

CANADA / JUDGMENT

Gordon v. Canada (Solicitor General)

2003 FC 1250

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DECIDED

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Decision Content

Date: 20031028

Docket: T-253-01

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BETWEEN:

GLEN DANIEL GORDON

Applicant

- and -

THE SOLICITOR GENERAL OF CANADA,

THE COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE

and THE DEPUTY ATTORNEY GENERAL OF CANADA

Respondents

REASONS FOR ORDER AND ORDER

CAMPBELL J.

- [1] In May of 1998, an Adjudication Board ("the Board") found that the Applicant, who held the rank of Constable in the Royal Canadian Mounted Police, had conducted himself in a disgraceful manner and brought discredit on the RCMP contrary to the provisions of its Code of Conduct established by regulation pursuant to s.38 of the Royal Canadian Mounted Police Act, R.S.C. 1985, c.R-10 ("the Act"). As a result, pursuant to s.45.12(3)(a) of the Act the Board directed the Applicant to resign from the Force within 14 days or be dismissed.
- [2] The Applicant appealed the Board's decision to the Commissioner of the RCMP ("the Commissioner"). The Commissioner dismissed the appeal of both the finding of misconduct as well as the sanction imposed, and in so doing, found that the Applicant had engaged in disgraceful conduct when he had sexual intercourse with a member of the public, Angela Thrasher, inside a relationship of professional trust that had been established. The Commissioner, therefore, directed the Applicant to resign or be dismissed from the RCMP.
- [3] In the present judicial review application, the Applicant asks that the Commissioner's decision be set aside.

A. The RCMP disciplinary process

- [4] The formal disciplinary process provided in sections 43 to 45.17 of the Act consists of three stages: an Adjudication Board hearing into a complaint and resulting decision; on an appeal of the Adjudication Board's decision to the Commissioner, a non-binding review of the Adjudication Board's decision by an External Review Committee; and the Commissioner's determination of the appeal on a consideration of the full record, including the Adjudication Board's decision, the External Review Committee's report, and submissions.
- [5] During the course of oral argument, counsel for the Applicant confirmed that no due process issues arise from the conduct of the complaint against the Applicant.

B. The Board's decision

- [6] Disciplinary proceedings against the Applicant arose from a June 12, 1997 complaint filed by Angela Thrasher, then a resident of Inuvik. Following the hearing of the complaint, in oral reasons, the Board made the following findings of fact from the original allegations made:
2. In the spring of 1997, Angela Thrasher, after having made an appointment, met with you at the Inuvik RCMP Detachment, to report a sexual assault upon her that had occurred some fifteen years previous.

4. On May 24, 1997, Angela Thrasher attended to your residence. You had been drinking. While Angela Thrasher was at your residence you made sexual advances towards her in that you pulled her to you and kissed her, asked her to "suck my cock", took off your pants, and prevented her from leaving.
8. You then grabbed her again in the laundry room and lifted her onto the dryer where you lifted up her shirt and kissed her. Angela Thrasher then got her shirt down and got off the dryer and the two of you returned to the living room.
10. You and Angela Thrasher then went back upstairs to your bedroom after you demanded that she have sex with you. You then had sexual intercourse with Angela Thrasher with consent that was induced as a result of your position of trust, power or authority. (Decision of the Commissioner, p. 22)
- [7] Contrary to the last quoted finding of the Board, in his testimony, the Applicant admitted having sexual intercourse with Ms. Thrasher in his home on the evening in question, but maintained that the act was consensual.
- [8] In subsequent written reasons, despite the Applicant's denial of the truth of some of the details of what occurred on the evening of May 24, 1997 as alleged by Ms. Thrasher, the Board detailed reasons for its positive determination of Ms. Thrasher's credibility.
- [9] With respect to sanction, the Board considered mitigating factors including: the Applicant brought specialized knowledge to the Force; was respected by some members of his peer group and the community; had expressed remorse for his actions; was cooperative throughout the investigation; and was experiencing family difficulties. However, the following aggravating factors persuaded the Board that the Applicant was no longer fit to perform his functions as an RCMP officer: the Applicant was in contravention of a very serious Code of Conduct violation; had failed to correct his behaviour after he had previously been convicted criminally and disciplined by a prior Adjudication Board in August 1990 for serious violations of the Code of Conduct involving incidents of unwanted sexual contact where excessive consumption of alcohol was a factor; failed to satisfactorily address problems he had with alcohol even after he had been required to undergo a program of alcohol treatment after the 1990 incident; and failed to appreciate the role that his excessive consumption of alcohol probably played in the incident against Ms. Thrasher (Decision of the Board, pp. 47-50).
- [10] Given its findings, the Board directed the Applicant to resign from the Force within 14 days, and in default, recommended he be dismissed.
- [11] The Applicant appealed to the Commissioner against both the Board's findings respecting misconduct and its sanction direction.

C. The External Review Committee's report

- [12] The appeal was referred to an External Review Committee ("the Committee") which recommended to the Commissioner that the appeal be allowed against the Board's finding that the allegation of misconduct was established.
- [13] The Committee found that there were problems with the Board's treatment of the evidence. In its report, the Committee expressed the opinion that Ms. Thrasher's evidence contained many significant contradictions which the Board failed to address, and that the Board exaggerated the extent to which Ms. Thrasher's evidence was corroborated by that of other witnesses. As a result, it found that the possibility that Ms. Thrasher freely consented to having sex with the Applicant cannot be easily dismissed. Finally, the Committee questioned whether there was any nexus between the Applicant's conduct and his employment.
- [14] With respect to the appeal on sanction, the Committee recommended that:

If the Commissioner finds that Ms. Thrasher freely consented to having sexual relations with the Appellant but that his conduct is disgraceful nonetheless and brings discredit to the Force, a more lenient sanction would seem to be justified. (Decision of the Committee, p.42)

D. The Commissioner's decision

- [15] Upon considering the full record, the Commissioner found that the allegation of disgraceful conduct was established, and dismissed the appeal against both that finding and the decision on sanction.
- [16] Although the Commissioner agreed with certain aspects of the Committee's findings relating to the evidence, he rejected the Committee's view that the relationship between the Applicant and Ms. Thrasher was not necessarily improper. In his reasons, the Commissioner stated as follows:

I accept the findings of the Committee that there were "numerous and significant contradictions in the testimony of Ms. Thrasher"

...

I am not prepared to accept the testimony of Ms. Thrasher where it differs from the Appellant and is not otherwise corroborated. In particular, I find that Ms. Thrasher may have consented to sex with the Appellant. This is not determinative of the matter, however. In this case there was a pre-existing relationship of trust between the Appellant and Ms. Thrasher as a result of the earlier disclosure by Ms. Thrasher to the Appellant that she had been sexually assaulted. The Committee considered whether the encounter between the Appellant and Ms. Thrasher is a type of relationship that may not be tolerated by the Force when it stated:

It is important to consider the question of whether Ms. Thrasher should be regarded as a client of the Appellant, either because she had previously discussed with him the possibility of filing a report about a criminal offence, or simply because she was a member of a community where the

Appellant exercised his law enforcement duties. It is my view that the Force does not have the right to tell its members that they are forbidden from having sexual relations with members of the community that they police, regardless of the size of the community. However, the Force may have a more legitimate interest in preventing intimate relationships between its members and individuals who are being investigated by the Force or who are a party to an investigation. Members do have an obligation to avoid placing themselves in a conflict of interest situation.

However, Ms. Thrasher was not a person under investigation nor was she a party to an ongoing investigation. The mere fact that the Appellant knew that Ms. Thrasher was contemplating filing a report about an alleged assault should not be considered sufficient to have rendered his relationship with her improper.

I respectfully disagree with the position of the Committee on this issue. In this case the Appellant's relationship with Ms. Thrasher went beyond mere knowledge that she was contemplating filing a report about an alleged assault. The record shows that Ms. Thrasher had made a very intimate, personal disclosure to the Appellant about a prior sexual assault. She had decided to discuss this matter with the Appellant because she felt that she could trust him and, at the time of this incident, she was still in the process of trying to determine what course of action to follow.

Under these circumstances the Appellant had an obligation to respect this relationship of trust and to ensure that he did nothing to take advantage of it. When Ms. Thrasher presented herself at the Appellant's residence on the evening of the incident in question the Appellant engaged in sexual relations while off duty with a person with whom he was in a position of trust as a result of his duties. Even if Ms. Thrasher consented to the sexual relations as the Appellant alleges, I agree with the Committee that..."the question of whether the Appellant violated the Code of Conduct is not wholly dependent on a finding that the Appellant sexually assaulted Ms. Thrasher or, as the Board put it, that he had "sexual intercourse with Angela Thrasher with consent that was induced as a result of [his] position of trust, power or authority". Therefore, I find the allegation of disgraceful conduct to be established and the appeal against the finding is denied. (Decision of the Commissioner, pp. 45-46)

[17] With respect to sanction, the Commissioner said this:

I have found that the Appellant engaged in disgraceful conduct when he had sexual intercourse with Angela Thrasher at a time when he was in a position of trust with her as a result of his duties. Regardless of whether Ms. Thrasher consented to the sexual activity, the Appellant had an obligation to avoid becoming intimately involved with a person who had recently disclosed to him that she had been sexually assaulted in the past and had turned to the Appellant for advice on how best to handle this very difficult situation. At the time of the incident the Appellant knew that Ms. Thrasher was still trying to decide on how best to deal with the sexual assault. He should have known Ms. Thrasher could be in a vulnerable, confused position and that having sex with her would be inappropriate and would be a conflict of interest at the very least.

The Committee stated that ".. if the Commissioner finds that Ms. Thrasher freely consented to having sexual relations with the Appellant but that his conduct is disgraceful nonetheless and brings discredit to the Force, a more lenient sanction [than dismissal] would seem justified."

In approaching the issue of sanction, I believe that the Appellant's full work history, including prior discipline must be considered. In this case, the Appellant has a significant prior discipline record. In 1988 he received a recommendation for professional counselling following a public complaint of spousal assault against him. In 1990 he appeared before an Adjudication Board for serious violations of the Code of Conduct. In that matter the Appellant had entered two different residences in Rankin inlet without lawful excuse and made contact of a sexual nature with two different women without their consent. That Board found that the member had indulged heavily in alcoholic beverages at the time. Convicted in criminal court, the Appellant was, as part of his criminal sanction, required to undergo a program of alcohol treatment and counselling. The sanction handed down by the Adjudication Board amounted to a forfeiture of five days' pay and a recommendation for counselling.

In that case the Board made the following statement to the Appellant:

"...S. Cst. Gordon, you must still take responsibility for your actions; the Board does not condone these incidents and expects that you will take serious steps to avoid any recurrence which would seriously jeopardized(sic) your future as a member of the RCMP."

The record shows that the appellant does have a satisfactory work history, has expressed remorse for his actions and has support amongst some of his peers as well as from the community. However, he also has been subject to prior serious discipline and the question which I must address is whether, in these circumstances, this prior discipline is sufficient to convince me that dismissal is appropriate in this case. Members of the RCMP must conduct themselves in accordance with our organizational values and we must be accountable for our conduct. In this case, as I have earlier noted, the Appellant had an obligation to respect the position of trust which existed between himself and Ms. Thrasher and he failed to do so.

The fact that alcohol played a role in this matter is also, in my view, a consideration. While I have accepted that it has not been conclusively shown that the conduct of the Appellant was the result of intoxication, I do note that the Appellant had been drinking at the time of the incident. The record indicates that the Appellant has, for some time, been aware that he has a serious problem with alcohol and has been offered assistance in this regard. While he has shown some effort in trying to address this issue, the efforts have not been sustained and he does not appear to have successfully addressed the issue.

I agree with the position of the Respondent that the test for dismissal as outlined in *Ennis v. Canadian Imperial Bank of Commerce* applies in this case. I find that "[t]he employee's conduct and the character it reveals, [is] such as to undermine or seriously impair the essential trust and confidence the employer is entitled to place in the circumstances of [this] particular relationship". In looking at the totality of the circumstances I am convinced that dismissal is the appropriate remedy in this case because I believe that the Appellant has demonstrated through

his actions that he is beyond rehabilitation to be able to maintain the high standards of conduct required of members of the RCMP. The Appellant is hereby directed to resign forthwith and in default of resigning within fourteen days of receiving this written decision he is to be dismissed from the RCMP. (Decision of the Commissioner, pp. 47-48)

E. The present application

[18] Admissions made by counsel for the Applicant during the course of oral argument substantially focussed the judicial review issues from those cited in the written argument.

[19] It is agreed that the standard of review of the Commissioner's decision is patent unreasonableness (*Millard v. Canada (Attorney General)* (2000), 253 N.R. 187 (F.C.A.); *Jaworski v. Canada (Attorney General)* (2000), N.R. 167 (F.C.A.); leave to appeal to the Supreme Court of Canada dismissed, [2000] S.C.C.A. No. 348; *Lee v. Canada (Royal Canadian Mounted Police)* (2000), 184 F.T.R. 74). As advanced by counsel for the Respondent, the test for patent unreasonableness as stated in *Canada Safeway Ltd. v. Retail, Wholesale and Department Store Union, Local 454*, [1998] 1 S.C.R. 1079, paras. 61-63 is as follows:

This standard of review has now been well established and accepted. It imposes a deferential approach to judicial review. This is a very high standard which will not easily be met. In *Canada (Attorney General) v. Public Service Alliance of Canada*, *supra*, it was said at pp. 963-64:

What is patently unreasonable to one judge may be eminently reasonable to another. Yet any test can only be defined by words, the building blocks of all reasons. Obviously, the patently unreasonable test sets a high standard of review. In the Shorter Oxford English Dictionary "patently", an adverb, is defined as "openly, evidently, clearly". "Unreasonable" is defined as "[n]ot having the faculty of reason; irrational . . . Not acting in accordance with reason or good sense". Thus, based on the dictionary definition of the words "patently unreasonable", it is apparent that if the decision the Board reached, acting within its jurisdiction, is not clearly irrational, that is to say evidently not in accordance with reason, then it cannot be said that there was a loss of jurisdiction. This is clearly a very strict test.

In order to justify judicial intervention, the arbitrator's decision must be more than simply unreasonable. In *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 57, Iacobucci J. described the difference between an unreasonable and a patently unreasonable decision as follows:

The difference . . . lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable.

A reviewing court cannot intervene simply because it disagrees with the reasoning of the arbitration board or because it would have reached a different conclusion. To do so would be to usurp the power of the administrative tribunal and to remove from it the ability to arrive at erroneous conclusions within its area of specialized expertise.

- [20] In oral argument, counsel for the Applicant admitted that the Commissioner did a thorough review of the record, and with respect to the Commissioner's findings, agreed that it was open to the Commissioner to find the existence of a relationship of trust. However, counsel for the Applicant did not agree that it was open to the Commissioner to find that there was a breach of this relationship. In essence, the argument is that a ten to fifteen minute conversation in the Detachment office is not sufficient to warrant dismissal.
- [21] Counsel for the Applicant argues that, on the facts, the standard of conduct imposed on the Applicant is just too high. It is clear on the record that, prior to the meeting in the Detachment office when Ms. Thrasher sought out the Applicant to discuss her potential sexual assault complaint, an acquaintanceship existed between the two as a result of prior job related contact. Counsel for the Applicant argues that the incident of May 24, 1997 was nothing more than part of that personal relationship; that is, it was remote from the relationship of trust created by the meeting in the Detachment office. In support of this argument, counsel advanced an interpretation of the evidence so as to establish that, in her willing pursuit of the personal relationship with the Applicant, Ms. Thrasher went to his home that night and had consensual sexual intercourse.
- [22] I give no weight to the personal relationship argument as rendering the Commissioner's decision as patently unreasonable. I find it was certainly open to the Commissioner to interpret the evidence as he did.
- [23] On the question of sanction, counsel for the Applicant argues that the sanction is unduly harsh. I can understand how this opinion can be held by the Applicant, but it is certainly not "clearly irrational" which is the test to be applied. In his decision, the Commissioner attempts to balance the interests of the Applicant with the interests of the RCMP as an institution, and, in so doing, makes an important policy choice. This is something that the Commissioner is entitled to do, with deference (see: *Dr. Q. v. College of Physicians and Surgeons of British Columbia* (2003) 223 D.L.R. (4th) 599 (S.C.C.) at paras. 30-32).

ORDER

Accordingly, for the reasons provided, this application is dismissed.

As agreed to by the Respondent, I award costs in the sum of \$2,500 against the Applicant, such sum being inclusive of any interlocutory costs orders outstanding.

(Sgd.) "Douglas R. Campbell"

Judge

Vancouver, B.C.

October 28, 2003

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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