Federal Court  Cour fédérale

Date: 20220511

Docket: T-2030-19

Citation: 2022 FC 693

Ottawa, Ontario, May 11, 2022

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

THOMAS DELIVA

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant is a former probationary member of the Royal Canadian Mounted Police [RCMP]. He seeks judicial review of an appeal decision made pursuant to paragraph 20(1)(b) of the *Commissioner's Standing Orders (Employment Requirements)*, SOR/2014-292 and Part 3 of the *Commissioner's Standing Orders (Grievances and Appeals)*, SOR/2014-289 [Final Level Decision]. In the Final Level Decision, the adjudicator [Final Level Adjudicator] found that the Applicant had failed to demonstrate that the finding made by the first level adjudicator [First Level Adjudicator] that the Applicant was unsuitable to serve as a member of the RCMP was clearly

unreasonable, was rendered in a manner which was procedurally unfair, or was based on an error of law. The Final Level Adjudicator dismissed the Applicant's appeal and confirmed the decision of the First Level Adjudicator.

[2] On this application for judicial review, the Applicant asserts that the Final Level Decision was unreasonable, that the Final Level Adjudicator failed to properly address the Applicant's allegation that the First Level Adjudicator was biased and that the Applicant was denied procedural fairness before both the First Level Adjudicator and the Final Level Adjudicator. For the reasons that follow, the application for judicial review shall be dismissed.

I. Background

[3] In 2016, the Applicant completed the Cadet Training Program of the RCMP Academy, Depot Division, in Saskatchewan. Following his graduation from the training program, the Applicant was appointed as a member of the RCMP pursuant to section 9.3 of the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10 [*RCMP Act*] for the probationary period of two years set out in the *Commissioner's Standing Orders (Employment Requirements)*.

[4] The Applicant was posted to the RCMP's six-month Field Coaching Program to the Wood Buffalo Detachment in "K" Division.

[5] The Field Coaching Program, which the Applicant commenced on October 25, 2016, is designed to allow new members to prepare for and develop the competencies required for success in their future roles with the assistance of a field coach and other complementary resources. In

order to successfully complete the Field Coaching Program, the new member must achieve a "professional" rating in all competencies.

[6] The Applicant failed to meet the requirements of the Field Coaching Program, receiving "unacceptable" ratings in the areas of "concern for safety", "driving skills", "care, handling, arrest and release of suspects and prisoners" and "developing self".

[7] On April 26, 2017, the Applicant was provided with a three-month extension in order to permit him to attempt to satisfactorily complete the Field Coaching Program.

[8] On May 19, 2017, the Applicant received a *Notice of Failure to Meet Required Standards*, advising him that he must obtain a "professional" rating for all required competencies by July 25, 2017.

[9] During this extension period, the Applicant was provided with supplemental training to improve his driving performance. However, his coaches continued to note serious safety concerns regarding his driving, including concerns for their own security and difficulties with multi-tasking.

[10] On August 28, 2017, the Applicant received a second *Notice of Failure to Meet Required Standards* and was given a second three-month extension to complete the Field Coaching Program. During this extension period, the Applicant was provided with further supplemental training to improve his skills.

[11] On September 8, 2017, the Applicant was removed from operational duties and placed on administrative duties due to officer safety concerns.

[12] On September 25, 2017, the Applicant was served with a *Notice of Probationary Period Interruption*, which indicated that his probationary period was interrupted due to him being placed on administrative duties.

[13] The Applicant was determined to be medically fit for all duties prior to being placed on administrative duties. However, after being place on administrative duties, the Applicant's medical profile changed.

[14] A process was initiated by the RCMP pursuant to the *Commissioner's Standing Orders (Employment Requirements)* in order to determine the Applicant's suitability to continue employment with the RCMP, which process culminated in a recommendation for the discharge of the Applicant made August 20, 2018. A *Notice of Intent to Discharge a Probationary Member* was served on the Applicant on September 11, 2018.

[15] Pursuant to section 13 of the *Commissioner's Standing Orders (Employment Requirements)*, C/Supt. Raj Gill, the Administration and Personnel Officer of the "K" Division, was delegated the necessary power to make a decision with respect to the recommendation to discharge the Applicant and is referred to herein as the First Level Adjudicator.

[16] The Applicant was served with a copy of the recommendation for discharge and the supporting material underpinning the recommendation and given an opportunity to provide a written response to the *Notice of Intent to Discharge a Probationary Member*. The Applicant provided the First Level Adjudicator with several written submissions.

II. The First Level Adjudicator's Decision

[17] The issue before a decision-maker in a probationary discharge process is whether an issue has come to light during the member's probationary period that demonstrates that the probationary member is not suited to a career as an RCMP officer. According to section 24.4.1.6 of the *Administration Manual*, a number of factors can be considered in conducting this suitability analysis:

> 1.6. The assessment of a probationary member's suitability (see App. 27-4-1) may include, but is not limited to, an evaluation of the probationary member's:
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> 1.6.1. reliability, including attendance at work;
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> 1.6.2. compatibility with colleagues or clients;
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> 1.6.3. ability to meet work requirements, including those associated with the workload and the ability to complete the Field Coaching Program;
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> 1.6.4. ability to adhere to applicable policies, procedures, practices and the Code of Conduct; and
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> 1.6.5. character, integrity, and attitude.

[18] By decision dated February 4, 2019, the First Level Adjudicator determined that there was clear evidence that the Applicant was not suitable to continue to serve as a member of the RCMP and that he should be discharged, effective February 26, 2019.

[19] The First Level Adjudicator set out in his decision, under the heading "Procedural Fairness", the following details:

> Pursuant to the *CSO-ER*, Cst. Deliva was provided an opportunity to submit a written response. On September 20, 2018, Cst. Deliva submitted a written request by email for an extension of the amount of time he was provided to respond to the Notice, requesting "at least two more weeks in extended time". On September 24, 2018, pursuant to *CSO-ER* Section 16(5)(b), I granted Cst. Deliva an extension to October 17, 2018, to provide his written response.
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> On October 9, 2018, Cst. Deliva emailed his response to the Notice and advised it would also be forthcoming in the mail. In his response, Cst. Deliva stated that "given more time, [he] could provide even more context and information that would be useful to this process". He also stated that the Employment Requirements process should be suspended pending the RCMP's completion of their duties regarding his accommodation. I was concerned with the lack of information Cst. Deliva provided. I did not want him to miss the opportunity to provide evidence and/or submissions he believed were necessary to fully answer the concerns noted in the Recommendation, including providing any updated medical evidence to support his requirement for accommodation. As a result, on October 17, 2018, I signed a memorandum advising Cst. Deliva that I was extending the time to November 1, 2018 in order for him to provide further written submissions.
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> On October 29, 2018, Cst. Deliva provided further submissions that did not address the substantive issues but, once again, asked that this matter be put on hold. He also requested my recusal as Decision Maker in this process. He subsequently submitted a second response on November 1, 2018, with attached documents.
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> On November 15, 2018, I signed a memorandum advising Cst. Deliva that although the *CSO-ER* does not specify a right to request recusal of a Decision Maker by a probationary member, the *RCMP Act* requires all members to act impartially (section 37(c)). It is my obligation, as the Decision Maker, to keep an open mind and only make my decision after I have sufficient information contemplated in Section 17(1) of the *CSO-ER*. At that time, I had yet to make my decision on the substantive issue of suitability as I wished to ensure Cst. Deliva had a reasonable opportunity to provide his written submissions. I did not have his submissions on the substantive issues.

Further, I advised Cst. Deliva that if he felt there is information or submissions that will impact upon the assessment made of his abilities, or that may impact upon my assessment of his suitability, to provide them to me. Although Cst. Deliva did not ask for another extension, I believed he ought to be given further time to provide written submissions on the substantive issues. I provided him until November 29, 2018, to do so.

On November 29, 2018, Cst. Deliva provided his response to my memorandum, along with attachments, and advised that certain medical information had been provided to the "K" Division Health Services Officer (HSO), by his doctor on November 9, 2018; however, Cst. Deliva stated he had not yet been made aware of what was in the document, nor of what the HSO planned to do with it. He advised more medical documentation would hopefully be provided shortly.

On December 10, 2018, Cst. Deliva sent me an email advising that he had recently received the documentation that he had been waiting for from his doctor and that it has been sent to the HSO for review. He requested that I refer to the HSO for relevant medical information in order to make an informed decision. On December 21, 2018, I was provided with the new medical information from the HSO. To ensure Cst. Deliva was aware of all of the information available to me, I provided him with this new information on December 24 and 27, 2018, and gave him an extension to January 10, 2019, to provide his written submissions.

On January 7, 2019, Cst. Deliva sent me an email advising that he received new information that he believed to be very important to the ER process but required a few days to obtain it in writing before he could provide it to me. He also stated that he was still waiting to receive further information from the HSO. Cst. Deliva sent a subsequent email on January 10, 2019, in which he provided this information to me; however, he again stated that he was still waiting for some information from the HSO and requested I wait until it is received.

On January 17, 2019, the HSO sent an email to Cst. Deliva advising that he could not add any further comment(s) to the information he had provided, or on Cst. Deliva's subsequent correspondences. Following this, on January 21, 2019, Cst. Deliva sent me an email stating the RCMP is required to forgo the ER process in favour of pursuing the accommodation process.

> On January 24, 2019, I provided a memorandum to Cst. Deliva advising him that I have decided that I have sufficient information to make my determination regarding his suitability.
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> Cst. Deliva has had over four months to provide information to me and he has provided significant submissions and representations over the course of this time.

[20] Turning to the issue of the Applicant's suitability to continue to serve as an RCMP member, the First Level Adjudicator concluded that, on a balance of probabilities, the Applicant had been unable to demonstrate that he can consistently meet the performance expectations and work requirements of the RCMP. The First Level Adjudicator found that:

A. The Applicant received continuous and direct supervision and training for eleven months, during which time he had four field coaches and was sent for additional training outside of his detachment.

B. To address the Applicant's problematic and dangerous driving performance, he was sent to the RCMP Depot for further training on highway driving, emergency vehicle operation and patrol driving. At the end of this training, the Applicant received an "unacceptable" rating for highway drive and emergency vehicle operation.

C. To address the Applicant's officer safety concerns, he was sent to the "K" Division Training Section where he worked with tactical instructors on the use of force model, scenario-based training and safety lectures, as well as building and vehicle tactics. At the end of this training, a report was completed and the Applicant received an "unacceptable" rating for failing to search a subject, failing to use the correction intervention option, failing

to arrest a subject for uttering threats, and failing to draw his pistol during a vehicle stop. However, it was noted that his performance did improve as training progressed.

D. Notwithstanding the aforementioned training, the Applicant demonstrated an inability to complete the Field Coaching Program. He had not demonstrated that he was capable of reaching a point where he would be able to function on his own without a field coach officer, and he continued to have significant problems with driving and officer safety during the arrest and search of suspects.

E. While the Applicant asserted that he was let down with respect to his field training (he asserted that his field coaches did not document accurate feedback, proper developmental plans were not provided to him, his field coaches did not possess the skills to provide him with the guidance and direction he required, and that he was not afforded sufficient time to practice the techniques he learned in remedial training before being placed on administrative duties), the evidence before the First Level Adjudicator did not support this assertion. The evidence demonstrated that the Applicant's field coaches documented both positive and negative observations, a number of developmental plans were provided to the Applicant, and that all of his field coaches were properly trained and strong performers at the detachment. Moreover, the First Level Adjudicator noted that immediately following the Applicant's return from remedial training, his field coach observed him fail to search an arrested individual he was placing in the rear of a police vehicle and who was clearly in possession of a knife.

F. The Applicant received an "unacceptable" rating for the following competencies: (i) planning and organizing; (ii) records and information management; (iii) concern for safety; (iv) driving skills; (v) care, handling, arrest and release of suspects and prisoners; and (vi) developing self.

G. The Applicant failed to demonstrate an ability to adhere to established policies, procedures and practices of the RCMP.

H. The Applicant demonstrated a steady pattern, both internally with his field coaches and supervisors, and externally with the facilitators of the additional training, that he was not able to meet the standards of the RCMP on his own.

[21] On the issue of accommodation, the First Level Adjudicator noted the following:

A. On June 6, 2017, Career Development and Resourcing Advisor Sgt. York conducted an interview with the Applicant regarding his performance issues, specifically his driving and officer safety practices. During this interview, the Applicant mentioned that he was going to see a specialist as he believed that he had attention deficit disorder [ADD], which impacted his ability to multi-task and to comprehend everything being said on the radio when he was concentrating on a report or dealing with an individual. The Applicant stated that if he were diagnosed with ADD, he would be able to treat it with medication.

B. “K” Division Health Services referred the Applicant to a specialist for an independent assessment and based on the specialist’s report, on July 5, 2017, the Applicant was found to be fit for operational duty with no restrictions. The Applicant did not object to this status and continued to work without any restrictions, limitations or accommodations.

C. In the Fall of 2017 and only once the Applicant was on administrative duties, new medical information was produced by the Applicant that suggested that he had a medical condition that was exacerbated by stress. The information revealed that the Applicant could return to work with certain accommodations and with a transfer away from his current location, given that he asserted that he was facing stress from alleged workplace conflict and harassment in his current position.

D. On June 30, 2018, the Applicant submitted a request for accommodation. The accommodation requested included: (a) allowing for the use of an audio recorder during meetings; (b) a field coach who is experienced and has been demonstrated to be capable, with pre-existing teaching experience or knowledge of his condition; (c) allowing additional training time to adapt to new tasks; (d) meeting with supervisors occasionally (once or twice a week) to discuss prioritizing tasks; (e) supervisors and coaches can frequently ask for progress reports to check in; (f) flex-time to facilitate some less-distracting time at work; (g) a computer work station that is somewhat isolated from unnecessary distraction; (h) extra time with a coach in a car working on specific issues with specific learning strategies in mind, including time lines, and relevant and quantifiable goals; (i) building structured breaks into his shifts to allow for movement and exercise

during lunch; and (j) access to a psychiatrist and to a psychologist for regular treatment, including cognitive behavioural therapy.

[22] The First Level Adjudicator expressed three concerns about the timing of the new medical information provided by the Applicant. First, he noted that it was only after being removed from operational duties and after he was made aware that the probationary discharge process had started that the Applicant's medical information changed such that part of his inability to perform his duties was a result of the stress from alleged workplace conflict or harassment that exacerbated a pre-existing condition. The First Level Adjudicator noted that the change in his medical information was based on self-reporting to his doctors, which makes the reports "perplexing".

[23] Second, the First Level Adjudicator noted that the documentation provided by the Applicant, combined with a lack of contemporaneous reports of alleged workplace conflict or harassment issues to his health care providers or the RCMP, led the First Level Adjudicator to conclude that the stresses faced by the Applicant were the normal stresses faced by all probationary members. While the First Level Adjudicator accepted that the Applicant likely has a disability and that it likely affected his performance and ability to demonstrate his suitability, he did not accept that there were any interpersonal issues that exacerbated the Applicant's condition.

[24] Third, the First Level Adjudicator noted that the notes of conversations that the Applicant had with the Health Services Officer and an adjuster at Great West Life revealed that the Applicant would be able to return to work if he was transferred to a different unit and given the requested accommodations. However, the First Level Adjudicator noted that he did not accept that there was

any workplace conflict that created more stress for the Applicant and as such, a transfer would not reduce the stress he would face in a new setting.

[25] The First Level Adjudicator noted that there were two further problems with the accommodations requested by the Applicant - the first being that most of the accommodations were already provided and the second being that he was not convinced that the requested accommodations would help the Applicant demonstrate his suitability.

[26] The First Level Adjudicator concluded his analysis of the duty to accommodate as follows:

> A greater concern I have is that the accommodation requested cannot be given to Cst. Deliva in the field. Police officers are required to respond to a wide variety of calls. They must be able to receive information and adjust to fluid and potentially dangerous circumstances. They have to be able to confidently and quickly respond and react to each circumstance as it unfolds. They must consistently remember officer safety protocols and be able to drive a police motor vehicle without being distracted or serious and potentially lethal consequences may follow. They cannot be accommodated with extra time to consider the circumstances or to be provided a quieter environment to think, as offenders and others may take advantage of any hesitation, mistakes, or lapses; which again, may endanger themselves, other offices, and the public. Nor would it be reasonable to build 'structured breaks' into Cst. Deliva's shifts due to the inability to predict when a call for service may be received.
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> As such, I find that the accommodation requested by Cst. Deliva has already been given for those activities that occur within the controlled environments of the office. I also find that it is not possible to accommodate Cst. Deliva, without undue hardship, for his role as an operational police officer. It would be too dangerous for Cst. Deliva and others to try to accommodate him in the requirements of his role as a fully operational police officer. Although Cst. Deliva has a disability and there has been an adverse impact upon him related to that disability, there is a bona fide occupational requirement that would make it impossible to accommodate him without undue hardship.

[27] The First Level Adjudicator then went on to consider the Applicant's request that he be accommodated by being given an administrative role as a regular member. The First Level Adjudicator found that the existing case law indicates that the duty to accommodate does not require an employer to consider accommodation of a probationary employee in modified or alternate positions. As the Applicant was a probationary member, the First Level Adjudicator found that it was unnecessary to consider other potential roles or positions in the RCMP.

[28] The First Level Adjudicator noted that RCMP policy only required him to consider whether an accommodation could assist the Applicant to demonstrate his suitability. As the Applicant had received assistance akin to accommodation within the Field Coaching Program itself for the administrative functions without being able to pass, and as the Applicant could not be accommodated without undue hardship in order to pass the program for the operational functions, the First Level Adjudicator found it was impossible to find an accommodation that would assist the Applicant to demonstrate his suitability.

[29] On February 19, 2019, the Applicant filed an appeal of the First Level Adjudicator's decision with the Office for the Coordination of Grievances and Appeals, asserting in his Statement of Appeal that the decision was reached in a manner that contravened the applicable principles of procedural fairness, was based on an error of law, and was clearly unreasonable. Specifically, the Applicant asserted that the decision "was reached after examining less than all the facts, fails to consider the need for accommodation, and violates [his] basic human rights".

III. Decision at Issue

[30] The Applicant's appeal of the First Level Adjudicator's decision [First Level Decision] was required to be conducted in accordance with the *Commissioner's Standing Orders (Grievances and Appeals)*.

[31] Section 44(1) of the *Commissioner's Standing Orders (Grievances and Appeals)* provides that "an adjudicator must render their decision in respect of an appeal or any matter arising in the context of the appeal as informally and expeditiously as the principles of procedural fairness permit".

[32] In considering an appeal, it is not the role of the adjudicator to consider the matter *de novo*. Rather, as set out in section 47(3), the adjudicator must determine whether the Applicant has demonstrated, on a balance of probabilities, that the First Level Decision contravenes the principles of procedural fairness, is based on an error of law or is clearly unreasonable.

[33] Section 47(1) provides that an adjudicator may dispose of an appeal by dismissing the appeal and confirming the initial decision or allowing the appeal and remitting the matter to another decision-maker or directing any appropriate redress.

[34] The Final Level Adjudicator delivered a 135-page decision, in which he determined the following six issues raised by the Applicant: (1) whether the First Level Decision was procedurally unfair because the Applicant was not provided an opportunity to tell his side of the story; (2) whether the First Level Decision was procedurally unfair because the First Level Adjudicator was biased; (3) whether the First Level Decision was clearly unreasonable because it examined and

considered less than all of the facts; (4) whether the First Level Decision was clearly unreasonable based on the record considered by the First Level Adjudicator; (5) whether the First Level Decision was clearly unreasonable because it failed to adequately address the Applicant's request for accommodation; and (6) whether the First Level Decision was based on an error of law.

[35] With respect to the first issue, the Final Level Adjudicator reviewed all of the correspondence between the Applicant and the First Level Adjudicator, the various extensions of time granted to the Applicant to provide his submissions and evidence and the various requests by the First Level Adjudicator for specific evidence from the Applicant for which the First Level Adjudicator had warned the Applicant that sufficient details had not been provided.

[36] The Applicant asserted that it was unfair for the First Level Adjudicator to render a decision until all of the other grievances and complaints initiated by the Applicant related to the conduct of individuals who had provided information in the probationary discharge process were determined. The Applicant asserted that the probationary discharge process should have been held in abeyance until findings from his other grievances and complaints were available. Relying on this position, the Applicant provided the First Level Adjudicator with only limited information regarding these other grievances and complaints. The Final Level Adjudicator noted that the First Level Adjudicator had advised the Applicant that each of the processes were separate and that the First Level Adjudicator would only consider the evidence provided by the Applicant in the probationary discharge process. The Applicant was then given additional time to provide further evidence and submissions.

[37] The Final Level Adjudicator determined that the Applicant had been provided with numerous opportunities to provide any information that he deemed appropriate for the First Level Adjudicator's consideration. To the extent that the Applicant did not provide such information, it was because the Applicant chose not to do so.

[38] With respect to the second issue, the Applicant asserted that the First Level Adjudicator was also a "respondent" (i.e. a decision-maker) in other processes which had been initiated by the Applicant and that the First Level Adjudicator was biased because of the existing relationship with the Applicant through these processes. The Applicant also asserted that the First Level Adjudicator's decisions in other matters and his actions and comments in the probationary discharge process demonstrated a pre-disposition against the Applicant.

[39] The Final Level Adjudicator noted that while the Applicant referred to other processes he had initiated in which the First Level Adjudicator was involved, the Applicant had not specified the nature of those processes or the First Level Adjudicator's involvement therein or the interactions/decisions attributed to the First Level Adjudicator that the Applicant believed demonstrated the First Level Adjudicator's bias.

[40] The Final Level Adjudicator found that the fact that the First Level Adjudicator may have been involved in several decisions being challenged by a member, on its own, does not demonstrate bias on the part of the First Level Adjudicator. Further, the Final Level Adjudicator found that, in the absence of any particulars of the First Level Adjudicator's "existing relationship" with the

Applicant, the Applicant had failed to demonstrate that the First Level Adjudicator was biased due to his involvement in the other processes the Applicant had initiated.

[41] Moreover, the Final Level Adjudicator found that the First Level Adjudicator's decision not to hold the probationary discharge process in abeyance pending the outcome of the other processes did not demonstrate bias against the Applicant. In addition, the First Level Adjudicator's decisions in other matters, involving other employees, were found not to be relevant to the probationary discharge process and not a basis for establishing any bias on the part of the First Level Adjudicator. The Final Level Adjudicator also rejected the Applicant's assertion that the First Level Adjudicator had already made up his mind on the issue of accommodation be referring to a document that suggested that efforts had already been made by the RCMP to accommodate the Applicant or by bringing certain case law on the issue of accommodation to the attention of the Applicant.

[42] With respect to the third issue, the Applicant asserted before the Final Level Adjudicator that the decision of the First Level Adjudicator was unreasonable as it was reached after examining less than all of the facts (because it was rendered without waiting for the other grievances and complaints to be completed). The Applicant asserted that the other processes which he had initiated were closely related to the probationary discharge process and that if he were to provide information in this process, it could interfere with those other processes. The Final Level Adjudicator found that the First Level Adjudicator was not obliged to wait for the other processes to be completed before rendering his decision in this matter. The Applicant had been given ample opportunity and warning to provide the evidence necessary to support his position. To the extent

that the Applicant chose not to provide sufficient detail to challenge facts which had been presented to the First Level Adjudicator, the Final Level Adjudicator found that the First Level Adjudicator was entitled to rely on those facts as being unrefuted.

[43] The Applicant further asserted before the Final Level Adjudicator that his ability to meet the standards required by the Field Coaching Program was affected by his medical condition – namely, his ADD – and that this medical condition should have been taken into account during the training process. The Final Level Adjudicator found that the Applicant had not provided the medical evidence necessary to support these claims, despite repeated requests from the First Level Adjudicator to do so.

[44] The Final Level Adjudicator extensively detailed the evidence in the record regarding the Applicant's performance issues and found a significant pattern of on-going documented concerns relating to the Applicant's performance related to driving and prisoner handling.

[45] The Applicant asserted that his trainers were at fault for his inability to learn the skills necessary to become a police officer, raising various concerns about their conduct. The Final Level Adjudicator held that the record showed that the Applicant's concerns had been examined by external parties and were properly considered by the First Level Adjudicator. The Final Level Adjudicator found that the record simply did not support the Applicant's assertion.

[46] The Final Level Adjudicator found that, given the pattern of significant performance problems that were presented to the First Level Adjudicator, the Applicant had failed to

demonstrate that the decision of the First Level Adjudicator to discharge him was clearly unreasonable.

[47] With respect to the fifth issue, the Applicant asserted that the RCMP had discriminated against him by failing to accommodate his disability. The Final Level Adjudicator noted that this assertion was based on the premise that the Applicant had established that he had a disability. However, the Final Level Adjudicator found that the Applicant had not met his onus of demonstrating that he suffered from a disability during his time enrolled in the Field Coaching Program.

[48] The Final Level Adjudicator found that the record demonstrated that the Applicant's medical profile was assessed during the Field Coaching Program and no medical issues relating to the Applicant's ability to carry out his police duties were identified by medical specialists at that time. To the contrary, he was expressly found to be fit for duty with no restrictions or requirements for accommodation and the specialist who tested the Applicant for ADD did not in fact diagnose him as having that disorder.

[49] The Final Level Adjudicator went on to find:

> [172] Subsequent medical issues appear to have impacted the Appellant *after* the Appellant's probationary period was interrupted and he was restricted to administrative duties pending the outcome of the probationary discharge process. Without providing medical tests or evidence to support this view, the Appellant's submissions associate the medical problems he experienced – after being restricted to administrative duties – with ADD. I find that the Appellant has not presented reliable medical evidence that identifies what his medical issues were, has not shown that these medical issues were a factor in the Appellant's performance difficulties, and

> has not demonstrated that these medical issues were even present during his FCP.

[50] The Final Level Adjudicator found that while there was evidence of the Applicant suffering from medical issues after he learned the probationary discharge process had been initiated, he disagreed with the First Level Adjudicator's comment that the Applicant likely has a disability and that it likely impacted his performance and his ability to demonstrate his suitability. The Final Level Adjudicator found that this comment was inconsistent with other findings expressed in the First Level Adjudicator's decision and, more significantly, is directly contradicted by the only medical evidence in the record – namely, the express statement by the Health Services Officer that there was no causal link between the medical condition for which the Applicant was assessed and his performance.

[51] The Final Level Adjudicator found that the Applicant's arguments that he was not accommodated were not relevant as he had not demonstrated that he was suffering from a medical disability and that this medical disability was a factor in his inability to demonstrate his suitability to serve as a police officer. However, the Final Adjudicator went on to find that even if the Applicant had presented medical evidence of disability, his submissions fell short of demonstrating that the First Level Adjudicator's decision not to accommodate a disability in these circumstances was clearly unreasonable.

[52] With respect to the sixth issue, the First Level Adjudicator referred to the Alberta Court of Appeal decision in *TWU v Telus*, 2014 ABCA 154 and other decisions in support of his determination that a probationary employee only has to be accommodated within the scope of the

position for which they were hired. The Applicant asserted that the First Level Adjudicator misapplied the law. The Final Level Adjudicator found that the Applicant did not refer to an error in how the First Level Adjudicator interpreted the case law, but rather simply argued that the *Telus* decision did not apply to his case without providing any other explanation.

[53] The Final Level Adjudicator found that the Applicant had failed to present any legal issues which challenge the First Level Adjudicator's interpretation of the law in relation to *Telus* and that the Applicant's application of *Telus* was consistent with the Final Level Adjudicator's understanding of the law as it related to accommodating probationary members.

[54] The Final Level Adjudicator concluded by finding that the Applicant had failed to demonstrate that the First Level Adjudicator's conclusion that the Applicant was unsuitable to serve as a member of the RCMP was clearly unreasonable, was rendered in a manner which was procedurally unfair or was based on an error of law. The appeal was accordingly dismissed and the decision of the First Level Adjudicator was confirmed.

IV. Issues and Standard of Review

[55] The following issues arise on this application:

A. Whether there was a breach of procedural fairness; and

B. Whether the decision of the Final Level Adjudicator was reasonable.

[56] With respect to the first issue, the Court's review of procedural fairness issues involves no deference to the decision-maker. The question is whether the procedure was fair having regard to all of the circumstances, focusing on the nature of the substantive rights involved and the consequences for the individual affected [see *Canadian Pacific Railway Company v Canada (Transportation Agency)*, 2021 FCA 69 at paras 46-47]. The ultimate question is whether the Applicant knew the case to meet and had a full and fair chance to respond [see *Laag v Canada (Minister of Citizenship and Immigration)*, 2019 FC 890 at para 10].

[57] With respect to the second issue, when the Court reviews the merits of an administrative decision, the presumptive standard of review is reasonableness. No exceptions to that presumption have been raised nor apply [see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 23, 25].

[58] When reviewing for reasonableness, the Court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified. A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker. The burden is on the party challenging the decision to show that it is unreasonable [see *Vavilov, supra* at paras 15, 83, 85, 99, 100]. The Court will intervene only if it is satisfied there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency [see *Adenjij-Adele v Canada (Minister of Citizenship and Immigration)*, 2020 FC 418 at para 11].

V. Analysis

A. The Applicant Was Not Denied Procedural Fairness

[59] The Applicant asserts that, on a proper application of the factors set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, the Applicant was entitled to a high level of procedural fairness in the probationary discharge process, which was not afforded to him. Specifically, the Applicant asserts that: (i) the Final Level Adjudicator failed to properly address the Applicant's allegation that the First Level Adjudicator was biased; and (ii) the First Level Adjudicator and the Final Level Adjudicator were not diligent in considering all of the facts and evidence before them.

[60] Turning to the first issue, as this Court stated in *Zhou v Canada (Citizenship and Immigration)*, 2020 FC 633 at paragraph 39, the burden is on the party alleging a reasonable apprehension of bias (actual or perceived) to show that a reasonable and informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude that it is more likely than not that the decision-maker, whether consciously or unconsciously, would not decide the matter fairly. In the absence of such evidence, members of administrative tribunals, like judges, are presumed to have acted fairly and impartially. The threshold for a finding of bias is therefore high and mere suspicion is insufficient to meet that threshold [see *Sagkeeng First Nation v Canada (Attorney General)*, 2015 FC 1113 at para 105; *Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR 369].

[61] An allegation of reasonable apprehension of bias must be supported by material evidence demonstrating conduct that derogates from the standard. It cannot rest on mere suspicion,

insinuations or mere impressions of a party or their counsel [see *Arthur v Canada (Attorney General)*, 2001 FCA 223 at para 8; *Ramirez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 809 at para 11; *Maxim v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1029 at para 30].

[62] The Applicant asserts that the fact that the First Level Adjudicator was acting as the adjudicator on multiple other grievances, on its own, calls into question the First Level Adjudicator's impartiality. Further, the Applicant asserts that the First Level Adjudicator commented on aspects of his case in a "highly inappropriate manner", indicated what his decision would likely be before the process was complete and improperly interfered in the other grievance processes by encouraging the Applicant to not continue with those grievances while at the same time indicating that those grievances were supposed to remain separate. The Applicant asserts that the Final Level Adjudicator failed to acknowledge the biased decision made by the First Level Adjudicator and properly consider the Applicant's allegation of bias.

[63] I find that the Applicant has failed to establish that any aspect of the conduct of the First Level Adjudicator demonstrated bias or would result in a reasonable apprehension of bias. The fact that the First Level Adjudicator was involved in other grievances filed by the Applicant does not, in and of itself, create a reasonable apprehension of bias and the Applicant has not provided any specific evidence or submissions to demonstrate how the First Level Adjudicator's involvement in those other complaints and grievances (the particulars of which were not described to the Court) impacted the First Level Adjudicator's ability to decide the probationary discharge process fairly.

[64] Moreover, the Applicant has failed to demonstrate how the First Level Adjudicator's decisions in other matters involving other employees (the details of which matters were not provided) impacted the First Level Adjudicator's ability to fairly determine the Applicant's case.

[65] Further, while the Applicant asserts that the First Level Adjudicator commented on aspects of his case in a "highly inappropriate manner" and indicated what his decision would likely be before the process was complete, the Applicant has failed to particularize for the Court the specific comments he relies upon or how the First Level Adjudicator foreshadowed his decision, yet alone demonstrate how such conduct would meet the high threshold to establish a reasonable apprehension of bias. To the extent that the Applicant relies on the fact that the First Level Adjudicator noted that the recommendation to discharge the Applicant mentioned various efforts to accommodate the Applicant, I find that the Applicant has failed to demonstrate how this statement would meet the threshold for bias as set out in *Zhou*. To the contrary, I find that there was nothing improper with the First Level Adjudicator, having found that the Applicant suffered from a disability, considering whether accommodations for his disability had already been provided to him in the Field Coaching Program, which was a question squarely put in issue by the Applicant.

[66] While the Applicant asserts the First Level Adjudicator improperly attempted to interfere in the Applicant's other grievance processes, the Applicant has pointed the Court to no evidence in support of this assertion, nor explained how such alleged interference is relevant to the impartiality of the First Level Adjudicator.

[67] In the circumstances, I am satisfied that the Applicant has failed to meet the high threshold for establishing a reasonable apprehension of bias and accordingly, I find that the Final Level Adjudicator's decision in relation to the Applicant's bias allegation was correct.

[68] Turning to the second issue, the Applicant asserts that the First Level Adjudicator denied the Applicant procedural fairness by proceeding with the probationary discharge process prior to the determination of the Applicant's other complaints and grievances, as the Applicant asserts that the information from those complaints and grievances was required for the proper determination of the probationary discharge process. However, having reviewed the record, I find that the Applicant did not provide the First Level Adjudicator or the Final Level Adjudicator with sufficient details or arguments to explain the relevance of these other processes and why they would warrant holding the probationary discharge process in abeyance pending their determination. The Applicant was given an extension of time to provide this information, which he chose not to provide. Similarly, on this application, the Applicant has provided the Court with no explanation of relevance of these other processes to the probationary discharge process. In such circumstances, I find that it was appropriate for the probationary discharge process to proceed and for the First Level Adjudicator to rely on the facts before him.

[69] The Applicant further asserts that the Final Level Adjudicator did not diligently consider all of the facts or answer all of the arguments and questions presented to him, which constitutes a violation of the Applicant's procedural fairness rights. However, the Applicant has failed to particularize what facts he alleges the Final Level Adjudicator failed to consider and what arguments and questions were allegedly not addressed.

[70] At the hearing of this application, the Applicant asserted that on at least one occasion, the First Level Adjudicator made a decision on an issue without affording the Applicant an opportunity to first address the issue. However, again, no particulars of this allegation were provided to the Court.

[71] The onus was on the Applicant to demonstrate that his procedural rights were infringed. Merely asserting that various breaches of procedural fairness occurred, without particularizing the alleged breaches and substantiating them with evidence, is insufficient to meet the Applicant's onus [see *Contrevenant no 10 v Canada (Attorney General)*, 2016 FCA 42 at para 12].

[72] Based on the record before me, I am satisfied that no breach of the Applicant's right to procedural fairness occurred in the probationary discharge process, nor during the appeal to the Final Level Adjudicator. To the contrary, I find that the record demonstrates that the First Level Adjudicator and Final Level Adjudicator went to considerable lengths to ensure that the Applicant had an opportunity to present his case, to respond to the evidence of the RCMP and to remedy the noted deficiencies in the Applicant's evidence, demonstrating great patience and fairness in their dealings with the Applicant.

B. The Final Level Adjudicator's Decision was Reasonable

[73] The record demonstrates that the Applicant's four coaches during the Field Coaching Program recorded numerous significant problems with the Applicant's performance which caused them fear for the public's safety and their own safety. These problems included, among others: (a) failing to search prisoners for weapons; (b) entering a room in an unsafe manner so as to provide

a prisoner with an opportunity to grab weapons; (c) failing to recognize danger and to handcuff; (d) failing to react when a suspect taken into custody dropped a knife from his pocket, picked it up and put it on the hood of a car; (e) failing to double-lock handcuffs and to maintain control over a prisoner; (f) striking the mirror of a parked car while on police patrol training; (g) driving into an opposing lane of traffic and not noticing before his coach brought it to his attention; (h) operating his vehicle in a school zone while looking at his cell phone and almost hitting a civilian; and (i) being unable to maintain appropriate speed or his own driving lane and forcing other drivers to take evasive action to avoid a collision.

[74] The Applicant did not dispute before the Court that these performance issues occurred. Rather, the Applicant asserts that his errors were part of his learning process and that they arose from, or were exacerbated by, his disability, for which the Applicant asserts accommodation was required. The Applicant asserts that he submitted documents regarding his medical issues and need for accommodation prior to the decision to discharge him. Specifically, he referred to a form 6470 ("Plan for Workplace Accommodation of Members") submitted on October 13, 2017, and a Return to Work Plan form submitted on October 16, 2017. The Applicant asserts that in light of this information, the Final Level Adjudicator's finding that the RCMP was unaware of his disability and the need for accommodation was not reasonable. Moreover, the Applicant asserts that there were still considerable measures that could have been undertaken by the RCMP to accommodate him (including transferring him to one of the numerous RCMP detachments in Alberta for further training) and therefore the determination that sufficient accommodation had already been provided was incorrect.

[75] I reject the Applicant's assertions. Based on the evidence in the record, I find that the Final Level Adjudicator reasonably concluded that there was insufficient medical evidence to established that the Applicant suffered from a disability, that the Applicant's medical issues were a factor in his performance difficulties or that the medical issues were even present during the Applicant's Field Coaching Program.

[76] The evidence demonstrates that the Applicant was found to be fit for duty with no restrictions or requirements for accommodation in July 2017, after the Applicant's assertion that he believed he suffered from ADD and after an independent assessment by a specialist who did not diagnose the Applicant as suffering from ADD or any other disability.

[77] It was only once the Applicant's probationary period was interrupted and he was put on administrative duties pending the outcome of the probationary discharge process that medical issues appear to have impacted the Applicant. The Final Level Adjudicator engaged in a detailed analysis of the medical evidence in the record from September 2017 onward and noted that while the documents on record did not clearly state what medical issues were impacting the Applicant, the medical opinion of the Health Services Officer was that there was no causal link between the medical condition impacting the Applicant and the Applicant's inability to perform his duties during the Field Coaching Program. The Final Level Adjudicator noted that the Health Services Officer's medical opinion had not been refuted by any other medical evidence.

[78] I note that the Applicant has not pointed the Court to any medical evidence that was overlooked by the Final Level Adjudicator and in particular, the Applicant has not pointed the

Court to any medical evidence diagnosing the Applicant with ADD during the term of the Field Coaching Program and/or opining that the Applicant's performance during the Field Coaching Program was impacted by any medical issues. The two documents relied upon by the Applicant as cited above are not medical documents, but rather forms completed by the Applicant himself.

[79] The Final Level Adjudicator did consider the undated disability insurance form submitted by a psychologist stating a primary diagnosis of "ADHD subset ADD" and a secondary diagnosis of anxiety. The Final Level Adjudicator placed little weight on the form due to the fact that it was incomplete, as the portions of the form asking the psychologist to provide clinical findings and observations and to describe the Applicant's functional abilities were blank and no test/investigation results were provided which on the face of the form indicated that no such tests or investigations were undertaken by the psychologist to support their diagnosis. Further, the Final Level Adjudicator noted that the Applicant's claim for disability insurance was ultimately denied by the insurance company on the basis that the Applicant had failed to provide medical evidence demonstrating that he was impacted by a disability that precluded him from being a police officer. I see no error in the Final Level Adjudicator's assessment of this evidence.

[80] Accordingly, I find that the Final Level Adjudicator's determination that the Applicant had not established a *prima facie* case for discrimination because he had not demonstrated that he was suffering from a disability during the relevant time was reasonable. In light of that determination, I need not consider the Applicant's assertion that additional accommodation beyond his supplemental training should have been provided.

[81] Based on the record before me and the submissions advanced by the parties, I find that the Applicant has failed to establish any basis to interfere with the Final Level Adjudicator's determination that the Applicant had failed to establish that the First Level Adjudicator's decision that the Applicant was unsuitable to serve as a member of the RCMP was clearly unreasonable.

VI. Conclusion

[82] I find that the Final Level Adjudicator's decision is reasonable. It is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and the applicable legal principles. Moreover, I find that the Applicant has failed to demonstrate any reasonable apprehension of bias on the part of the First Level Adjudicator or any breach of his procedural fairness rights. Accordingly, the application for judicial review shall be dismissed.

[83] The Respondent seeks their costs of the application in the amount of $1,000.00. The Applicant asserts that it would be unfair to assess costs against him. I see no basis to depart from the general principle that as the successful party, the Respondent should recover their costs of the application. However, I am satisfied that, in the circumstances of this case, only a minimal amount of costs fixed at $250.00 should be awarded.

JUDGMENT in T-2030-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. The Applicant shall pay to the Respondent costs of this application in the amount of $250.00, inclusive of disbursements and taxes.

"Mandy Aylen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2030-19
STYLE OF CAUSE:	THOMAS DELIVA v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
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APPEARANCES:

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Maude Normand	FOR THE RESPONDENT

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