

Federal Court of Appeal



Cour d'appel fédérale

Date: 20191001

Docket: A-408-18

Citation: 2019 FCA 241

**CORAM: RENNIE J.A.
WOODS J.A.
LASKIN J.A.**

BETWEEN:

JASON HONG

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on September 3, 2019.

Judgment delivered at Ottawa, Ontario, on October 1, 2019.

REASONS FOR JUDGMENT BY:

WOODS J.A.

CONCURRED IN BY:

**RENNIE J.A.
LASKIN J.A.**

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REASONS FOR JUDGMENT

WOODS J.A.

[1] Constable Jason Hong, a member of the Royal Canadian Mounted Police, appeals from a judgment of the Federal Court that dismissed his application for an order of *mandamus*. Cst. Hong sought *mandamus* to compel the RCMP to implement an adjudicator's decision directing the RCMP to reinstate him in a training program leading to qualification as a forensic identification specialist (2018 FC 1208).

I. Background

[2] In 2011, Cst. Hong filed an application with the RCMP for acceptance into its Forensic Identification Apprenticeship Training Program (FIATP). Prior to the completion of the selection process, his application was rejected, for reasons that are not directly relevant to this appeal. Cst. Hong successfully contested the rejection through a series of grievances, using the RCMP's internal grievance procedure.

[3] In the last grievance decision, which was issued on October 4, 2017, the adjudicator directed the RCMP to take certain remedial action. In this appeal, the parties agree that the adjudicator's decision requires remedial action, but they disagree as to what that action entails.

[4] The RCMP read the grievance decision to require them to place Cst. Hong back in the selection process with credit for steps that he had already completed. It would then be left to Cst. Hong to complete the remaining steps in the process. Since the selection process had changed since Cst. Hong first applied, the RCMP placed him in the current selection process.

[5] However, according to Cst. Hong's interpretation, he was to be placed directly in the training program without having to go through further steps in any selection process.

[6] On March 12, 2018, Cst. Hong filed an application for judicial review in the Federal Court. He sought an order of *mandamus* to compel the National Headquarters Human Resources

Officer of the RCMP “to implement the [grievance decision] and reinitiate the [training program].” (appeal book at p. 24).

II. The grievance decision

[7] The relevant parts of the grievance decision which led to this dispute are set out below.

[41] For the reasons stated above, I find that the Grievor 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 Grievor is to be given the opportunity to continue in the FIATP process.

...

[46] Should the Grievor still be interested in Forensic Identification Services, he is to be reinstated in the FIATP where he left off and offered a similar and available position.

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

...

[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 Grievor’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 Grievor. The Grievor is to be offered a suitable position with Forensic Identification Services.

[52] Upon the successful completion of the FIATP 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.

III. Federal Court decision

[8] The Federal Court stated the issue as follows: “[W]hether 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.” (Federal Court reasons at para. 23).

[9] The Court then considered whether it should “exercise its equitable jurisdiction to order *mandamus*.” It concluded that *mandamus* is not appropriate on the basis that RCMP had already complied with the grievance decision by placing Cst. Hong back in the selection process. The Court’s reasons are reproduced below:

[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.

IV. Discussion

[10] In the application for judicial review in the Federal Court, the only remedy that was sought by Cst. Hong was an order of *mandamus*. As noted by the Court, the general principles to be applied are as set out in *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742 at para. 45, 162 N.R. 177 (F.C.A.). “Among the requirements ... is that there is a public duty to act owed to the Applicant and a clear right to performance of that duty.” (Federal Court reasons at para. 26).

[11] The question to be decided is whether the Federal Court made any reviewable error in concluding that an order of *mandamus* should not be granted because the RCMP had complied with the grievance decision. Cst. Hong submits that two errors were made: (1) the Federal Court incorrectly gave deference to the RCMP’s interpretation of the adjudicator’s decision, and (2) the Federal Court incorrectly interpreted the terms of the adjudicator’s order. In my view, no reviewable error was made, and there is no reason for this Court to intervene.

[12] The Federal Court decision should be reviewed by this Court in accordance with *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. The standard of review for any question of fact (including any question of mixed fact and law for which there is no extricable question of law) is palpable and overriding error, and for any question of law is correctness.

[13] As for whether the Federal Court incorrectly gave deference to the RCMP's interpretation of the adjudicator's decision, I disagree with Cst. Hong that deference was given, but even if it was it would not change the outcome of this appeal.

[14] Although the Federal Court stated that the RCMP's interpretation attracts deference (Federal Court reasons at para. 24), the Court's *mandamus* findings were made on the higher correctness standard of review. In particular, the Federal Court concludes that "the record does not support [Cst. Hong's] understanding that his success before the Adjudicator meant that he was not required to submit to the new [selection] requirements." (Federal Court reasons at para. 33). Accordingly, the outcome of the judicial review would be the same regardless of the standard of review that is applied.

[15] As for whether the Federal Court incorrectly interpreted the adjudicator's decision, the adjudicator's reasons and the record as a whole amply support the conclusion of the Federal Court that Cst. Hong had to complete the selection process. The adjudicator did not direct the RCMP to place Cst. Hong directly in the training program, as Cst. Hong suggests.

[16] Cst. Hong relies on three documents in support of his position, an affidavit of Frederick Fontaine, a preliminary adjudication decision, and the final grievance decision that is at issue in this appeal (appellant's memorandum at para. 44). I do not agree that these documents support Cst. Hong's position.

[17] As for the first two documents, they do not purport to state that Cst. Hong had completed the selection process. Mr. Fontaine's affidavit reveals that Cst. Hong had completed only two of the four steps in the selection process at the time of his elimination. The preliminary adjudication decision explains that Cst. Hong completed "preliminary screening", but makes no assertion that he completed the selection process as a whole.

[18] As for the third document, the final grievance decision, Cst. Hong relies on paragraph 9 of that decision. It reads:

[9] The Grievor was accepted to participate in the FIATP. On December 7, 2011, the Grievor successfully passed the Physical Comparison Aptitude Test, which is the initial test for the FIATP. The next step would be a three-week assessment with Surrey RCMP Identification Services.

[19] In this paragraph, the adjudicator finds that Cst. Hong had not completed a three-week assessment that formed part of the selection process. However, the adjudicator also finds that Cst. Hong had been accepted into the FIATP. These two findings are at odds unless the adjudicator's use of the defined term for the training program, FIATP, is read as including the selection process. Accordingly, the adjudicator's direction that Cst. Hong "meet all current requirements of the FIATP" means that the current selection process must be completed (grievance decision at para. 47).

[20] Cst. Hong also relies heavily on paragraph 51 of the grievance decision:

[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 Grievor. The Grievor is to be offered a suitable position with Forensic Identification Services.

[21] Cst. Hong emphasizes that paragraph 51 directs the RCMP to place him in Forensic Identification Services. The problem with this submission is that it focusses only on one sentence in the decision rather than giving meaning to the grievance decision as a whole. For the reasons discussed above, the adjudicator's decision does not permit Cst. Hong to bypass the selection process. It is not clear why the adjudicator referred to "Forensic Identification Services" in paragraph 51, but the comment does not permit Cst. Hong to bypass the procedures required by the selection process.

[22] At the hearing, both parties acknowledged that the grievance decision is not drafted as clearly as it might have been. Be that as it may, I agree with the Federal Court that Cst. Hong's interpretation is not supportable. I would therefore dismiss the appeal with costs.

"Judith Woods"

J.A.

"I agree
Donald J. Rennie J.A."

"I agree
J.B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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LASKIN J.A.

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APPEARANCES:

Christopher Rootham
Andrew Montague-Reinholdt

FOR THE APPELLANT

Kirk Shannon
Sanam Goudarzi

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nelligan O'Brien Payne LLP
Ottawa, Ontario

FOR THE APPELLANT

Nathalie G. Drouin
Deputy Attorney General of Canada

FOR THE RESPONDENT