Federal Court of Appeal | Cour d'appel fédérale

Date: 20220602

Docket: A-85-21

Citation: 2022 FCA 99

CORAM: **GLEASON J.A.**
WOODS J.A.
DAWSON D.J.C.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

MICHAEL MULLER

Respondent

Heard at Vancouver, British Columbia, on March 29, 2022.

Judgment delivered at Ottawa, Ontario, on June 2, 2022.

REASONS FOR JUDGMENT BY: DAWSON D.J.C.A.

CONCURRED IN BY: GLEASON J.A.
WOODS J.A.

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REASONS FOR JUDGMENT

DAWSON D.J.C.A.

[1] The respondent is a member of the Royal Canadian Mounted Police. While off-duty he was involved in an incident at a fast food restaurant that led to him being charged with three breaches of the RCMP Code of Conduct. Only one charge is material to this appeal. This is the charge that:

> On April 18, 2016, at or near Kamloops, in the Province of British Columbia, while off duty, you used inappropriate and unwanted force on [the manager of the restaurant], contrary to Section 7.1 of the Code of Conduct.

[2] As required by the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10 (Act) the alleged breaches were considered by a Conduct Authority. The Conduct Authority found two breaches of the Code to be established, one of which was the charge of the use of inappropriate and unwanted force, contrary to section 7.1 of the Code of Conduct. Section 7.1 requires members of the RCMP to "behave in a manner that is not likely to discredit the Force". The Conduct Authority imposed a penalty of forfeiture of two days' pay in respect of this breach.

[3] The respondent appealed the decision that he had used inappropriate and unwanted force. As required by the Act, the Commissioner referred the case to the External Review Committee for its review and recommendation.

[4] The Review Committee found that the Conduct Authority had erred in finding that the respondent had admitted to using inappropriate and unwanted force, and further erred by failing to apply the proper legal test for ascertaining whether the conduct was likely to bring discredit to the Force. The Review Committee recommended that the appeal should be allowed and that the Commissioner should impose the finding that the Conduct Authority should have made. The Review Committee concluded that the appropriate finding was that the use of force was both inappropriate and unwanted and would likely discredit the RCMP.

[5] The Commissioner's delegated Conduct Appeal Adjudicator then rendered the Level II decision on the respondent's appeal. The Adjudicator agreed with some of the findings of the

Review Committee and gave reasons for departing from other findings and recommendations. The Adjudicator found that the decision of the Conduct Authority was not clearly unreasonable. The Adjudicator went on to find in the alternative that:

> ... even if I upheld the Appeal and rendered my own decision based on the Record, I would agree with the [External Review Committee] recommendation to find that the allegation was established and would adopt the [Committee's] rationale for this recommendation (Report, paras 109-114).

[6] The respondent then sought judicial review of the decision of the Adjudicator in the Federal Court.

[7] For reasons cited 2021 FC 159, the Federal Court allowed the application for judicial review. In its view, the finding that the charge was made out was "clearly unreasonable because it was based on the error that Mr. Muller admitted to it. For that reason alone, the appeal ought to have been allowed" (reasons, paragraph 19; emphasis in the original). As discussed below, the Federal Court also took issue with the reasons of the Review Committee adopted by the Adjudicator. Finally, the Federal Court went on to find that, for the reasons given, there was "no value in remitting the matter back for redetermination." (reasons, paragraph 29). Accordingly, the decision of the Adjudicator was set aside with costs.

[8] This is an appeal from the judgment of the Federal Court.

[9] On this appeal, this Court is required to "step into the shoes" of the Federal Court and focus on the administrative decision *(Agraira v. Canada (Public Safety and Emergency*

Preparedness), 2013 SCC 36 at paragraphs 45-47, [2013] 2 S.C.R. 559). In this case, the administrative decision under review is that of the Adjudicator.

[10] Therefore, the question before this Court is whether the Adjudicator's decision is reasonable.

[11] I begin my analysis by briefly describing the conduct that gave rise to the allegation of misconduct and then reviewing the reasons for the Adjudicator's alternative finding that the allegation was established.

[12] The facts that gave rise to the allegation are not in dispute. The facts were succinctly summarized by the Adjudicator as follows:

> The Appellant is a General Duty Member with the [City of K] RCMP. His work duties in April 2016 were administrative in nature due to an unrelated medical issue. On April 18, 2016, the Appellant, while off-duty, ordered a cheeseburger at a McDonald's restaurant. When he received it he believed the patty was raw. The Appellant became upset and raised his voice and used profanities. As he was attempting to photograph the patty, the McDonald's manager took it away. The Appellant grabbed the manager's wrist and pulled him forward to prevent him from doing so, causing the manager to lose his balance. The manager said that he would contact the police. The Appellant then identified himself as a police officer. Although the manager did not believe the Appellant was a police officer, he was "freaked out" by the Appellant's claim. The manager called 911. The Appellant obtained the store owner's contact information and departed the scene before police arrived. This event (the Incident) was captured on video surveillance.

[13] In finding the allegation of misconduct to be made out, the Adjudicator adopted paragraphs 109 through 114 of the reasons of the Review Committee:

[109] In my view, the record supports a finding that the Appellant's use of force on the McDonald's Manager was inappropriate and unwanted, and likely to bring discredit upon the Force, contrary to section 7.1 of the *Code of Conduct*.

[110] To restate, the test for ascertaining such conduct is how a reasonable person with knowledge of all relevant circumstances including the realities of policing generally and in the Force particularly would view the conduct (see *Code of Conduct of the Royal Canadian Mounted Police, Annotated Version 2014*, at page 21; ERC C-006, *supra*; Final Adjudicator agreed, *supra*). As Paul Ceyssens points out in *Legal Aspects of Policing*, Volume 2 (Toronto: Earlscourt, 2002, pages 6-13 to 6-22), where statutory language governing discreditable conduct addresses acting in a manner likely to discredit the reputation of a police force, actual discredit need not be shown. Rather, the extent of the potential damage to the reputation and image of the police force, should the action become public knowledge, is the measure used to assess the misconduct. In performing this assessment, the impugned conduct must be considered against the reasonable expectations of the community.

[111] Allegation 3 asserted that, on April 18, 2016, while off duty, the Appellant used unwanted and inappropriate force on the McDonald's Manager, contrary to section 7.1 of the *Code of Conduct*. It is plain from the Notice of Conduct Meeting, the [Investigative Report] and the evidence attached to both, including the Appellant's warned statement, that the use of force involved grabbing the McDonald's Manager's left wrist for approximately a second and pulling him with enough force to guide him part of the way across the service counter and cause him to release a burger patty he was holding (Material, pages 4-169, 144-145, 148, 203-205; Video Record entitled "*McDonald's CCTV-16.04.18 204843 hrs*").

[112] To begin, I find that the Appellant's use of force on the McDonald's Manager was "*unwanted*". The McDonald's Manager stated that he felt angry and threatened by the Appellant's grabbing and pulling of him, and that he told the Appellant he was disappointed a police officer would act in such a way. Moreover, the McDonald's Manager opted to call 911 after he was grabbed and pulled. This evidence indicates he did not want to have force used on him (Material, pages 115-119, 127-134).

[113] I also find that the Appellant's use of force on the McDonald's Manager was "*inappropriate*". The Appellant initially explained that his use of force was justified, minimal, not intended to cause injury and harmless (Material, page 218). Yet he later says in his apology letter to the McDonald's Manager that "*you should have never been treated this way by a customer and I am sorry for my actions*" (Appeal, page 55). That perspective is consistent with the evidence of three McDonald's employees, who all felt uncomfortable with the Appellant's use of force, which they deemed to be unnecessary (Material, pages 89-90, 113, 139-

> 140). Indeed, upon viewing the use of force, which begins at the 20:49.51 mark of the CCTV recording … I observed the abrupt and aggressive nature of the Appellant's grabbing and pulling of the McDonald's Manager, for which no clear justification was evident from the recording. While I accept that the McDonald's Manager was removing food the Appellant wished to photograph at the time, there were much more appropriate ways for the Appellant to handle the situation, including asking or even insisting that the McDonald's Manager place the food back on the service counter. The evidence plainly illustrates that the Appellant's use of force was both wrong and unacceptable.
>
> [114] In my opinion, the reasonable person with knowledge of the relevant circumstances, including the realities of policing in general and in the RCMP in particular, would construe the Appellant's use of force against the McDonald's Manager as likely to bring discredit to the Force, contrary to section 7.1 of the *Code of Conduct*. The reasonable person would extend to an off-duty police officer some leeway in raising concerns over a restaurant order being undercooked. However, this leeway would almost certainly not include tolerating the police officer grabbing the restaurant manager and pulling him against his will, even if that unwanted force lasted for only one second. The reasonable person would be uneasy if the police officer, immediately after using force on the restaurant manager, went behind the service counter directly where the manager worked. The reasonable person would also be troubled if the RCMP, having considered the evidence, determined that the police officer's use of force was serious enough to warrant bringing a criminal charge of assault against him, regardless of whether that charge was eventually stayed by a Crown prosecutor. Finally, the reasonable person, aware of the principles of the *Conduct Measures Guide*, would concede that, while the officer's use of force was a "*relatively minor use of force, such as simple shoving, which* [did] *not lead to a criminal conviction or injury*", it fell within the scope of conduct likely to bring discredit to the RCMP, contrary to section 7.1 of the *Code of Conduct*, as described in the *Guide* (see pages 47-48).

[14] As counsel for the respondent, the appellant in the proceedings below, argued before us, the Federal Court saw no value in remitting the matter back for redetermination because, in its view, there was only one reasonable outcome: the breach of the Code of Conduct was not established. The Federal Court came to this conclusion notwithstanding that decision-makers with knowledge of the realities of policing generally, and of RCMP policing, in particular, had found to the contrary.

[15] The RCMP Code of Conduct imposes a higher standard of conduct on members of the Force than is expected of members of the public. It does so because public trust is essential for the RCMP to effectively serve and protect Canadians. Public trust requires members of the Force to conduct themselves in accordance with the Code of Conduct. The imposition of this higher standard also recognizes that members of the Force have specialized training and experience, including training in handling conflict and the de-escalation of conflict, and training in the appropriate use of force.

[16] When the Adjudicator's decision is reviewed in this light, I see no error in the decision of the Adjudicator that rendered the decision unreasonable. The decision "as a whole is transparent, intelligible and justified" (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paragraph 15, 441 D.L.R. (4th) 1).

[17] In my view, the Federal Court erred when it concluded that the erroneous statement in the reasons of the first level Conduct Authority, that the appellant had admitted to breaching the Code, provided a sufficient basis to set aside the Adjudicator's decision. In my view, the Court further erred by failing to correctly apply the reasonableness standard of review and instead conducting a *de novo* review of the evidence.

[18] With respect to the first error, both the Review Committee and the Adjudicator concluded that the record failed to demonstrate that the respondent had admitted to breaching the Code of Conduct. The Adjudicator then, in his alternate finding, considered the matter free of this error.

[19] The initial erroneous statement by the first level decision-maker was not material to the decision of the Adjudicator.

[20] As to the second error, nowhere in its reasons did the Federal Court consider the respondent's conduct through the lens of the Code of Conduct and the higher standard of conduct members of the RCMP are held to.

[21] This is demonstrated, for example, at paragraph 27 of the reasons of the Federal Court where it expressed its concern with the basis of the Adjudicator's alternate finding. Directing itself only to one of the six paragraphs adopted by the Adjudicator, paragraph 114 (set out above), the Federal Court expressed the following concerns:

i. The Adjudicator ignored the reason the respondent used force on the manager, i.e. because the manager was removing the burger while the respondent was attempting to photograph it.

ii. The Adjudicator ignored the fact that the manager never offered any explanation for doing so, nor did the manager make any offer of a refund before removing the burger.

iii. The Adjudicator relied upon the fact that after the use of force, the respondent went behind the counter to retrieve the burger. In the Court's view, this was irrelevant to the use of force allegation.

iv. The Adjudicator erred by referring to the laying of criminal charges and stating that it was not relevant that the Crown decided to stay that charge.

[22] In my respectful view, the Federal Court parsed the Adjudicator's reasons, substituting its view of how an officer should act and the nature of conduct that is likely to discredit the Force. The reasons failed to recognize that there were more appropriate ways to respond to the

manager's actions, suggested that the manager's failure to offer a refund justified the respondent's use of force and failed to recognize that a decision by a prosecutor to stay a charge does not demonstrate that the respondent's conduct met the higher standard of conduct imposed upon members by the RCMP Code of Conduct.

[23] I am not convinced that the fact that, after menacing the manager, the respondent went directly behind the service counter, was irrelevant to the use of force allegation. However, I am convinced that even if this conduct was irrelevant, the reference to this action does not constitute an error sufficiently material to vitiate the decision of the Adjudicator.

[24] For these reasons, I would allow the appeal with costs in this Court and set aside the judgment of the Federal Court. Pronouncing the judgment that the Federal Court ought to have pronounced, I would dismiss the application for judicial review with costs in the Federal Court payable by Mr. Muller to the Attorney General of Canada.

"Eleanor R. Dawson"
D.J.C.A.

"I agree
Mary J.L. Gleason J.A."

"I agree
Judith Woods J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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