

CANADA / JUDGMENT

Flanagan v. Canada (Attorney General)

2014 BCCA 487

COURT

British Columbia Court of Appeal

DECIDED

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2014 BCCA 487 Flanagan v. Canada (Attorney General) COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Flanagan v. Canada (Attorney General), 2014 BCCA 487 Date: 20141210 Docket: CA041102 Between: Brian Leigh Flanagan Appellant (Plaintiff) And The Attorney General of Canada, and the Minister of Public Safety and Solicitor General for the Province of British Columbia Respondents (Defendants) And Ian MacDonald, Member of the Royal Canadian Mounted Police (Defendant) Before: The Honourable Mr. Justice Lowry The Honourable Madam Justice Kirkpatrick The Honourable Mr. Justice Groberman On appeal from: An order of the Supreme Court of British Columbia, dated July 5, 2013 (Flanagan v. Canada (Attorney General), 2013 BCSC 1205, Vancouver Docket S117226). Counsel for the Appellant: T. F. Beasley Counsel for the Respondents: Mitchell R. Taylor, Q.C. and B. B. Bharaj Place and Date of Hearing: Vancouver, British Columbia November 27, 2014 Place and Date of Judgment: Vancouver, British Columbia December 10, 2014 Written Reasons by: The Honourable Mr. Justice Lowry Concurring in by: The Honourable Madam Justice Kirkpatrick The Honourable Mr. Justice Groberman Summary: Appeal from an order dismissing an action by a member of the RCMP for constructive wrongful dismissal. Held: appeal dismissed. Members of the RCMP are not party to a common law contract of employment. Their relationship with the police force is governed by statute. The cause of action was not one the member could maintain. Reasons for Judgment of the Honourable Mr. Justice Lowry:

- [1] Brian Flanagan was a member of the RCMP for 25 years. He sought and was granted a voluntary discharge in 2005. He contends the circumstances that led to his discharge constitute a breach of his contract of employment amounting to a constructive wrongful dismissal. In 2007, he commenced this action against the Crown, both federally and provincially, for damages to be assessed on a 20-month notice period to which he maintains he was entitled. The action was tried, over five years later, before Mr. Justice Melnick. He held Mr. Flanagan could not maintain an action in contract because the relationship between the force and its members is not governed by contract at common law but rather by a statute that codifies all rights and remedies including grievance procedures. Mr. Flanagan appeals, challenging what the judge held as being inconsistent with the requirement of the serving rank and file of the force to obtain adequate remedies in circumstances such as he found himself.

- [2] As pleaded, the Federal Crown (the Attorney General of Canada) is sued as being responsible for the liability of the RCMP to Mr. Flanagan. The Provincial Crown (the Minister of Public Safety and the Attorney General) is sued on the basis that at the material times Mr. Flanagan was engaged by the province through the RCMP by virtue of a service agreement between them.
- [3] Mr. Flanagan also sued an RCMP staff services physician, Ian MacDonald, who was involved in the events that led to his discharge. The action against Dr. MacDonald was pleaded in tort but was dismissed by consent before the trial. The judge considered and rejected the Crown having vicarious liability in respect of that claim. However, counsel for Mr. Flanagan says no claim in tort against the Crown was argued before the judge and none is advanced on this appeal. The Discharge
- [4] Mr. Flanagan's difficulties arose out of a concern on the part of his superiors over his consumption of alcohol and, more particularly, whether he had become dependent upon it. He never accepted the concern as other than ill-founded. The judge set out the course of events in detail but, for present purposes, it is sufficient to say an incident in late 2004 when Mr. Flanagan was stopped because he was driving while appearing to be impaired led to his being investigated by his superiors over the next several months. During that time, he was seen by Dr. MacDonald who referred him first to a physician who was known to be highly experienced in the field of addiction medicine and then later, at Mr. Flanagan's request, to another physician of similar qualification. Both expressed the opinion there was reason for concern that he was alcohol dependent and that he should seek treatment.
- [5] He was relieved of his regular duties and assigned to administrative duties only. They amounted to very little if anything. He was ultimately told, and then ordered, to attend a particular clinic where his dependency on alcohol would have been assessed and then, if necessary, he would have been treated. He refused. The judge found his decision to apply to be discharged, which followed, was based on his belief that he was being wrongly required to take treatment for alcoholism from which he did not suffer. Mr. Flanagan maintains the substantive changes in his duties imposed upon him amounted to a constructive dismissal which was wrongful, citing in particular *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20, [2008] 1 S.C.R. 661 at para. 26. He was, he says, effectively dismissed without notice. Mr. Flanagan's Contention
- [6] Mr. Flanagan contends that the RCMP, a police force continued by statute under s. 3 of the Royal Canadian Mounted Police Act, R.S.C. 1985, c. R-10, and its members, appointed by the commissioner of the force under s. 7(1) of the Act, are in an employer-employee relationship amounting to a contract of employment at common law, it being an implied term that a member not be discharged other than for cause without being given reasonable notice. This is said to be so because the relationship meets the recognized common law criteria that render a member an employee of the force and the legislation does not provide otherwise. The criteria, being organizational control as discussed in *Co-Operators Insurance Assn. v. Kearney*, [1965] S.C.R. 106 at 112, and control per se as well as other factors like the

ownership of tools and the opportunity for profit and loss as discussed in *Montreal v. Montreal Locomotive Works Ltd.*, [1947] 1 D.L.R. 161 (P.C.), are said to be well met in what is an organized police force that controls when and where its members' duties are to be discharged.

- [7] While it is accepted there is apparently no instance where a member of the RCMP, or for that matter a member of any other police force, has maintained an action for wrongful dismissal, it is contended there is no sound basis in law or in policy not to recognize members of a police force are in a contract-based employment relationship entitling them to common law remedies for breach of contract. The RCMP is said to have breached its employment contract with Mr. Flanagan when he was constructively dismissed without notice. It is said the rights of those who are employees are enshrined in contract law; it governs the working lives of most and cannot be denied in the absence of validly enacted legislation which expressly does so. The Judgment
- [8] In rejecting the contention, the judge found the Act and the regulations for which it provides to be a complete code that governs the relationship between the RCMP and its members: the common law governing an employer-employee relationship has no application. He did so in light of the long-recognized independence the members of a police force have in carrying out the duties of the public office they hold and what he said was the weight of the authority cited to him.
- [9] At the outset of his analysis, the judge said that, upon his appointment, Mr. Flanagan took an oath whereby he acknowledged he was subject to the Act, the regulations, and all orders made pursuant thereto. Section 12(2) of the Act provides that no member may be discharged or dismissed from the force except as provided in the Act, its regulations, or the standing orders of the commissioner (none of which provide for giving the notice for which Mr. Flanagan contends).
- [10] The judge considered and quoted from the decisions of the Supreme Court of Canada in *R. v. Campbell*, [1999] 1 S.C.R. 565, and *Wells v. Newfoundland*, [1999] 3 S.C.R. 199. In *Campbell*, while considering the illegality of RCMP police conduct in the course of investigating a crime, the Court considered the status of its members in the exercise of their duties in that regard. A member of a police force was said to be occupying a public office initially defined at common law and subsequently set out in statute, not acting as a government functionary or agent (para. 27). In *Campbell*, what was said in *Attorney-General for New South Wales v. Perpetual Trustee Co.*, [1955] A.C. 457 (P.C.) at 489-90 was quoted (para. 32): [A constable's] authority is original, not delegated, and is exercised at his own discretion by virtue of his office: he is a ministerial officer exercising statutory rights independently of contract. The essential difference is recognized in the fact that his relationship to the Government is not in ordinary parlance described as that of servant and master.

- [11] Indeed, it was observed (at para. 36) that s. 36 of the Crown Liability and Proceedings Act, R.S.C 1985, c. C-50, that deems members of the armed forces and the RCMP to be servants of the Crown for the purposes of liability, would not be necessary if, at law, members of the RCMP were in any event servants of the Crown for all purposes.
- [12] In *Wells*, while acknowledging that senior civil servants who hold public offices may now be considered to be party to contracts of employment at common law, the Court recognized (at paras. 31 and 32) there continues to remain exceptions, citing as examples judges, ministers of the Crown, and others who fulfill constitutionally defined state roles the fundamental terms of which cannot be altered by agreement. Additionally, it was said there are certain offices that survive "because their historical roots are still nourished by functional consideration". The example given was the independent "office" of a member of a police force, citing *Campbell and Ridge v. Baldwin*, [1964] A.C. 40 (H.L.).
- [13] The judge reviewed decisions of the Federal Court where the question of the relationship between the RCMP and its members has been considered: *Gingras v. Canada*, [1994] 2 F.C. 734 (C.A.); *McLean v. Canada* (1999), 164 F.T.R. 208; and *Clark v. Canada*, [1994] 3 F.C. 323 (T.D.). That court has held a member of the RCMP cannot maintain an action for wrongful dismissal (see in particular *McLean* at para. 22 and *Clark* at 343-344 as quoted by the judge).
- [14] The judge concluded his analysis as follows:
- [67] The RCMP was described to me in argument by the defence as being, in nature, a paramilitary organization. From my review of its governing legislation, that would appear to be a not unreasonable description. That is, it is fair to say that members of the RCMP are sufficiently different from the types of civil servants that are the subject of the decision in *Wells* that I conclude that the general law of contract does not apply to the relationship between the RCMP and its members. I say that notwithstanding the "indicia" of employment pressed upon me by counsel for the plaintiff.... In the case of RCMP members, the general law is specifically superseded by the explicit terms of the RCMP Act, its regulations and the Commissioner's standing orders made pursuant to his authority under the RCMP Act. The RCMP Act, its regulations and orders issued by the Commissioner provide a complete code with respect to the relationship between a member and the RCMP with respect to matters that would be classified, in other situations, as part of a contract of employment. Members confirm that when they sign the documents by which they enlist or re-engage in RCMP service.
- [68] Thus, it is not open to *Flanagan* to bring an action for breach of contract of employment against the defendants. The Appeal
- [15] On this appeal, no authority that it is said the judge failed to consider or that would undermine his judgment is cited. At best, reference is made to what might be said to be inconclusive interlocutory decisions that bear on whether there may be a contract of employment between the RCMP and its members: *McMillan v. Canada*, [1999] F.C.J. No. 164 (C.A.), and *Aussant v. Canada* (2000), 188 F.T.R. 245. For the most part, it is contended here,

as before the judge, that, because the common law criteria of an employer-employee relationship were met, Mr. Flanagan had the benefit of a contract of employment entitling him to notice of dismissal or, more particularly, to maintain an action for constructive wrongful dismissal. This is again said to be so in the absence of any provision of the Act precluding a common law claim based in contract, the assertion being the remedies afforded a member under the Act, through the grievance procedures for which it provides, are inadequate and, indeed, not the subject of any independent adjudicative process.

- [16] I do not consider there to be any error in the judge's analysis or conclusion: Mr. Flanagan was not party to a common law contract of employment enabling him to maintain an action for constructive wrongful dismissal. His remedies lay in pursuing the grievance procedure that was available to him under the Act or seeking administrative injunctive or other relief while he remained a member of the force. He chose to resign. Whether the remedies available to him were then less than adequate may be a matter for legislative consideration, but this action was properly dismissed.

Disposition

- [17] I would dismiss the appeal. "The Honourable Mr. Justice Lowry" I agree: "The Honourable Madam Justice Kirkpatrick" I agree: "The Honourable Mr. Justice Groberman"

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