Federal Court  Cour fédérale

Date: 20181004

Docket: T-10-18

Citation: 2018 FC 993

Ottawa, Ontario, October 4, 2018

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

DAVID LLOYD SMITH

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Sergeant David Lloyd Smith ["Sgt. Smith"], a member of the Royal Canadian Mounted Police ["RCMP"], applied for judicial review of a December 7, 2017 Conduct Appeal Decision pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. As a result of the Conduct Appeal Decision, Sgt. Smith had conduct measures imposed against him and thus had to forfeit 11 days of annual leave. Sgt. Smith represented himself at the hearing.

II. Background

[2] Sgt. Smith has been employed with the RCMP for more than 33 years. Sgt. Smith has an unblemished record with no prior history of discipline as a member of the RCMP. There is no doubt that Sgt. Smith is a remarkable man. He is a veteran of two wars and has served his country with NATO, the United Nations, and the RCMP. Sgt. Smith's service record was also noted by counsel for the Respondent.

[3] I wish to add that I am aware that this was a very personal matter to Sgt. Smith. I imagine that this matter caused stress, personal humiliation, and embarrassment after such a long and distinguished career. Especially given that this matter is related to the Ceremonial Mounted Unit of which has benefited the RCMP's image for years. Although I make this acknowledgement, unlike an action for damages, it does not form part of the judicial review on the record.

[4] In or around 1990, Sgt. Smith created an RCMP "Ceremonial Mounted Unit". The function of the Ceremonial Mounted Unit was to provide for a trained RCMP member in red serge, accompanied by his personal horse, Justice and dog, Yukon at various public events. From 1990 to 2014, Sgt. Smith participated in hundreds of such events while off-duty in the appropriate regalia. The Ceremonial Mounted Unit has received numerous accolades as was evidenced by press clippings.

[5] In order to recuperate the out-of-pocket expenses for these functions, Sgt. Smith filed for overtime or expense claims throughout the years.

[6] At an undetermined point between 1990 and 2014, Sgt. Smith created a document entitled the "Standard Budgetary Cost Back" ["MOU"]. The MOU provides for "regular costs pro-rated over the year" to deal with the numerous costs not fully budgeted for. It further allows for Sgt. Smith to use his "discretionary judgement" to cover expenses related to the Ceremonial Mounted Unit. The MOU is signed by Sgt. Smith only and not by any financial manager from the RCMP or by a supervisor. The Conduct Authority Decision concluded that the MOU was not an appropriately sanctioned MOU between the RCMP and Sgt. Smith.

[7] Sgt. Smith disputes the term "MOU" and referred to this document as a contract or as a service agreement. In any case, nothing turns on what the document he created is called, but for ease of identification and to match the wording in the Conduct Authority Decision and Conduct Appeal Decision and what Sgt. Smith before the hearing called it, I will refer to it as a "MOU". However, it is acknowledged that the document is unsigned, unendorsed, and not an official MOU as set out in the prescribed format that is typically used by the RCMP with external vendors. The MOU has been the basis for Sgt. Smith's reimbursement from its creation and has never been the subject of any issue.

[8] On December 11, 2014, the Regional Manager in Accounting Operations - Corporate Management & Comptroller Branch (Finance), Arvind Reddy forwarded a memorandum to Sgt. Smith's superior officer, Chief Superintendent Lench ["Lench"], noting a number of discrepancies with Sgt. Smith's newly submitted expense claims. The discrepancies in the submitted claims had prompted the Regional Manager, to cite a number of concerns that arose from the period of May 2014 to August 2014.

[9] The concerns relating to expense claims discrepancies can be summarized as follows:

i. Sgt. Smith had four undated damaged tire invoices for his personal vehicle. The same undated invoices were submitted to each of the four different detachment commanders for reimbursement [“Tire Issue”].

ii. Horse shoe receipts, insurance deductibles, vaccinations, and mileage reimbursements were questioned by the Regional Manager as to their validity [“Other Issues”]

[10] Based on the concerns raised above in the Accounting Operations memorandum, Lench ordered an investigation under section 40(1) of the *Royal Canadian Mounted Police Act* (R.S.C., 1985, c. R-10) [“*RCMP Act*”] into Sgt. Smith’s actions to determine whether there had been a breach of the *Code of Conduct* [“Code”].

[11] The purpose of the investigation was to determine whether Sgt. Smith was guilty of the following contraventions:

1. Between the 1st day of May 2014 and the 30th day of September 2014, Sgt. Smith submitted fraudulent expense claims contrary to section 7.1 of the Code [“Allegation 1”].
2. Between the 1st day of May 2014 and the 30th day of September 2014, Sgt. Smith submitted expense claims and was reimbursed for expenses for which he would not normally be entitled contrary to section 8.1 of the Code [“Allegation 2”].

[12] Allegation 1 arose based on the facts from the Other Issues, while Allegation 2 arose based on the facts from the Tire Issue.

[13] Sgt. Warren Wilson [“Sgt. Wilson”] of the Professional Standards Unit was assigned to serve as the investigator. Sgt. Wilson forwarded a completed investigative report to Lench for review on or about May 7, 2015.

[14] On or about May 21, 2015, Sgt. Smith submitted that Lench was in a conflict of interest. Sgt. Smith further requested that “I would prefer it move to someone with a legal background like A./Com. Lipinsky [spelling error]” to be appointed as the Conduct Authority.

[15] On the basis of Sgt. Wilson’s investigation, on August19, 2015, Lipinski, in his role as the new Conduct Authority, found that Allegations 1 and 2 were made out on the basis of a balance of probabilities. The Conduct Authority decision penalized Sgt. Smith for 12 days of annual leave, forbade Sgt. Smith from continuing in his role as part of the Ceremonial Mounted Unit until a proper MOU was put in place, and ordered reimbursement for the expenditures in regards to the Other Issues but not the Tire Issue.

[16] Sgt. Smith appealed the finding of the Conduct Authority pursuant to section 45.11(3) of the *RCMP Act*.

[17] Under section 45.16(11) of the *RCMP Act,* an individual may be delegated the authority of the Commissioner in deciding appeals under the *RCMP Act.* Steven Dunn was designated as the Delegate of the Commissioner and served as the Conduct Appeal Adjudicator [“Appeal Adjudicator”].

[18] Sgt. Smith submitted that the principles of natural justice and procedural fairness were contravened by a biased Conduct Authority process. Sgt. Smith also submitted that the finding of contravention of Allegations 1 and 2 was clearly unreasonable.

[19] The Appeal Adjudicator allowed Sgt. Smith's appeal in part. The Conduct Appeal Decision clarified that while Allegation 2 was made out on a *primae facie* basis, Allegation 1 was not made out.

[20] The finding that Allegation 1 was established was found to be unreasonable by the Appeal Adjudicator. The Appeal Adjudicator held that because the Conduct Authority was satisfied with Sgt. Smith's explanation relating to the Other Issues to the extent that the Conduct Authority ordered reimbursement, it was not possible to justify a finding of Allegation 1 being established.

[21] The Appeal Adjudicator held, however, that the finding related to Allegation 2 was reasonable. Holding that Sgt. Smith's argument relating to his detrimental reliance on the MOU and RCMP past conduct did not render the Conduct Authority Decision unreasonable, the Appeal Adjudicator upheld the finding of the Conduct Authority on the question of Allegation 2.

[22] The Appeal Adjudicator, in determining whether the conduct measure imposed was appropriate, allowed the appeal in part in finding that the forfeiture of 11 days of annual leave, rather than 12, was appropriate.

[23] Of note is that Sgt. Smith was paid for all the bills submitted, including the farrier bills from his wife and the rent for the horse trailer that is owned and licensed to him, with the exception of the claim for four tires.

[24] In addition, Sgt. Smith indicated that he was not asking the Court to review the part of the decision where it was found that he had not contravened Allegation 1. The Respondent agreed, and the remainder of the decision focuses on Allegation 2.

III. Preliminary Issues

A. *Style of Cause*

[25] At the outset, the RCMP should be removed from the style of cause.

[26] In Sgt. Smith's pleadings, the RCMP is named as a responding party to this judicial review.

[27] The Respondent asserts that pursuant to Rule 303(1) of the *Federal Court Rules*, SOR/98-106 ["*FCR*"], the only properly responding party named should be the Attorney General of Canada.

[28] I agree with the Respondent's assessment of Rule 303(1). The Respondent's argument conforms to the jurisprudence regarding Rule 303(1), as cited in *Kalkat v Canada (Attorney General)*, 2017 FC 794 ["*Kalkat*"].

[29] In conclusion, the style of cause should be amended to name only the "Attorney General of Canada" as a Respondent.

B. *Affidavit of Sgt. Smith*

[30] The Respondent submits that sections of the affidavit of Sgt. Smith, sworn on February 2, 2018 ["February Affidavit"], must be struck under Rule 81(1) of the *FCR*. Rule 81(1) of the *FCR* requires that affidavits must be confined to facts within the deponent's personal knowledge.

[31] The Respondent submits that a number of paragraphs of the February Affidavit are argumentative, inadmissible, hearsay or opinion and that they should be therefore struck. In the alternative, the Respondent asks that the sections be given no weight or probative value.

[32] Those paragraphs of the affidavit that the Respondent asks to be struck are: 8, 17, 25-27, 31-37, 39, 41, 43-44, 47, 49-55, 60, 62-63, 65-66, 68-69, 71, 76-79, 81-84, 88-99, 102-109, 113-114, 116-117, 121, 123-127, 133-134, 140, 142, 144-145, 147, 157, and 164-209.

[33] The Respondent is correct in asserting that the sections of the Sgt. Smith's February Affidavit that are fundamentally defective should be struck out. While the Court has an obligation to make accommodations for self-represented litigants, this "obligation cannot extend to ignoring rules of evidence" (*Navid Bhatti v Canada (Citizenship and Immigration)*, 2010 FC 25 at para 18).

[34] The Respondent's argument in regards to the above cited paragraphs, with the exception of paragraph 82, is not unfounded. On the face of it, the sections fall into the categories of hearsay, opinion, or argument, and thus fall into the jurisprudential categorization of inadmissibility.

[35] As Letourneau J.A. stated at paragraph 13 in *Burns Lake Native Development Corp v Canada (Commissioner of Competition)*, 2005 FCA 256, "The normal procedure for striking out an affidavit or parts of it is to bring a motion that effect" .

[36] Although not raised by the Respondent, Rule 306 is also relevant to this discussion. To quote from page 746 of Saunders et al, *Federal Court Practice* (Toronto: Thomson Reuters, 2018):

> It is now well established that judicial review of a decision of a federal board is to be considered on the basis of the material that was before the board when it made its decision. The parties cannot supplement that material in their affidavits. However…Extrinsic evidence may be allowed where it is relevant to an allegation that the decision maker breached natural justice or procedural fairness.

[37] Much of the February Affidavit is clearly an attempt to "bootstrap" the material that was before the Conduct Authority and the Appeal Adjudicator. However, there are parts of the February Affidavit that may meet the point around the extrinsic evidence question, as Sgt. Smith swears new evidence in the affidavit that speaks to alleged procedural defects in the Conduct Appeal Decision, as well as the Appeal Adjudicator's alleged conflict of interest.

[38] Paragraphs 150-161 of the February Affidavit provide evidence regarding potential natural justice or procedural fairness issues arising out of the Conduct Appeal Decision in terms of a reasonable apprehension of bias that arose from Sgt. Smith's past criticism of the Appeal Adjudicator's former office.

[39] Sgt. Smith makes no argument around a principled exception to the hearsay rules.

[40] Given the circumstances, and in order for the hearing to proceed on the materials filed and the argument prepared by Sgt. Smith, I will not strike the paragraphs but will give minimal or no probative weight or value to the prejudicial paragraphs of the affidavit (listed in paragraph 32 above). As well, I will give no weight to paragraph 4 (which requests the remedy of judicial review and contains argument), paragraph 40 (argument), paragraph 59 (opinion), paragraph 75 (argument), paragraphs 110-111 (hearsay/argument), paragraph 135 (hearsay), and paragraph 156 (argument).

C. *Les Rose Affidavit*

[41] The Appeal Adjudicator refused to admit the affidavit of Les Rose ["Rose"].

[42] Rose, who worked for RCMP Legal Services, stated in the relevant affidavit that he and Sgt. Smith were friends and that there was a potential for a perceived conflict of interest.

[43] I agree with the submissions of the Respondent that the Appeal Adjudicator did not err in law by refusing to admit the affidavit of Rose. Under the relevant authority, the Appeal

Adjudicator correctly held that the appellant was not entitled to file a document that was not provided to the person who rendered the decision that is the subject of the appeal as it was available to Sgt. Smith when the decision was rendered.

[44] The subject matter of the impugned affidavit - namely, Rose's perspective on an abusive process - did indeed fall within the Appeal Adjudicator's concerns raised in the paragraph above.

[45] The Appeal Adjudicator came to a reasonable decision in refusing to admit Rose's affidavit.

[46] If I am incorrect, however, nothing turns on Rose's affidavit, as Rose also indicated in an email that he had, "no material evidence to offer this investigation".

IV. Issues

[47] The issues are:

A. Was the Conduct Appeal Decision reasonable?
B. Was there a breach of procedural fairness in the adjudication of the Conduct Decision or Conduct Appeal Decision?

V. Standard of Review

[48] Decisions of the Commissioner or the Delegate of the Commissioner are entitled to a high degree of deference in the exercise of statutory discretion and therefore on the standard of reasonableness (*Kalkat* at para 52).

[49] The reasonableness standard means that the Court will not set aside the decision of the decision-maker as long as it is in accordance with the principles of justification, transparency, and intelligibility, as per *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47.

[50] The issues relating to procedural fairness are reviewable on the standard of correctness.

[51] Being a self-represented party made it necessary for the Court to comment during the hearing several times that this was a judicial review of the Conduct Appeal being reviewed on the standard in the above paragraph, and that this was not a *de novo* hearing. Much of Sgt. Smith's argument and evidence was geared to the Court making a *de novo* decision on more than the Conduct Appeal decision. Sgt Smith adjusted his argument when it was brought to his attention.

VI. Relevant Provisions

[52] The relevant provisions of the *Royal Canadian Mounted Police Act* are as follows:

Conduct	**Déontologie**
Purposes of Part	**Objet**

Purposes

36.2 The purposes of this Part are

(a) to establish the responsibilities of members;

(b) to provide for the establishment of a Code of Conduct that emphasizes the importance of maintaining the public trust and reinforces the high standard of conduct expected of members;

(c) to ensure that members are responsible and accountable for the promotion and maintenance of good conduct in the Force;

(d) to establish a framework for dealing with contraventions of provisions of the Code of Conduct, in a fair and consistent manner, at the most appropriate level of the Force; and

(e) to provide, in relation to the contravention of any provision of the Code of Conduct, for the imposition of conduct measures that are proportionate to the nature and circumstances of the contravention and, where appropriate, that are educative and remedial rather than punitive.

Objet

36.2 La présente partie a pour objet :

a) d'établir les responsabilités des membres;

b) de prévoir l'établissement d'un code de déontologie qui met l'accent sur l'importance de maintenir la confiance du public et renforce les normes de conduite élevées que les membres sont censés observer;

c) de favoriser la responsabilité et la responsabilisation des membres pour ce qui est de promouvoir et de maintenir la bonne conduite au sein de la Gendarmerie;

d) d'établir un cadre pour traiter les contraventions aux dispositions du code de déontologie de manière équitable et cohérente au niveau le plus approprié de la Gendarmerie;

e) de prévoir des mesures disciplinaires adaptées à la nature et aux circonstances des contraventions aux dispositions du code de déontologie et, s'il y a lieu, des mesures éducatives et correctives plutôt que punitives.

Investigation

40 (1) If it appears to a conduct authority in respect of a member that the member has contravened a provision of the Code of Conduct, the conduct authority shall make or cause to be made any investigation that the conduct authority considers necessary to

Enquête

40 (1) Lorsqu'il apparaît à l'autorité disciplinaire d'un membre que celui-ci a contrevenu à l'une des dispositions du code de déontologie, elle tient ou fait

enable the conduct authority to determine whether the member has contravened or is contravening the provision.	tenir l'enquête qu'elle estime nécessaire pour lui permettre d'établir s'il y a réellement contravention.

[53] The relevant provision of the Schedule of the *Royal Canadian Mounted Police Regulations*, 2014 (SOR/2014-281) are as follows:

8 REPORTING	**8 SIGNALEMENT**
8.1 Members provide complete, accurate and timely accounts pertaining to the carrying out of their responsibilities, the performance of their duties, the conduct of investigations, the actions of other employees and the operation and administration of the Force.	**8.1** Les membres rendent compte en temps opportun, de manière exacte et détaillée, de l'exécution de leurs responsabilités, de l'exercice de leurs fonctions, du déroulement d'enquêtes, des agissements des autres employés et de l'administration et du fonctionnement de la Gendarmerie.

VII. Analysis

A. *Was the Conduct Appeal Decision reasonable?*

[54] The decision of the Appeal Adjudicator was reasonable as per the test in *Dunsmuir*, falling well within the range of possible, acceptable outcomes on a balance of probabilities. There was significant evidence before the Appeal Adjudicator that showed that Sgt. Smith had breached section 8.1 of the Code. Most importantly, Sgt. Smith admitted clearly to "faltering" on his expenditures relating to the tires.

[55] Sgt. Smith suggests that his notation about "faltering" in relation with the Tire Issue speaks to a reference that he should have informed more detachment commanders about his

MOU and past verbal agreements. I do not think that the decision maker finding this to not be a credible explanation is unreasonable.

[56] If Sgt. Smith's response to Sgt. Wilson's questions is referred to, the response supports the decision maker's finding:

> 24 years, 350 events, I agree **I faltered with the tires**. The damage to my tires was documented in my notebook and pro—rated to cover the costs. **I agree I was not forthwith with sharing this information**. As past experience I did not want to be out of more money again. [emphasis added]

[57] Sgt. Smith attempted to provide justification, in that he had billed for damaged tires before and been paid. Based on this, he therefore justified his decision to "pro-rate" his tire expense between detachments rather than to the detachment where the tire failure occurred, which suggest that the actions of Sgt. Smith were not inadvertent. Rather, it seems that he proceeded with a degree of intentionality. In the past when Sgt. Smith damaged a tire at an event he was reimbursed for that tire but that was not the issue of whether he would ever be reimbursed for a damaged tire. The fact is clear (which he confirmed in later questioning) that he did not damage a tire at each of the events that he then claimed for separately from 4 detachments.

[58] The decision maker had evidence from the tire shop manager that Sgt. Smith had ordered the four tires and asked for four (4) separate invoices. In the notes it is simply stated, "It was learned from the manager at OK Tires, you ordered 4 new Toyo Tires in late June/early July, and upon doing so, you asked for 4 separate invoices". The notes from Sgt. Wilson in his interview with the tire shop manager stated, "He saw the original tires on Smith's truck. All were worn out, there were no punctures or flats." The evidence before the decision maker suggested that the tires

were worn when they were replaced with new ones but not flat. This evidence was briefly canvassed at page 3 and page 4 of the Conduct Authority Decision.

[59] Sgt. Smith put forward multiple explanations to different people that eventually went before the Appeal Adjudicator as to how the tires were damaged. While Sgt. Smith initially stated on the record that he had been driving when the truck tires were damaged, when questioned later in the investigation he admitted that his wife had been driving.

[60] Sgt. Smith stated in his written responses to Sgt. Wilson in the second last paragraph on the page that that:

> On 2014—06-30 returning to Mount Currie with horse at completion of patrol day Michell was called back to Whistler. Michell turned east off of Highway 99 on a construction road 4 km north of Whistler to turn around. The loaded truck got stuck sinking into the newly laid granite gravel rock. The incident damaged the sidewalls of the tires. After a period of time with a jack, rocks, and wood the truck was backed out onto the highway. The four tires were damaged on the sidewalls with visible rubber cracks and scaring.
>
> …
>
> The unforeseen expense of replacement tires would put my costs way over budget. Having committed to several other Horse and Dog requests I had to replace the truck tires to have a safe vehicle. To replace the four tires I decided to pro-rate it over the 4 most demanding Detachments requesting my services.
>
> • One tire was charged to Ridge-Meadows for Pitt Meadows Days. This is because I had a flat that date and paid for the repair myself and didn't claim it. (documented in notebook 2014-06-07).
>
> • One tire charged back to Whistler keeping it under the pre-agreed budget and keeping costs lower that the previous 4 years (documented June 30).
>
> • One tire was charged to UBC (documented July 8).

- One tire was charged to White Rock (documented).

[61] When he presented the invoices to the individual detachments, the Commanders asked Sgt. Smith about the basis of the expense claim (1393's) invoice. This was confirmed in the investigation:

- The UBC Commander said Sgt. Smith told him that he drove over a curb and damaged the tire;
- Ridge Meadows Inspector said Sgt. Smith told him he damaged the tire on a curb;
- The White Rock Commander believed that Sgt. Smith told her that he had hit a curb with the tire to damage it;
- The Whistler Commander did not have any information.

[62] These inconsistent explanations further give credence to the decision maker's decision regarding the breach of section 8.1 of the *RCMP Act*.

[63] Sgt. Smith did write in his notebook after he charged each detachment for a tire that he was pro-rating the tires. However, he did not tell the Commanders that exact story of what happened and how he was going to claim for the tires but instead told the Commanders a different story than the truth. It appears that the fact he did not tell the whole story from the start to everyone when asked is at the crux of the Appeal Adjudicator finding a breach of the Code.

[64] The Appeal Adjudicator found that he knowingly failed to provide accurate accounts. The decision was based on the evidence and falls within the spectrum of reasonable.

(1) Detrimental Reliance & Promissory Estoppel

[65] Nor does Sgt. Smith's suggestion about "detrimental reliance" or "promissory estoppel" hold any weight.

[66] Briefly argued at the hearing, the law relating to detrimental reliance is clear: there must be an assurance or representation, attributable to the party, that the party does not intend to rely on its strict legal rights, and that the claimant must suffer detriment if the party goes back on that assurance (*Ryan v Moore*, [2005] 2 SCR 53, 2005 SCC 38).

[67] Unfortunately for Sgt. Smith, there is little evidence of such an assurance or representation made by a representative officer from the RCMP.

[68] The MOU put forward by Sgt. Smith as evidence is only signed by him and not a RCMP representative. There is no affidavit evidence submitted by past detachment officers who could clearly establish assurances that claiming the tire expenditures in such a fashion was according to their previously held expectations about proper expenditure reconciliation.

[69] While arguments about Sgt. Smith being barred from seeking an equitable remedy without clean hands, and a lack of holding out a clear assurance could be made in holding that the Appeal Adjudicator made a reasonable finding in holding that the detrimental reliance argument was not persuasive, it is unnecessary to even go to that argument. The fact that Sgt.

Smith fundamentally misrepresented the Tire Issue (Allegation 2) to multiple detachment Commanders leads to the fundamentally reasonable nature of the Appeal Adjudicator's finding.

[70] Sgt. Smith argued in his written material that because he was not reimbursed he should not have been subject to a *Code of Conduct* hearing. While it is true that Sgt. Smith was not "reimbursed" for the tires under the language of section 8.1 for the improper claims, I accept the Appeal Adjudicator's notation that, "…he knowingly failed to provide accurate accounts. To be clear, reimbursement is not required to establish a contravention of section 8.1" (page 42 of the Conduct Appeal Decision).

[71] To require reimbursement to establish a charge for improper expenditures would be an extraordinary reading of the Code, and I therefore accept the Appeal Adjudicator's rejection of that reading.

[72] Given the nature of the evidence relating to Allegation 2, inconsistent evidence relating to who was driving the vehicle, and the questionable nature of the evidence put forward by Sgt. Smith to demonstrate the defense of promissory estoppel or detrimental reliance, I am satisfied that the decision of the Appeal Adjudicator was reasonable and falls well within the range of acceptable outcomes.

(2) Conduct Measure

[73] In terms of the conduct measure imposed, Sgt. Smith does not dispute the forfeiture of days of annual leave but he did argue that there were two allegations before the decision maker.

He submits that the former decision maker gave him 12 days, Conduct Appeal Decision overturned one of the two allegations, and yet the Appeal Adjudicator only reduced the measure to 11 days. Sgt. Smith submits this was unreasonable. He felt it was unreasonable as he had been successful on 50% of the appeal, and so the conduct measure should have been reduced by 50% too.

[74] Regardless, the Appeal Adjudicator reasonably considered the mitigating and aggravating factors and imposed the least severe measure within the applicable mitigating range in the *Conduct Measures Guide*, where the mitigated range for low gravity contraventions suggests 11-20 days as a sanction

B. *Was the Decision Fair?*

[75] The Appeal Decision was fair on the standard of correctness.

(1) Abuse of Process

[76] Under the doctrine of abuse of process, the unfair or oppressive treatment of an appellant disentitles the Crown to carry on with the prosecution of the charge. The prosecution is set aside, not on the merits (*R v Jewitt*, [1985] 2 SCR 128 at para 45), but because it is tainted to such a degree that to allow it to proceed would tarnish the integrity of the Court (*Blecoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 119).

[77] Successful abuse of process claims are often generated from prosecutorial misconduct, frivolous or scandalous investigations or procedures, or when the actions of the impugned party would shock the conscience of the community (*Sanofi-Aventis Canada Inc v Novopharm Ltd*, [2008] 1 FCR 174, 2007 FCA 163; *R v Campbell*, [1999] 1 SCR 565, 1999 CanLII 676 (SCC)).

[78] There was no abuse of process in this matter as is evident from the record. Lench was required to initiate the investigation based on under section 40 of the *RCMP Act* once the third-party financial manager memorandum was sent to him. The matter was brought to his attention by Arvind Reddy, Regional Manager in Accounting Operations, who in sending the December 11, 2014 memorandum to Lench, stated at the outset, "Sgt. Smith`s expense claims for his horse and police dog for various RCMP events require further investigation".

[79] At the hearing, Sgt. Smith argued that Lench maliciously initiated the investigation, but could not produce a document or email where it was shown that Lench initiated a review of Sgt. Smith's financial accounts. While I have no doubt that Sgt. Smith believes this to be true, there was no evidence before me to support such a finding.

[80] There was evidence from Rose that Lench was biased against Sgt. Smith. Rose stated in an email on May 5, 2015, that Lench had tried to have Sgt. Smith vacate his current position, and so, "may ground the lenses through which C/Std Lench has examined this matter resulting in significant distortion and bias". Sgt. Smith led evidence before the decision maker which can be characterized as the two parties not liking each other. However, there was no evidence that would raise this question of dislike to the level of abuse of power.

[81] Sgt. Smith could not establish an alternative suggestion for what Lench should have done when alerted to potentially fraudulent behaviour by a member.

[82] The investigation did not constitute harassing behaviour, but instead proceeded as it was legislatively required to do. The decision maker did note that the "investigation was unusually rigorous in the circumstances" but that the actions of Lench and Sgt. Wilson did not lead to a finding of abuse of process.

[83] As the Respondent correctly points out, the record shows that the course of the investigation adhered to the statutory requirements required by the Code and under the *RCMP Act.*

(2) Right to Be Heard

[84] Sgt. Smith asserted that he was silenced by Lipinski during the conduct hearing, where Lipinski allegedly put up his hand and said "I don`t want to turn over these stones". The Appeal Adjudicator was correct in finding that Sgt. Smith`s assertion could not be made out on the basis of the record.

[85] The gesture and comment are not recorded on the record, but the Appeal Adjudicator correctly pointed to the numerous opportunities that Sgt. Smith had to present his case. In addition, Lipinski's conduct meeting notes indicate that Sgt. Smith was afforded the opportunity to be heard during the conduct meeting. The relevance of the particular argument to the matter

before him may have led to Lipinski to making the impugned remarks, but based on what I have before me, I do not agree that Sgt. Smith was not afforded the opportunity to present his case.

[86] I note that the actual determination of what attributes of procedural fairness is to be afforded the "right to be heard" during the Conduct Authority Decision making process was not before the Court and I am not deciding that in these reasons.

(3) Right to an Unbiased Decision Maker

[87] Sgt. Smith has not established a real or any reasonable apprehension of bias on the part of Lipinski or on the part of Dunn.

[88] In *Baker,* it was held that the test for a reasonable apprehension of bias is what, "would an informed person, viewing the matter realistically and practically- and having thought the matter through- conclude. Would he think it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly" (para 46).

[89] When Sgt. Smith requested that Lench be removed from the investigation, he was removed immediately, even though the Certified Tribunal Record ["CTR"] shows evidence that Lench did not think he had any conflict or could not do an unbiased investigation.

[90] It is telling that Sgt. Smith requested Lipinski, and when Lipinski made a ruling that Sgt. Smith did not like, Sgt. Smith argued that Lipinski was biased.

[91] In the CTR, there is evidence of regular reporting to Lench under the briefing note threshold requirement under section 6.1 of the *Administration Manual: ch XII.1. Conduct* which requires an update by the investigator to the subject member every 14 days until the final investigation report is delivered to the conduct authority.

[92] I do not find that by following the relevant policy Lench could be deemed to be directing the investigation in a manner that rose to the level of procedural unfairness.

[93] While Sgt. Smith argues that Dunn was also biased against him, little evidence has been proffered to substantiate such an argument.

[94] Such scanty evidence as asserting that the Appeal Adjudicator was "part of a senior leadership team of the RCMP Executive which was heavily criticized" or that he was the former Chief of Staff of Commissioner Paulson ["Paulson"] who Sgt. Smith had been critical of in the past, or that Dunn and Lipinski knew each other professionally, cannot stand up to the reasonable apprehension of bias test. The evidence of the decision maker being a former chief of staff of Paulson and that Sgt. Smith had criticized Paulson for initially not paying for the honor guard at his wedding, cannot lead a finding of reasonable apprehension of bias on the part of the Appeal Adjudicator.

[95] Though the parties confirmed at the hearing that they were not seeking to have me review the overturning Allegation 1, some of the evidence was brought up at the hearing. So I will address some comments related to Allegation 1. I do not see the suggestion of asking a member

who was a farrier for her opinion as somehow demonstrating bias or procedural unfairness. Sgt. Smith did however advance the argument that the investigators using individuals that may benefit from transfers showed bias and procedural unfairness. That evidence was pure malicious hearsay and as noted above at paragraphs 32 & 40 will be given no weight whatsoever.

[96] In any case, the fact that the Appeal Adjudicator struck Lipinski's decision in relation to Allegation 1 further substantiates the notion that the Conduct Appeal Decision was conducted correctly from a procedural fairness perspective; Sgt. Smith's argument was clearly heard by a decision maker who cannot be tainted with the brush of abuse of process or reasonable apprehension of bias.

(4) Right to Disclosure

[97] Sgt. Smith's argument at the hearing was that if all of the disclosure that he eventually obtained had been given at the very start, this matter may not have proceeded, or at a minimum would have changed or at least influenced the initial decision maker`s decision.

[98] It is unfortunate that Sgt. Smith had to use *Access to Information* requests to obtain all the materials he felt were necessary to present his case, but this circumstance partially arose because Sgt. Smith was attempting to advance a theory related to bias and abuse of power, which is not of course part of the normal course of a *Code of Conduct* hearing's disclosure.

[99] I accept the Respondent's submission that the requested disclosure was supplied to Sgt. Smith with the exception of the cell phone records. The CTR makes it quite clear that all such

disclosure was provided. I have no evidence of procedural unfairness as the material before the appeal decision maker was exactly what Sgt. Smith had and what should be before the Court in the CTR.

[100] On this basis, Sgt. Smith's argument about disclosure cannot succeed.

[101] Nor can it be accepted that Sgt. Wilson's cell phone records are tangentially necessary or relevant for an adjudication of a claim over improper expenditure reports.

(5) Right to Legal Counsel

[102] Under the *CSO (Conduct) Guide*, it is quite clear that a subject member is eligible for a Member Representative ["MR"] only if there are potentially serious penalties that could await them, such as dismissal, or stoppage of pay and allowances.

[103] The Respondent argued that the question is moot given that at the end of the day, the range of penalties did not reach the threshold of requiring an MR, and that the change in the range of penalties was an administrative one rather than a substantive shift.

[104] It is true that in a letter sent by Lipinski on July 27, 2015, Lipinski noted that the normal range for sanctions on the basis of the Conduct Authority Decision would be 21 days to dismissal on Allegation 2. Lipinski noted, however, in the same letter that the "range of sanctions that may be imposed for this contravention exceed my authority under the RCMP Act", and that the matter should therefore be referred to the "E" Division Deputy Commissioner. A further explanation

was that Lipinski's subsequent promotion to Acting Commanding Officer gave him the required authority so he could proceed.

[105] That letter was amended to show that dismissal was not a sanction being sought.

[106] I find that the initial letter is of no consequence as it was amended and clearly showed that the sanctions sought was not in the range that counsel was paid for. Lipinski did issue the Conduct Authority Decision, and he noted in his decision that the appropriate range "include a forfeiture of 11-30 days' pay (as) sufficient to appropriately address Allegation 1 and Allegation 2 jointly".

[107] Sgt. Smith was not deprived of his right to independent legal counsel paid by the RCMP as the sanctions sought were not in the range that allowed counsel to be provided.

[108] Notwithstanding the above, on January 13, 2015, Brian Sauvé, in an emailed response to a query from Sgt. Smith in regards to whether the RCMP would fund legal services, noted that, "None of the above precludes any Member, facing any conduct measure, to seek representation or guidance by private counsel, at their own expense".

[109] The common law right to counsel rarely, in and of itself, imposes a positive duty on an administrative actor to provide an applicant with counsel because the primary historical purpose of the common law grounds of review has been to limit the exercise of public power by imposing negative obligations on government. Put more simply, the right to counsel does not extend to the

right to state funded legal counsel as a general rule, as was held at paragraph 10 in *Alberta (Minister of Justice) v Bjorgan*, 2005 ABCA 309.

[110] Sgt. Smith was advised that he was allowed to have a Staff Relations Representative to provide support for him during the Conduct Authority Decision process, but Sgt. Smith elected not to take advantage of this service. He was advised that he was eligible to have a MR to prepare for the conduct meeting, but did not take advantage of this service.

[111] It was also open for Sgt. Smith to have private counsel as his representative. Sgt. Smith was not entitled to RCMP funded legal services, and so there was no breach of procedural fairness.

VIII. Cost Submissions

[112] Sgt. Smith did not seek costs. But Sgt. Smith argued that no costs should be awarded against him because: he sought to expedite this hearing; and the Respondent did not accept his good-faith offer to settle.

[113] The Respondent filed a bill of costs of fees and disbursements in the amount of $6,192.49. When asked for a lump sum amount, the Respondent sought costs in the inclusive amount of $1,000.00.

[114] In *Air Canada v Thibodeau*, 2007 FCA 115, Justice Létourneau, writing for the Court, held that there is a three-fold objective of a costs award: providing compensation, promoting settlement and deterring abusive behaviour.

[115] The record in the CTR discloses that Sgt. Smith did not make good-faith attempts to shorten or truncate the proceedings. Indeed, Sgt. Smith had initially asked for this hearing to be a 15 hour hearing.

[116] On the other hand, Sgt. Smith did make several attempts to settle the matter which he said the Respondent would not engage in.

[117] Taking into account the Supreme Court of Canada's decision in *Pintea v Johns*, [2017] 1 SCR 470, 2017 SCC 23, which endorsed *the Statement of Principles on Self-represented Litigants and Accused Persons* (2006) established by the Canadian Judicial Council, an award of $1,000.00 may be too onerous given the facts and the goodwill of the actual subject matter of personal appearances by Sgt. Smith and his horse and dog.

[118] I will award costs payable by Sgt. Smith to the Respondent forthwith in the inclusive of taxes and disbursements the lump sum amount of $200.00.

JUDGMENT in T-10-18

THIS COURT'S JUDGMENT is that:

1. The style of cause will be amended for the Respondent to be the Attorney General of Canada only;

2. The Application is dismissed;

3. Costs payable forthwith by Sgt. Smith to the Respondent in the lump sum inclusive of taxes and disbursements of $200.00.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-10-18
STYLE OF CAUSE:	DAVID LLOYD SMITH v RCMP AND ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	SEPTEMBER 12, 2018
JUDGMENT AND REASONS:	MCVEIGH J.
DATED:	OCTOBER 4, 2018

APPEARANCES:

David Smith	FOR THE APPLICANT, ON HIS OWN BEHALF
Maia McEachern	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT