Federal Court



Cour fédérale

Date: 20181130

Docket: T-470-18

Citation: 2018 FC 1208

Ottawa, Ontario, November 30, 2018

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

JASON HONG

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

The Applicant, Jason Hong, is a member of the Royal Canadian Mounted Police (RCMP or the Force). He applied for admission to the Forensic Identification Apprenticeship Training Program (FIATP) in 2011 but was eliminated from the selection process. He grieved that decision. In this application for judicial review, he seeks an order of *mandamus* to compel the RCMP to implement an October 4, 2017 Adjudicator's decision directing the Force to reinstate

him in the process. For the reasons that follow, the application is dismissed. The Court will exercise its discretion not to award costs against the Applicant.

II. Background

- [2] The Applicant has been an RCMP member since 2007 and currently holds the rank of Constable. In 2011, his assigned position was in the Surrey, British Columbia detachment. While there, the Applicant applied to FIATP and submitted the required application package. FIATP is a training program for RCMP members to learn forensic identification and crime scene examination.
- [3] The Applicant was initially advised he was eliminated from the application process due to performance deficiencies. It was subsequently determined the decision maker had confused the Applicant and another candidate. Upon reconsideration of his application, he was then informed, on January 22, 2012, that he was not releasable from his existing position because members are required to serve three years in their assignments. The Applicant had, at that time, been in his assignment for 1.2 years.
- [4] On February 28, 2012, the Applicant grieved the RCMP's decision not to release him for FIATP. The RCMP grievance process has two levels: Level I, the initial grievance decision; and Level II, reconsideration of a Level I decision. The Applicant's grievance initially proceeded to Level I.

- On July 27, 2012, the first Level I Adjudicator ruled the Applicant's grievance was filed outside the 30-day timeframe prescribed by the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10, paragraph 31(2)(a) [*RCMP Act*]. That decision was confined to the timing issue. However, the first adjudicator mentioned at paragraph 5 that the Applicant had "…successfully completed preliminary screening."
- [6] The first decision was overturned by a Level II Adjudicator on December 18, 2014. The Level II Adjudicator returned the matter to a different Level I Adjudicator to determine whether the grievance was now moot given the Applicant's transfer to another detachment.
- [7] On December 2, 2015, the second Level I Adjudicator ruled the issue was not moot as the Applicant was still interested in FIATP. As the parties had not yet submitted arguments on the merits, the Adjudicator referred the matter to a third Level I Adjudicator to receive their submissions and determine the merits.
- [8] The parties filed their submissions by July 27, 2016. On August 22, 2017, still not having received a decision on the merits, the Applicant filed an application for judicial review seeking an order of *mandamus* to compel the third Level I Adjudicator to issue a decision. On October 6, 2017, the third Level I Adjudicator upheld the Applicant's grievance. The Applicant then discontinued his first application for *mandamus*.
- [9] In the decision upholding the Applicant's grievance, the third Level I Adjudicator interpreted both the relevant national and divisional policies and found that under the national

2010 RCMP Career Management Manual [the 2010 CMM], members selected for FIATP were "deemed releasable." As such, the RCMP's decision not to release the Applicant was against policy.

- [10] The Adjudicator found the Applicant should be reinstated in the FIATP process where he left off and offered a similar and available position. The Adjudicator also held the Applicant would be required to meet all FIATP's current requirements. Finally, the Adjudicator directed the RCMP to confirm the Applicant's suitability and continued interest within 30 days of the decision, and to reinitiate the Applicant's FIATP process within 90 days after the confirmation. The Adjudicator wrote: "The [Applicant] is to be offered a suitable position with Forensic Identification Services [FIS]." The Adjudicator also directed the RCMP to backdate the Applicant's promotion by two years if he successfully completes FIATP and is promoted to the rank of Corporal.
- [11] The Applicant confirmed he was still interested in FIATP on October 26, 2017. A few days later, the North Vancouver (NV) Career Development and Resourcing Advisor (CDRA) wrote to confirm he had advised FIS the Applicant was still interested and they had 90 days to find him a position.
- [12] The NV CDRA then advised the Applicant he would have to submit an application form, an updated *curriculum vitae* (CV), and a FIATP questionnaire. The form also required references. In the subsequent weeks, the Applicant and the RCMP continued to correspond to

resolve other application details and the Applicant continued to follow up for updates on implementing the grievance remedy.

- [13] The Forensic Identification Program (FIP) CDRA took over implementing the Applicant's grievance remedy on January 9, 2018. The FIP CDRA again asked the Applicant to submit an updated CV and questionnaire. According to the FIP CDRA, these requirements stemmed from changes to the FIATP selection process between 2012 and 2017 and were needed for a suitability assessment.
- [14] The FIP CDRA considered the Applicant reinstated in the FIATP selection process as of December 22, 2017. The FIP CDRA confirmed this to the Applicant on January 10, 2018, in an email exchange in which the Applicant argued he did not have to provide the information requested. Nonetheless, he provided the required documentation, stating these should not affect his suitability as he was already guaranteed re-entry into the program.
- [15] The FIP CDRA's evidence is that in order to understand the process, it is necessary to consider three documents: the 2010 CMM; the August 15, 2014 Integrated Forensic Identification Manual; and the December 20, 2017 Integrated Forensic Identification Manual (2017 IFIM). The July 18, 2012 Bulletin on Psychological Assessments of Technological Crime and Integrated Forensic Identification Services (AM-2259) is also relevant.
- [16] Under the 2010 CMM, the FIATP selection process consisted of four steps: (1) application form and CV; (2) file review by RCMP; (3) Physical Comparison Abilities Test; and

- (4) Forensic Identification Suitability Assessment. The 2010 CMM also states that structured reference checks may be conducted before a candidate is admitted to FIATP. Under that selection process, successful candidates were placed in FIATP to register in the Forensic Identification Course (FIC) and then, when operationally possible, to transfer to an apprentice position.
- [17] The selection process was modified in 2012 and again in 2017. Under the new process, once the application and file review steps are completed, candidates are eligible for transfer directly to an apprentice position. Members in apprentice positions have commenced FIATP.
- [18] Under the 2017 IFIM, apprentices complete FIATP in three different phases: (1) a minimum of three months of training and assessment to determine a candidate's suitability; (2) successful completion of the FIC; and (3) a twelve month apprenticeship.
- [19] Under AM-2259, applicants for FIS positions are required to undergo initial psychological assessments. This assessment determines whether candidates are suitable or not suitable for an assignment with FIS. The Applicant completed the psychological assessments in March 2018 after initiating this application for judicial review. He was informed of a successful outcome on April 5, 2018.
- [20] On April 25, 2018, the FIP CDRA provided the Applicant with a Notification of Transfer Planning form pertaining to available positions with FIS. The Applicant confirmed his interest in

one of the available positions that same day. The FIP CDRA's evidence is that under the 2017 IFIM, members are subject to a final review before transfer.

- [21] It is clear from the evidence that the Applicant and the FIP CDRA had different understandings of the grievance decision's exact requirements. The Applicant believed it entitled him to an immediate FIS position. The FIP CDRA understood that the decision had been complied with by the fact that he was moving the Applicant through the steps required under the 2017 IFIM, since the Applicant had not completed all of the selection process steps in 2011–2012.
- [22] In his affidavit, dated April 10, 2018, the Applicant states "[t]o date, I have still not been readmitted into the FIATP program". His application for judicial review seeks an order of *mandamus* requiring the RCMP to put him into FIATP and offer him a position with FIS.

III. Issues

[23] The Applicant submits the issue is whether the Court should grant *mandamus* to require the RCMP to comply with the terms of the Adjudicator's order. The Respondent contends the issue is whether the RCMP has already complied with the order. The issue, in my view, is whether the RCMP's interpretation of the grievance decision, and of the steps taken thus far to satisfy it, is reasonable. If so, there is no basis for this court to intervene.

IV. Standard of Review

- [24] I conclude that the RCMP's interpretation of the Adjudicator's decision attracts deference and is to be decided on the reasonableness standard. FIATP's application requirements are a discrete regime where only the RCMP has expertise, and I do not find that the interpretation raises a question of law that is of central importance to the legal system, a constitutional question, a true question of jurisdiction, or a question regarding the jurisdictional lines between specialized tribunals: see *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 55–56, 58–61, [2008] 1 SCR 190.
- [25] I also note indirect support for a deferential approach based on the Federal Court of Appeal decision accepting that an RCMP Commissioner's promotion decision is to be reviewed on the reasonableness standard: *Canada (Attorney General) v Boogaard*, 2015 FCA 150 at paras 32–33, 474 NR 121.

V. Analysis

The legal framework to be applied in determining whether *mandamus* should issue is that set out by the Federal Court of Appeal in *Apotex Inc v Canada (Attorney General)*, [1994] 1 FC 742 at para 45, 162 NR 177 (FCA) [*Apotex*]. Among the requirements to be established by the party seeking the order is that there is a public legal duty to act owed to the Applicant and a clear right to performance of that duty.

- [27] The Applicant submits that the October 4, 2017 grievance decision required that he be placed in an FIS position within 90 days of confirming his interest. That decision was binding on the Force, he argues, under *RCMP Act* subsections 32(1) and (4) and was non-discretionary. The Applicant further contends he has a clear right to performance of the duty to implement the decision as he has met all of the conditions precedent, made a prior demand for performance and has no alternate remedy. Among the other *Apotex* prerequisites to be satisfied, the order sought would have practical value to him as he continues to want to participate in FIATP and any further delay could cost him financially as his backdated promotion continues to be delayed. He contends that there is no equitable bar to relief on this application and the balance of convenience favours a *mandamus* order as there would be no inconvenience to the RCMP. FIATP continues to function and continues to accept candidates. Moreover, the Applicant submits, he is unaware of any operational need requiring him to stay in his current post.
- [28] The Respondent does not disagree that a duty to act arose from the Adjudicator's decision and that the duty was owed to the Applicant. However, the Respondent disputes the Applicant's claims that: (1) the grievance decision prevented the RCMP from requiring the Applicant to fulfill any preconditions to being placed in an FIS position; and (2) that the RCMP was required to offer him a suitable position within a specified timeframe.
- [29] The relevant portions of the Adjudicator's October 4, 2017 decision read as follows:

DISPOSITION

[41] For the reasons stated above, I find that the [Applicant] has established on a balance of probabilities that there was an inconsistent application of the lateral transfer policy. Therefore, the Grievance is upheld and the [Applicant] is to be given the opportunity to continue in the FIATP process.

CORRECTIVE ACTION/REDRESS

[...]

[46] Should the [Applicant] still be interested in [FIS], <u>he is to be</u> reinstated in the FIATP where he left off and offered a similar and <u>available position.</u>

[47] The [Applicant] would be required to meet all the current requirements of the FIATP. If the [Applicant] successfully completes the FIATP and is subsequently promoted, that promotion shall be backdated by a period of 24 months.

DIRECTION

[...]

- [50] The National Headquarters Human Resources Officer or delegate in consultation with "E" Division Human Resources Officer will, within 30 days of receiving this decision, confirm the [Applicant]'s suitability and continued interest in the FIATP.
- [51] Within 90 days of receiving confirmation of suitability and continued interest, the National Headquarters Human Resources Officer will reinitiate the FIATP process for the [Applicant]. The [Applicant] is to be offered a suitable position with Forensic Identification Services.
- [52] <u>Upon the successful completion of the FIATP</u> and a subsequent promotion under CMM Chapter 14, Section 15, the promotional date shall be backdated by an additional two years by the National Headquarters Human Resources Officer.

[Emphasis added]

[30] The parties each focus on specific sentences within the grievance decision that, they contend, supports their particular point of view on this controversy. The Applicant relies on the statement that "[t]he [Applicant] is to be offered a suitable position with [FIS]". The Respondent cites the statement that "[the Applicant] would be required to meet all the current requirements of the FIATP."

- [31] The Applicant claims the only remaining precondition was that he confirm his continued interest, as stated in the decision at paragraph 46. He argues the finding of the First Adjudicator that he had "successfully completed preliminary screening" is dispositive of the question of whether he had met the preconditions. In email exchanges with the FIP CDRA in January 2018, the Applicant stated that he was told in 2011 he would be starting rotations with the Surrey RCMP FIS Team and then attending the FIC in Ottawa. He took this to mean he had completed all of the FIATP selection process's requirements. However, the Applicant was told in January 2018 that under the current process, several steps remained to be completed, including a suitability assessment. At the hearing, the Respondent advised the Court of that assessment's outcome; the Court does not consider it relevant to this application's determination.
- [32] The Applicant is understandably frustrated with the delays and the shifting ground he has encountered in trying to pursue his interest in a career as an RCMP forensic identification specialist. From the Court's perspective, the procedures employed by the Force appear to be a bureaucratic maze which would make it difficult for any candidate to succeed. It is a credit to the Applicant's determination that he has persisted.
- [33] That said, I am not persuaded this is a proper case for the Court to intervene and exercise its equitable jurisdiction to order *mandamus*. The grievance decision required that the Applicant be reinserted in the selection process with credit for any steps already completed. But it was also clearly stated by the Adjudicator that he must meet the current requirements of the FIATP selection process. In my view, the record does not support the Applicant's understanding that his success before the Adjudicator meant that he was not required to submit to the new requirements.

[34] Once the FIP CDRA took over the Applicant's file and prepared to move the Applicant through the remaining FIATP selection process steps, the Applicant had been reinstated in the FIATP selection process. As this was done within 90 days of the Applicant's confirmation of continued interest, the RCMP had fulfilled its requirements under the grievance decision. There was no failure to comply with the decision. The Court cannot order execution of a duty to act that has already been done.

VI. Costs

[35] The Respondent had requested costs. At the hearing, the Parties advised the Court that they had reached agreement on the amount they considered appropriate to be awarded to either party depending on the outcome. In the circumstances of this case, which arose in part because of delays occasioned by the Respondent, the Court will exercise its discretion to decline to award costs notwithstanding that the Respondent was wholly successful in the result.

JUDGMENT IN T-470-18

THIS COURT'S JUDGMENT is that:

- 1. the application for judicial review and an order of *mandamus* is dismissed;
- 2. the parties shall bear their own costs.

"Richard G. Mosley"	
Judge	

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-470-18

STYLE OF CAUSE: JASON HONG V ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: NOVEMBER 5, 2018

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DATED: NOVEMBER 30, 2018

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