal grievance against the decision on November 18, 2011. The grievance process is ongoing.

Issue

[22] There are three issues for this judicial review:

(1) Should the Court exercise its discretion to decline jurisdiction;

(2) Whether the applicant was denied procedural fairness; and

(3) Whether the decision was unreasonable.

Alternative Remedy

[23] While Staff Sergeant Boogaard has the right to seek judicial review, it remains a discretionary remedy. Section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7 preserves that discretion as it contains permissive, as opposed to mandatory, language: *Canadian Pacific Ltd v Matsqui Indian Bank*, [1995] 1 SCR 3, paras 30-31.

[24] As an element of that discretion, absent exceptional circumstances, courts will not interfere with an ongoing administrative process when it may provide an adequate alternative remedy. This

prevents fragmentation of administrative processes and piecemeal litigation: *Canada (Border Services Agency) v CB Powell Ltd*, 2010 FCA 61, paras 31-32.

[25] The grievance process is set out in Part III of the *Royal Canadian Mounted Police Act*. Subsection 31(1) of that *Act* provides that a member may grieve:

> […] any decision, act or omission in the administration of the affairs of the Force in respect of which no other process for redress is provided by this Act, the regulations or the Commissioner's standing orders […]
>
> [Emphasis added]
>
> […] une décision, un acte ou une omission liés à la gestion des affaires de la Gendarmerie causent un préjudice peut présenter son grief par écrit à chacun des niveaux que prévoit la procédure applicable aux griefs prévue à la présente partie dans le cas où la présente loi, ses règlements ou les consignes du commissaire ne prévoient aucune autre procédure pour corriger ce préjudice.
>
> [Je souligne]

[26] Staff Sergeant Boogaard was entitled to file a grievance from the negative decision regarding his harassment complaint. He did so, with similar arguments as those put forward on judicial review. The grievance process is ongoing and the Court will decline to grant a remedy if satisfied that the grievance process provides an adequate alternative remedy.

[27] In this case, the crux of Staff Sergeant Boogaard's complaint in that he has been denied an important promotional opportunity on the basis of unfounded rumours and that those rumours were fuelled by Superintendent Reid's suggestion that there was more to the case than would appear as a matter of first impression. The remedy for this is appointment to the position or rank. This is a remedy which the Court cannot grant. The respondent concedes that appointment to the rank could

be the result of the grievance. In this regard, and in respect of the interests of greatest importance to Staff Sergeant Boogaard, the grievance procedure is an adequate remedy.

[28] The adequacy of an alternate remedy depends, not only on the substance of the relief available, but also on its timeliness. In so far as the harassment complaint is concerned, the chronology paints a very dim picture of what is to be an effective and quick process for the resolution of workplace disputes. The harassment complaint was filed in April 2010, the final decision was rendered by A/Commissioner McNeil on October 31, 2011, eighteen months later.

[29] This was not a complex matter. Far from it. Three witnesses were identified and all of their material evidence has been recounted in three pages of these reasons for judgment. I do not accept the respondent's effort to attribute responsibility for the delay to the applicant. The applicant was posted overseas, as part of his ongoing responsibilities, and presumably it was in the furtherance of the better administration of the RCMP that that posting occurred. The posting was neither an excuse for nor implied consent to delay in processing. Indeed, it is surprising for the RCMP to point to difficulties and delays in communications with an overseas officer, with whom presumably it would be important to remain in contact.

[30] With respect to the November 18, 2011 grievance of the harassment decision, it is now some fourteen months outstanding. The facts that underlie this are straightforward which makes it very difficult to understand why it took four months to transfer the file to the Level I adjudicator, and why it has now been with the adjudicator for decision for a year.

[31] Grievance and harassment procedures are intended to be expeditious. The Harassment Policy notes that the objective of that policy is that complaints are to be resolved in a timely manner. Their summary nature supports the objective of a harmonious and effective workplace. Grievance decisions left outstanding allow issues to fester, bring uncertainty to the workplace together with ineffectiveness and inefficiency.

[32] The delays in question stretch the tolerance for the harassment and grievance procedures to be considered an adequate alternate remedy to judicial review. To be an adequate remedy it must be timely. Timeliness, in turn, depends on the objectives of the process and interests at stake. It is important to remember that the grievance of the harassment decision was filed on November 18, 2011. It is now 2013 and no decision is on the horizon.

[33] Complex judicial review proceedings and trials are routinely commenced and disposed of in this Court in far less time than this compliant has languished in the system. This gives rise to serious questions as to whether the objectives of the harassment and grievance procedures are being met. These observations apply with particular force in the context of this case where what is in issue is promotion from a pool to a senior position. Officers may have only a limited number of years of eligibility in the pool before they retire.

[34] The question whether an alternate adequate remedy exists is informed by the context. That context includes the substance of the complaint and the consequences of the behaviour in question for the complainant. In this case, given that what is in issue is injury to promotional opportunity late in a career, the grievance procedure can be perceived as no remedy whatsoever.

[35] While I find that the delays in question in both the harassment and grievance procedures stretch the boundaries of tolerance, the singular fact remains that this Court cannot give a remedy which advances resolution of the issues. It is important to note as well, in this context, that there is a parallel grievance arising from failure to appoint to a specific position (April 19, 2010). Again, however, it would appear that it too has been forgotten in the system.

Procedural Fairness

[36] Were this Court in a position to provide an effective remedy, it would exercise its discretion in favour of the applicant.

[37] The respondent justifies the constraints on disclosure during the harassment process as being in furtherance of the expeditious disposition of complaints. However, it would seem, at least on the facts of this case, that that objective is not met. The RCMP and its members have the worst of both worlds: a procedure that truncates procedural fairness in the name of efficiency and workplace harmony, but provides neither.

[38] This Court has emphasised that "decisions on an allegation of harassment or abuse of authority may have significant consequences for everyone involved, and this raises the level of procedural fairness required": *Potvin v Canada (Attorney General)*, 2005 FC 391, para 19. In *Potvin*, Justice Tremblay-Lamer concluded that procedural fairness requires disclosure of the preliminary report to both the complainant and the respondent. In that case, the policy involved was that of a different department with different procedures.

[39] Here, Staff Sergeant Boogaard challenges not only the reasonableness and merits of the underlying decision to reject the harassment complaint, but also the fairness of the process by which that decision was reached. Necessarily, this involves challenging the procedure provided by the Harassment Policy itself.

[40] The Harassment Policy does not, by its terms, provide for disclosure of the evidence collected by the investigator. Staff Sergeant Boogaard had requested the opportunity to review that evidence and the investigative report. In accordance with the policy his request was denied. The RCMP is free, within reason, to determine its own procedures. Those procedures may vary with the nature of the inquiry and the circumstances of the case: *Kane v University of British Columbia* [1980] 1 SCR 1105, p 1112. I note however, that the RCMP Policy is inconsistent with the guidance contained in the Treasury Board Policy on Harassment Prevention and Resolution, section 2.1, which provides:

2.1 This policy applies to the core public administration which includes the organizations named in Schedule I and the other portions of the federal public administration named in Schedule IV of the Financial Administration Act unless excluded by specific acts, regulations or Orders in Council.	**2.1** La présente politique s'applique à l'administration publique centrale, dont les organismes nommés à l'annexe I et aux autres secteurs de l'administration publique fédérale nommés à l'annexe IV de la Loi sur la gestion des finances publiques, sauf s'ils en sont exclus en vertu d'une loi, d'un règlement ou d'un décret particulier.

[41] If the complaint gets to the investigation stage, the Treasury Board's guidelines dealing with the complaint process provide:

Complainants and respondents must also be provided with the opportunity to review the draft investigator's report	Les plaignants, les mis en cause et les témoins doivent avoir l'occasion de revoir leurs déclarations, et les

to confirm its accuracy, subject to the requirements of the Access to Information Act and the Privacy Act. You should involve your human resources specialist or coordinator responsible for harassment issues in reviewing the report, to ensure that it meets the test of procedural fairness and to examine the quality of the report. You can return the report to the investigator for further work if you are not satisfied. The investigator then provides you with the final report concluding whether the complaint is founded or not. Before providing the parties with the report you should also involve your Access to Information and Privacy (ATIP) coordinator to ensure that ATIP requirements are respected.	plaignants et les mis en cause, de revoir l'ébauche du rapport de l'enquêteur pour en confirmer l'exactitude, sous réserve des dispositions de la Loi sur l'accès à l'information et de la Loi sur la protection des renseignements personnels. Vous devriez aussi demander à votre spécialiste des ressources humaines ou au coordonnateur responsable des questions de harcèlement d'examiner le rapport, de manière à vous assurer que ce dernier soit conforme aux principes d'équité procédurale ainsi que pour en contrôler la qualité. Si vous n'êtes pas satisfait du rapport, vous pouvez le renvoyer à l'enquêteur pour qu'il l'améliore. L'enquêteur vous remet ensuite son rapport final indiquant si la plainte est fondée ou non. Avant de remettre le rapport aux parties, vous devriez aussi faire appel au coordonnateur de l'Accès à l'information et protection des renseignements personnels (AIPRP) qui vérifiera que les exigences de l'AIPRP ont été respectées.

[42] Staff Sergeant Boogaard received and did in this case, through an Access to Information request obtain a copy of the final investigation report. This was, however, only after the investigation was concluded. While the applicant understandably would prefer greater disclosure, earlier, the requirements of procedural fairness do not apply with full force in all circumstances. Harassment policies are intended to be efficacious and non-adversarial. They are meant to resolve workplace issues on a fair and principled basis, but this does not mean that they are to assume the trappings of a court or of an adversarial process. Provided minimal requirements are met the respondent has to be accorded some latitude in tailoring the process.

[43] It cannot be said, therefore, that the principles of procedural fairness are breached.

The Decision Itself

[44] The applicant further contends that the decision under review is unreasonable. It is noteworthy that Ms. Gallo recognized the inappropriate nature of the inquiries of her by Inspector Gaudet. The marked and sudden change in Inspector Gaudet's attitude toward promotion and that this change was contemporaneous with his inquiries of Ms. Gallo were not taken into account in the harassment decision. The harassment decision makes no effort to explore or understand the readily apparent causation between Inspector Gaudet's query of Superintendent Reid, Superintendent Reid's reply, the call to Ms. Gallo and the consequences for Staff Sergeant Boogaard. In sum, the decision did not address the issue.

[45] The decision dismisses the complaint on irrelevant considerations. The A/Commissioner determined that because Inspector Gaudet had heard the rumour previously it somehow negated or rectified Superintendent Reid's conduct in telling Inspector Gaudet that he might be on to something and to call Ms. Gallo. Inspector Gaudet may have indeed heard a rumour previously, although, it is to be recalled "he could not remember when or from whom he heard it." That is not the issue; Inspector Gaudet's knowledge is not the subject of the complaint, it is Superintendent Reid's conduct. As Chair of the Adjudication Board, Superintendent Reid held a special role and it was reasonable for Inspector Gaudet to conclude that if Superintendent Reid thought there was smoke, there was probably fire.

[46] Many questions arise, including why, if Inspector Gaudet had heard the rumour previously, he did not act upon it earlier and why, according to the investigation report, Inspector Gaudet only made the link during Superintendent Reid's talk.

[47] Insofar as relevancy is concerned, the existence of the prior rumour is an irrelevant distraction to the central issue, namely whether Staff Sergeant Boogaard's interests had been affected, a point which is never addressed. Superintendent Reid told Inspector Gaudet that there may be more to the case than meets the eye and to contact Ms. Gallo. Within a month Ms. Gallo was contacted by Inspector Gaudet and Staff Sergeant Boogaard noticed the chilly reception by Inspector Gaudet.

[48] Ms. Gallo's evidence, which would appear to be the only documented evidence of the critical events, is dismissed as it contains elements of hearsay. Ms. Gallo's evidence is, in effect, contemporaneous objective evidence which establishes the material conversations. To dismiss it as hearsay in the conduct of informal harassment procedure under the decision is unreasonable. This is particularly so given the uncertainty and vagueness that characterized much of the evidence gathered during the investigation. Secondly, the analysis is incorrect. It insulates Superintendent Reid's conduct by saying that it was Inspector Gaudet who approached Superintendent Reid. Again, this is an irrelevant consideration. At issue is what Superintendent Reid said and what, as Chair of an Adjudication Board, he did. It may have been entirely innocuous for Superintendent Reid to say that he had heard a similar rumour; but that comment cannot be disassociated, as it was, from the fact that Superintendent Reid held an important position as Chair. His acknowledgment of the rumour, his role as Chair and his suggestion that Inspector Gaudet follow up with Ms. Gallo

needed to be assessed globally, and not parsed into issues or viewed through the lens of Inspector Gaudet's role in asking the questions.

[49] To conclude, the harassment decision fails to meet the criteria of intelligibility, justification and transparency: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190. The substance of the complaint is not addressed; it is disposed of on irrelevant considerations and material facts are not considered. The delays are close to rendering the alternative remedy ineffective. On the other hand, the grievance procedure does provide a highly effective remedy which is not available on judicial review; appointment of Staff Sergeant Boogaard to a rank. This is conceded by the respondent.

[50] I conclude, on balance, that the Court should decline to grant a remedy which would otherwise be forthcoming. Setting aside the decision would do little, other than to delay matters further.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Donald J. Rennie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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