IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20101029
Docket: S104994
Registry: Vancouver

Between:

Daniel Dickhout

Petitioner

And

Brad Parker

Respondent

Before: The Honourable Madam Justice Dickson

Oral Reasons for Judgment

Counsel for Petitioner	S.M. Boorne
Counsel for Respondent	T.M. Rankin, Q.C.
Place and Date of Hearing:	Vancouver, B.C. September 22, 2010
Place and Date of Judgment:	Vancouver, B.C. October 29, 2010

INTRODUCTION

[1] The petitioner, Daniel Dickhout, seeks an order setting aside the June 17, 2010 decision of the respondent, Chief Constable Brad Parker, refusing to recuse himself from presiding over a disciplinary hearing under the *Police Act*, R.S.B.C. 1996, c. 367 (the "*Act*") for reasonable apprehension of bias (the "Decision"). He also seeks an order remitting the matter to Chief Officer Clapham for the appointment of a new Discipline Authority to preside over a new disciplinary hearing. The respondent resists the application on the basis that no reasonable apprehension of bias has been established and, even if it has, the harm caused falls within the *de minimis* range so the court should decline to grant the remedy sought by the petitioner.

ISSUES

[2] The issues for determination are:

1. Did the respondent's conduct in commissioning an expert report and speaking with its author create a reasonable apprehension of bias?

   and

2. If so, should the court exercise its discretion to grant the remedy sought by the petitioner?

FACTS

[3] The petitioner is a police constable with the South Coast British Columbia Transit Authority Police Service (the "SCBCTAPS"). The respondent is the Chief Constable of the Port Moody Police Service.

[4] The *Act* governs the conduct and discipline of municipal police officers in British Columbia. It was recently amended by the *Police (Misconduct, Complaints, Investigations, Disciplines and Proceedings) Amendment Act* S.B.C. 2009 c. 28 (the "*Amended Act*"). The *Amended Act* came into force on March 31, 2010. Existing

complaints for which no formal discipline disposition was rendered by March 31, 2010 became transitional complaints subject to Part 2 of the *Amended Act*.

[5] The *Act* and *Amended Act* provide for the appointment of a Discipline Authority in connection with complaints of officer misconduct. A Discipline Authority's powers include the power to review a final investigation report prepared by an investigator in response to a complaint, determine whether disciplinary or corrective measures are required and, if so, convene and preside over a discipline proceeding.

[6] On April 18, 2008 the Office of the Police Complaint Commissioner received a complaint lodged by the BC Civil Liberties Association with respect to eight deployments of conducted energy weapons, also known as TASERs®, by officers of the SCBCTAPS (the "Complaint"). The petitioner is one of the subjects of the Complaint.

[7] Following receipt of the Complaint, then Chief Officer Kind of the SCBCTAPS ordered an external investigation into the petitioner's decision to deploy his conducted energy weapon during an arrest on September 13, 2007. The investigation was conducted by Sgt. Ron Bieg of the Vancouver Police Department Professional Standards Section.

[8] On April 25, 2008 the respondent was appointed Discipline Authority pursuant to s. 46(1) of the *Act*.

[9] After completing his investigation, Sgt. Bieg submitted a final investigation report to the respondent (the "FIR "). In it, he summarized the evidence and concluded that the petitioner's deployment of the conducted energy weapon on September 13, 2007 was justified. Accordingly, he recommended that the Complaint be found to be unsubstantiated and no disciplinary measures be taken against the petitioner. Sgt. Bieg's supervisor, Supt. Eric Petit, concurred with his conclusion and recommendation.

[10] The respondent reviewed the FIR and the evidence, including tapes generated by the TASER® CAM device on September 13, 2007. Unlike Sgt. Bieg, however, he formed the view that the evidence was sufficient to warrant the imposition of disciplinary and corrective measures. For this reason, the respondent did not accept Sgt. Bieg's FIR recommendation. Instead, on May 29, 2009 he issued a Notice of Decision re: Disciplinary or Corrective Measures pursuant to s. 57.1(a) of the *Act* to the petitioner (the "Notice"). In the Notice, he notified the petitioner that the disciplinary default of abuse of authority had been alleged against him and recommended proposed disciplinary or corrective measures, including a two-day suspension without pay, a direction to undertake special training or retraining on the appropriate deployment of the TASER® and a written reprimand.

[11] A discipline proceeding for the Complaint was scheduled for December 4, 2009.

[12] On the morning of December 4, 2009 the respondent took ill unexpectedly. He was, therefore, unable to convene the disciplinary hearing as planned. In the course of a discussion between counsel regarding the necessary adjournment, counsel for the petitioner advised counsel for the respondent that the petitioner would be relying on use of force report prepared by Cst. Darren Hall (the "Hall Report").

[13] Cst. Hall is a use of force trainer employed by the Vancouver Police Department. In the Hall Report he opined that the petitioner's actions on September 13, 2007 were appropriate and consistent with his training and policies in place at the time, as well as guidelines established by the National Use of Force Framework. Counsel for the petitioner provided counsel for the respondent with a copy of the Hall Report shortly after the December 4, 2009 disciplinary hearing was adjourned.

[14] After receiving the Hall Report the respondent decided that he did not wish to proceed with the disciplinary hearing on the basis of a single use of force expert report. As a result, he telephoned John McKay, a retired use of force trainer, to commission an additional use of force expert report. Two days later, the respondent

met with Mr. McKay and provided him with the TASER CAM evidence, as well as the FIR and a synopsis and occurrence narrative authored by the petitioner. The respondent did not provide Mr. McKay with the Hall Report or discuss its substance with him.

[15] On December 22, 2009, Mr. McKay prepared a use of force report in connection with the September 13, 2007 incident (the "McKay Report"). In it, he opined that the petitioner's actions were not reasonable in the circumstances. This opinion was contrary to the opinions expressed in the FIR and the Hall Report, but consistent with the preliminary view of the respondent as reflected in the Notice.

[16] The respondent provided a copy of the McKay Report to the petitioner shortly after he received it. He did not, however, advise the petitioner of his proposed course of action before commissioning the McKay Report and meeting with Mr. McKay.

[17] After the petitioner received the McKay Report he applied to the respondent for an order that he recuse himself from presiding over the discipline proceeding. The motion was based on an alleged reasonable apprehension of bias arising out of the respondent's actions with respect to the McKay Report. In summary, the petitioner alleged a reasonable apprehension of bias in connection with two issues:

1) the respondent contacted and met with Mr. McKay and, in so doing, stepped outside of his permissible role under the *Act* and took on an investigatory role; and

2) the respondent's contacts with Mr. McKay, both by telephone and in person, occurred *ex parte*, without the prior knowledge, participation or consent of the petitioner.

[18] According to the petitioner, the respondent's conduct gives rise to a reasonable apprehension of bias because it created a reasonable apprehension that, in his role as Discipline Authority, he may not decide the case fairly and with an open mind.

[19] On June 17, 2010, the respondent issued an order and released reasons in which he denied the petitioner's motion for recusal. In the course of his analysis the respondent wrote:

> Constable Dickhout's present counsel, Mr. Boorne, submits that I took on an investigatory role in commissioning Mr. McKay's use of force report and that this course of conduct gives rise to a reasonable apprehension of bias on my part. It may be argued that Sergeant Bieg, as the investigating officer, ought to have asked to have requested such a report. However, in the circumstances, we note that Sergeant Bieg had already completed his investigation, long before the initial use of force report was commissioned by Cst. Dickhout's former counsel. His "Final" Investigation Report had been rendered and Superintendant Petit had written me to the effect that his work had been completed. Secondly, in these unusual circumstances, I only happened to become aware that Cst. Hall's use of force was to have been tabled without notice to me. Had the hearing proceeded as contemplated on December 4, 2009 in the face of a single use of force "expert report", I would have had the option of adjourning the hearing and seeking another such report. Due to my illness, I had the ability to commission a second report. Even if a request for a second report had gone through Sergeant Bieg, it is not clear that he would have chosen to commission one. He and Superintendent Petit had already rendered a Final Investigation Report, which had concluded that Incident #6 did not give rise to any issues pertaining to use of force. My initial reaction to the evidence was different. Either Sgt. Bieg would have concluded that no additional use of force evidence was required and not commissioned a second use of force report, or else he would have asked for one, resulting in me acquiring a second report which is exactly what occurred. Therefore in my view, to insist on involving Sgt. Bieg at this late stage would amount to a triumph of form over substance in these unique circumstances.
>
> Here, as I indicated through counsel I have no particular expertise on the "use of force" and therefore sought a broader perspective in order to assess the "expert report" prepared and commissioned by the Applicant. Knowing that Mr. McKay's report would immediately be provided to his counsel, I fail to see any reasonable apprehension of bias in these circumstances. The Applicant argues that contact between Mr. McKay and myself 'occurred *ex parte* and without the prior knowledge or consent of the defence'. For reasons that follow, it is my conclusion that no such "consent" is required in these circumstances.

[20] The respondent went on to review the relevant jurisprudence in his reasons. He concluded that the facts in this case are distinctly different from those in cases where a reasonable apprehension of bias has been found.

DISCUSSION

The legislative framework

[21] Section 112 of the *Act* sets out the powers of the Discipline Authority following receipt of the final investigation report regarding a misconduct complaint. It provides, in part:

> **112** (1) Within 10 business days after receiving an investigating officer's final investigation report in respect of the conduct of a member or former member, the discipline authority must
>
> (a) review the report and the evidence and records referenced in it,
>
> (b) subject to subsection (6), provide
>
> (i) the complainant, if any, with a copy of the final investigation report, and
>
> (ii) the member or former member with a copy of the final investigation report and the evidence and records referenced in it, and
>
> (c) notify the complainant, if any, the member or former member, the police complaint commissioner and the investigating officer of the next applicable steps to be taken in accordance with this section.
>
> ...
>
> (3) If, on review of the report and the evidence and records referenced in it, the discipline authority considers that the conduct of the member or former member appears to constitute misconduct, the discipline authority must convene a discipline proceeding in respect of the matter, unless section 120 (16) *[prehearing conference]* applies.
>
> (4) If, on review of the report and the evidence and records referenced in it, the discipline authority decides that the conduct of the member or former member does not constitute misconduct, the discipline authority must include that decision, with reasons, in the notification under subsection (1) (c).

[22] The *Act* does not provide for a Discipline Authority to conduct his or her own investigation into an allegation of police misconduct. Rather, that function is delegated to an investigating officer, who prepares and submits the final investigation report and, if the Discipline Authority so directs, conducts any further investigation required.

The standard of judicial review

[23] It is unnecessary for the court to consider the appropriate standard of judicial review when a decision is challenged based on a denial of procedural fairness and natural justice. Rather, the proper approach is to ask whether the requirements of procedural fairness and natural justice were met in the particular circumstances of the case: *Moreau-Berube v. New Brunswick*, [2007] 1 S.C.R. 247 at para. 74; *Commissioner of Ontario Provincial Police v. MacDonald et. al.*, 2009 ONCA 805 at paras. 34-38.

The duty of fairness

[24] The duty of fairness applies to all administrative bodies. The extent of the duty, however, will depend on the nature and function of the particular administrative body in question: *Newfoundland Telephone Company v. Newfoundland (Board of Commissions of Public Utilities)*, [1992] 1 S.C.R. 623.

[25] In *Newfoundland Telephone Company*, Cory, J. outlined the test for determining whether there is a reasonable apprehension of bias. He stated at page 636:

> The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased. It is, of course, impossible to determine the precise state of mind of an adjudicator who has made an administrative board decision. As a result, the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness. To ensure fairness the conduct of members of administrative tribunals has been measured against a standard of reasonable apprehension of bias. The test is whether a reasonably informed bystander could perceive bias on the part of an adjudicator.

[26] Put another way, the test is:

> What would an informed person, viewing the matter realistically and practically and having thought the matter through, conclude?
>
> *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369

[27] An allegation of reasonable apprehension of bias must be considered carefully. The threshold is high. Each case will be uniquely fact driven and a real likelihood or probability of bias must be demonstrated before a positive finding is justified: *R. v. S.(R.D.)*, [1977] 3 S.C.R. 484. In order to support such a finding, the apprehension of bias must be real in the sense that there is some fact or evidence from which a reasonable person would conclude the adjudicator may not have had an open mind: *Merchant v. Law Society (Alberta)*, 2007 ABQB 658.

[28] There is a presumption of judicial impartiality and integrity. This is an essential element underpinning the high threshold for a finding of reasonable apprehension of bias: *MacDonald*. In *Merchant*, Kent, J. cited Cory, J.'s explanation for the high threshold requirement in *S.(R.D.)*:

> [A finding of reasonable apprehension of bias] is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. See Stark, supra at para. 19-20. Where reasonable grounds to make such allegation arise, counsel must be free to fearlessly raise such allegations. Yet, this is a serious step that should not be undertaken lightly.

[29] The right to be treated fairly is an unqualified and independent right of every person who appears before an administrative body. The existence of a reasonable apprehension of bias is inconsistent with a fair hearing. Accordingly, a decision reached by a tribunal which denied a fair hearing is void rather than voidable. It cannot be cured by the tribunal's subsequent decision and a reviewing court cannot deny the right to an impartial hearing based on its own view as to what the result might have been had a fair hearing taken place: *Newfoundland Telephone Company*; *Lee v. College of Physicians and Surgeons of Ontario*, [2004] CanLII 32260 (Div.Ct.).

[30] Despite the foregoing, the court retains a discretion on judicial review in deciding whether to intervene in the administrative process and grant a particular remedy. One factor for consideration is the existence of an effective right of appeal. A finding of bias does not automatically result in the exclusion of a legislated appeal

route, although the overall appearance of fairness is of paramount concern in all cases: *Merchant*.

Private communications outside the hearing process

[31] The leading case on the issue of private communications between an adjudicator and a witness is *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105. In *Kane* the Supreme Court of Canada held that unless a decision-maker is expressly or by necessary implication empowered to act *ex parte* he or she must not hold private interviews with witnesses or hear evidence in the absence of a party whose conduct is under scrutiny. The court also noted that administrative tribunals are free, within reason, to determine their own procedures, and they are not fettered by the strict evidentiary and other rules applicable to proceedings before courts of law: see also *Dubé v. Bolduc* (1997), 194 N.B.R. (2d) 135; *Spence v. Prince Albert (City Commissioner of Police)* (1987), 53 Sask. R. 35; *Braemer Bakery Ltd. v. Manitoba (Liquor Control Commission)* 1999 CarswellMan 562.

[32] In *Merchant*, Kent, J. considered a telephone call made by the Chair of the Hearing Committee of the Law Society of Alberta to a witness in a disciplinary proceeding. She held that the occurrence of an *ex parte* communication in such a context does not automatically void the process, and a pragmatic approach to analysis must be undertaken. It is the content and nature of the communication and surrounding circumstances that must be considered in determining whether an informed bystander would conclude that a reasonable apprehension of bias arises.

[33] Kent, J. held that the requisite high threshold was met in the circumstances that prevailed in *Merchant*. In so finding she stated:

> The telephone call was made to determine whether a representation made by the Applicant about sending a letter of apology was true. Although one could speculate about the reason for the call, that is irrelevant. The contact between the Hearing Chair and the witness was not accidental in the sense that an inadvertent comment was made during a conversation about other matters. Neither was the contact innocuous. It was intended to gather information. In my view a reasonable person could conclude that by making

> the call, the Hearing Chair stepped out of the role of impartial adjudicator and took on a investigatory role. It is not the content of the call that is significant. Rather it is stepping out of the role of impartial adjudicator which is critical. That creates a reasonable apprehension of bias.

ANALYSIS

[34] In this case the petitioner emphasizes that the respondent contacted and met with Mr. McKay in order to gather information. In so doing he submits the respondent stepped out of the role of impartial adjudicator and took to an investigatory role. As in *Merchant*, the contact at issue was intentional and directed at the gathering of information on a key issue for determination at the hearing. According to the petitioner, the fact that the report was later produced to the defence is irrelevant. It is the stepping outside the role of impartial adjudicator that raises a reasonable apprehension of bias and renders the process unfair. In these circumstances, taking into account the seriousness of the disciplinary finding for his career, the petitioner seeks an order setting aside the Decision and remitting the matter for appointment of a new Discipline Authority.

[35] The respondent replies that his contact with Mr. McKay was made solely for the purpose of commissioning an expert report, which report was to be provided to the petitioner and considered later at the disciplinary hearing. In his submission there is nothing in the surrounding circumstances to support the inference that he took on an investigatory role or did not retain an open mind. In addition, he emphasizes that he did not hear any evidence or receive submissions from one party in the absence of another. Rather, he directed Mr. McKay to investigate and report in an area in which Mr. McKay's special expertise would be of value in the disciplinary proceedings. He also emphasizes that the petitioner was provided with a copy of the McKay report and retains the ability fully to test it by way of cross-examination at the disciplinary hearing.

[36] The respondent relies heavily on the relevant context in support of his submissions. He notes that, as Disciplinary Authority, he comes to the hearing process with prior exposure to the evidence, concerning which he has already made

a preliminary assessment. In these circumstances, in his submission, the commissioning of an additional report was entirely innocuous. This is particularly so given the unusual circumstances involving the adjournment and late submission of the Hall Report, which the respondent says he accepted in an effort to be fair to the petitioner.

[37] Despite his counsel's able submissions, I cannot agree with the respondent. In my view, the nature of the legislative scheme is clear. The Discipline Authority's role pursuant to the scheme is adjudicative, not investigative. It was, therefore, incumbent upon the respondent to remain detached from the information gathering process. By meeting privately with Mr. McKay to commission the report and personally providing him with evidence required for that purpose, in my view he failed to remain sufficiently detached.

[38] Although it is true that, as Discipline Authority, the respondent made a preliminary assessment of the evidence in advance of the hearing it is also true that the evidence in question was independently gathered by the designated investigator. This process was followed because, pursuant to the legislative scheme, the investigative role is for the appointed investigator, not for the Discipline Authority.

[39] I conclude that the respondent stepped out of the role of impartial adjudicator when he contacted and met privately with Mr. McKay to gather further information for consideration at the disciplinary hearing. Like Kent, J. in *Merchant* I find that his reason for so doing, however well-intentioned, is irrelevant beyond the fact that his purpose was to obtain further information on the key issue for determination. In these circumstances, I am satisfied that an informed person could form the view that the respondent created a reasonable apprehension of bias. This is particularly so given that he had reached a preliminary conclusion on the existing evidence which differed from that of the investigator, Sgt. Bieg, as well as that expressed in the Hall Report.

[40] I also conclude that the availability of cross-examination at the disciplinary hearing does not provide an adequate remedy to the petitioner. Indeed, in my view

the prospect of cross-examination underscores the problem, from a procedural fairness perspective, created by the respondent's private meeting with Mr. McKay. It is easy to imagine Mr. McKay being cross-examined on his discussion with the respondent and its impact prior to formulation of his opinion, particularly as that opinion aligns with the respondent's own assessment and contradicts the opinions expressed in the FIR and the Hall Report. It is also easy to imagine that an informed person, viewing the matter realistically, could reasonably conclude the respondent may be unable to adjudicate upon Mr. McKay's answers impartially, given his personal participation in the subject matter of such cross-examination.

[41] The petitioner's application is granted.

Dickson, J.

DICKSON, J.