ALBERTA LAW ENFORCEMENT REVIEW BOARD

Citation*: EF v Edmonton (Police Service)*, 2015 ABLERB 001

Date: 20150107

Appellant: EF

Respondent: Chief of Police, Edmonton Police Service

Officers: Cst. C. Gabora (No. 1802), Cst. A. Maze (No. 2514), Det. D. Pelech (No. 1350), Cst. D. Smith (No. 2335), Insp. D. Jolly, Insp. D. Strang

Panel Members: David Loukidelis QC, Dale Fedorchuk QC and Edward Lawson

Summary: The appellant over time made numerous complaints of sexual assault, all related to the same situation, to the Edmonton Police Service. In the case of each complaint, the various assigned police officers concluded that there was insufficient evidence to support a charge and the investigations were closed. The appellant brought complaints against all of the officers involved in the various investigations, suggesting they were biased because they focussed on her expressed desire for financial compensation as a victim of crime. The Chief dismissed the complaints on the basis that there was no reasonable prospect of conviction at a disciplinary hearing. The Chief's decision was within the range of reasonable, acceptable outcomes.

Authorities Considered: *EF v Edmonton (Police Service)*, 2014 ABLERB 042; *Calgary Police Service v Alberta (Law Enforcement Review Board)*, 2013 ABCA 124; *Pelech v Alberta (Law Enforcement Review Board)*, 2010 ABCA 400; *Land v Alberta (Law Enforcement Review Board)*, 2013 ABCA 435; *Newton v Criminal Trial Lawyers' Association*, 2010 ABCA 399; Edwards *v Alberta (Law Enforcement Review Board)*, 2010 ABCA 77; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62*; Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61; *Construction Labour Relations v Driver Iron Inc.*, 2012 SCC 65; *EllisDon Corporation v Ontario Sheet Metal Workers' and Roofers' Conference and International Brotherhood of Electrical Workers, Local 586*, 2014 ONCA 801; *Wall v Office of the Independent Police Review Director*, 2014 ONCA 884

Legislation Considered: *Police Act*, RSA 2000, c P-17; *Police Service Regulation*, Alta Reg 356/1990

INTRODUCTION

[1] In 1998, the appellant[1] filed a complaint with the Edmonton Police Service ("EPS") about a sexual assault that she said took place in 1996. The matter was investigated by Detective Johnson, who concluded that there was insufficient evidence to support a criminal charge against the alleged assailant. The appellant was referred to victim services and the investigation was closed, a decision with which the appellant agreed, according to Detective Johnson's report.

[2] In 2006, the appellant again contacted the EPS and indicated she wanted the investigation to be re-opened. She was interviewed by respondent Gabora, who reviewed all of the evidence and concluded that there was insufficient evidence to support a charge of sexual assault.

[3] In June of 2010, the appellant provided a 49-page statement detailing the sexual assault allegation to respondent Smith, who was working with the EPS Recruitment and Diversity Unit. He passed the statement on to respondent Jolly, of the Sexual Assault Unit, in October of 2010.

[4] In September of 2010, the appellant met with a representative of the Edmonton Police Commission to express her dissatisfaction with the 2006 investigation into her allegations. She declined to file a complaint at that time, but in October of 2010 sent a letter of complaint regarding the 1998 and 2006 investigations to the Professional Standards Branch ("PSB") of the EPS.

[5] The matter was assigned for investigation by respondent Strang and respondent Maze, who interviewed the appellant. When respondent Maze interviewed respondent Gabora, she indicated that respondent Gabora noted the appellant's desire for financial compensation as well as her inability to provide any new information with respect to the sexual assault allegations.

[6] While PSB was conducting its investigation, respondent Jolly arranged to have the sexual assault file reviewed by respondent Pelech, as well as the statement that the appellant had provided to respondent Smith. Respondent Pelech concluded no new allegations of sexual assault were made out.

[7] Respondent Maze concluded that that the complaints against Detective Johnson (1998 investigation) and respondent Gabora (2006 investigation) were time-barred (with one

[1] In an earlier decision, the Board directed that the appellant's identity as a victim of alleged sexual assault be protected: *EF v Edmonton (Police Service)*, 2014 ABLERB 042.

exception in relation to respondent Gabora, as discussed below). Respondent Strang commented that "…It appears as though this complaint was born out of [the complainant's] desire to be financially compensated."

[8] The appellant filed a new complaint on June 30, 2011, followed by a 16-page statement in September of 2011. She was interviewed by PSB Investigator Moser in December of 2011. There was a further undated, unaddressed letter that referenced a phone call in June of 2012, which purported to provide further details and clarity with respect to the allegations against respondents Smith and Maze.

[9] The Chief dismissed the appellant's complaints in a letter dated December 27, 2013. In each instance, the Chief either found that there was insufficient evidence to proceed any further or that the actions of the police officer did not rise to the benchmark of misconduct under the *Police Act*.

[10] The appellant filed two notices of appeal with the Board, dated January 6, 2014 and January 30, 2014.

[11] At the hearing of this matter, the appellant indicated that she was abandoning her complaint against respondent Jolly.

ISSUES

[12] The only issue to be decided in this appeal is whether the decision of the Chief to dismiss the appellant's complaints without sending the allegations to a hearing was reasonable in light of the facts and the law.

[13] The appellant urges the Board to find that the Board's civilian oversight mandate is engaged in this matter and that it should apply a standard of review of correctness.[2] The appellant argues that the investigation into this matter was negligent and biased and that therefore the integrity of the investigative process is put in issue. Further, the failure of the Chief to address this flaw in the investigation means that the Board should not give any deference to the Chief and his decision. The respondents argue that the facts demonstrate the exact opposite: the investigation was transparent and was not tainted or flawed in any way. They submit that the proper standard of review is reasonableness. In reviewing the investigation, the Board finds no evidence that it was flawed or tainted such that it would

[2] The Court of Appeal has made it clear that the civilian oversight mandate is an original mandate. Though we leave it to another day, we note here that it is not at all clear that the mandate involves a standard of review at all. See, for example, *Newton v Criminal Trial Lawyers' Association*, 2010 ABCA 399 at para 61.

engage the civilian oversight mandate of the Board. The Board finds that the standard of review in this matter is reasonableness.

DISCUSSION

Standard of Review

[14] The standard of review with respect to a decision by a chief of police to dismiss a complaint without a hearing is that of reasonableness, absent anything that would engage the civilian oversight mandate of the Board.[3]

[15] The Board will only intervene if the Chief's decision is unreasonable or where the Board concludes the investigation or proceedings before the Chief were tainted. It is not sufficient that the Board might have come to a different conclusion. Because the Board concludes that it could have been reasonable to lay charges does not mean that it was unreasonable for a chief to decide not to.[4]

[16] The test regarding when a chief should refer a complaint to a hearing under s 45 of the Act is whether there is a reasonable prospect of conviction.[5] The reasonable prospect of conviction test is similar to that for committing a criminal charge to trial after a preliminary inquiry: is there enough evidence that, if believed, could lead a reasonable and properly instructed person to convict the police officer at a disciplinary hearing?[6] This test is designed to ensure that incredible or baseless complaints are dismissed without a chief having to order a hearing. This allows a limited weighing of evidence for such purposes.[7] The case law is clear that a chief is not to make findings of fact or credibility.[8]

Was the Chiefs' decision reasonable?

[17] The appellant's complaints fall within several broad categories: bias, failure to get facts right, and the dismissal or minimization by the respondents of the appellant's sexual assault-harassment complaints based upon their belief that the appellant was motivated primarily by financial considerations. Further, the appellant alleges that, at the time that the Chief made his

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[3] *Calgary Police Service v Alberta (Law Enforcement Review Board)*, 2013 ABCA 124 ["*Cody*"].
[4] *Pelech v Alberta (Law Enforcement Review Board)*, 2010 ABCA 400 ["*Pelech*"], at para 26.
[5] *Land v Alberta (Law Enforcement Review Board)*, 2013 ABCA 435 ["*Land*"], at para 30. This was the finding in *Cody* at paras 24-27. In so finding, the Court referred to its earlier decisions in *Edwards v Alberta (Law Enforcement Review Board)*, 2010 ABCA 77, and *Pelech.*
[6] *Land* at paras 57 and 62.
[7] *Land* at paras 58 and 59.
[8] *Land* at para 53.

decision, he did not have the entirety of the PSB file in front of him and that, therefore, he was not fully informed, rendering his decision unreasonable.

[18] The respondents argue that the appellant's complaints regarding her sexual assault are lengthy and rambling, with little specificity. They contend that the presentation of the complaints is such that it makes it difficult to investigate and that there is little in the way of corroborating evidence that would support her allegations. With respect to the various references to the appellant being interested in financial compensation, the respondents argue that there were such numerous references to financial compensation by the appellant that it was not unreasonable for the respondents to note it and comment on it.

Respondent Gabora

[19] The appellant alleged that respondent Gabora improperly informed respondent Maze that the appellant was only trying to obtain financial compensation. This was the only allegation against respondent Gabora that was not time-barred. The appellant relied upon the report of respondent Maze wherein she stated that respondent Gabora told her:

> …that [the appellant] has come full Circle, meaning she has tried every avenue to get compensated financially. Said she has dealt with [Ins.] John Ratcliff in regard to financial benefits and was declined. Cst. Gabora said she in 2006 when she interviewed [the appellant], she was unable to provide any information new or otherwise to support charges. Indicated that her situation did not meet the requirements for a sexual assault. Said the interview was videotaped and report was submitted. Stated that [the appellant] was an ongoing problem and attempting to get financial benefits.[9]

[20] The appellant argued that respondent Gabora was not required to provide any explanation for her comments and that she simply stated she did not believe she would have anything to add. The appellant argued that there is no evidence that respondent Gabora's comments "were not intended to be malicious or misleading."[10]

[21] In his decision, the Chief noted that respondent Gabora indicated she had nothing to add with respect to the investigation she concluded in 2006, and that her comments with respect to the appellant were based on "her vague recollection of her dealings with you approximately four years prior."[11] The Chief concluded that he was satisfied that respondent Gabora was not intentionally malicious or misleading.

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[9] PSB Investigative Summary, record, p 73.
[10] Appellant's written submission, p 4.
[11] Record, p 8, para 4.

[22] A reading of the record did not suggest any reasonable basis for the Chief to form the opinion that respondent Gabora acted maliciously or with bad faith towards the appellant. Further, there was sufficient evidence in the record to support the conclusion that the appellant was concerned about financial compensation. Observations to this effect by respondent Gabora could not, on the evidence, have formed a reasonable prospect of conviction for misconduct of respondent Gabora. In these circumstances, the conclusion reached by the Chief was reasonable.

Detective Pelech

[23] The main complaint against respondent Pelech allegedly appears to be the appellant's concern that he had dismissed her complaints due to bias and that he focused on her supposed expressed need for financial compensation. Additionally, the appellant felt that respondent Pelech should not have been assigned to conduct the review of her matter as he had previously been the subject of disciplinary proceedings.

[24] Respondent Pelech argued that he had conducted a thorough review of a voluminous file and that the review did not focus inordinately on any financial compensation being sought by the appellant; in fact, no such mention was made.

[25] In his decision, the Chief dismissed the complaint against respondent Pelech, stating that the appellant failed to provide any evidence to suggest that respondent Pelech was biased in any manner in his conclusions regarding the appellant's sexual assault allegations.

[26] The Board finds the Chief's conclusion regarding alleged bias on the part of respondent Pelech to be reasonable. The Board discerns no evidence whatsoever to demonstrate that respondent Pelech displayed, let alone had, any bias toward the appellant. While the Chief did not address the appellant's contention that respondent Pelech focused on compensation, nor did the appellant's counsel point to any basis for this regarding the appellant's supposed need for financial compensation. In reading the report by respondent Pelech, it cannot reasonably be said that he had an inordinate focus on this issue, as the references he made to her application for compensation through the victims of crime process were observations of fact.

[27] The fact that the Chief did not address this issue explicitly, while unfortunate, did not render his decision unreasonable, particularly in light of the lack of evidence to reasonably support the allegation. It is clear that, on judicial review, a court must first seek to supplement and not subvert a decision-maker's reasons and decision. The Board seeks to do the same, recognizing there must be limits to doing so. In the course of an appeal, for one thing, the Board cannot write a chief's reasons or make a decision for a chief. That would, to say the least,

tend to negate the purpose of an appeal in the first place. The Board may, however, discern a chief's implicit reasons where it can reasonably be concluded that a decision has been made on an issue, and if the record as a whole and the context permit it.[12] We have concluded that, in this instance, the record and the context of the Chief's decision permit us to conclude that the Chief implicitly was of the opinion that there was no reasonable prospect of respondent Pelech being convicted at a disciplinary hearing for misconduct for having referred in his work to the appellant's stated desire for compensation. The outcome on this allegation was reasonable and the Chief's decision was therefore reasonable.

Constable Smith

[28] The appellant alleged that respondent Smith also focused unnecessarily upon her supposed need for financial compensation. She further stated that the disposition report provided to the Chief for his review did not deal with this issue at all. As a result, the investigation into respondent Smith was incomplete and flawed and, by extension, the Chief's decision was unreasonable, as it was based upon a flawed investigation.

[29] In oral argument before the Board, the appellant referenced discrepancies between what the appellant told respondent Smith and what respondent Smith's version of events recorded. She argued that these discrepancies require a hearing to determine credibility.

[30] Respondent Smith countered that, in fact, the financial compensation issue was addressed in the disposition report, at pages 27 and 48. Further, it was mentioned in paragraph 57 of the final report. With respect to the discrepancies between versions of events, respondent Smith argued that the appellant's complaint is vague and that it is perfectly possible to have differing versions of events without it rising to the level of misconduct.

[31] The Chief was of the opinion that, while the appellant made a number of allegations, she did not provide any cogent evidence that would support a disciplinary charge. As a result, he dismissed the complaint against respondent Smith. In reviewing the record and the reasons of the Chief, the Board cannot find that the decision by the Chief in this regard is unreasonable. There was sufficient evidence to support his conclusion that the allegations against respondent

[12] We have considered these cases on this issue: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61; *Construction Labour Relations v Driver Iron Inc.*, 2012 SCC 65; and *EllisDon Corporation v Ontario Sheet Metal Workers' and Roofers' Conference and International Brotherhood of Electrical Workers, Local 586*, 2014 ONCA 801. In *EllisDon*, the Ontario Court of Appeal suggested that a reviewing court is "obliged to discern the tribunal's implicit reasons, having regard to the context and the evidentiary record" (para 46). Also see the recent Ontario Court of Appeal decision in *Wall v Office of the Independent Police Review Director*, 2014 ONCA 884.

Smith did not rise to the level of misconduct. Respondent Smith was basing her response upon notes and recollections from several years prior. There do not appear to be discrepancies between her account and that of the appellant that are of such significance as to ground a finding of misconduct of any kind, let alone hold a disciplinary hearing. The Board upholds the decision of the Chief as reasonable.

Inspector Strang

[32] The appellant alleged that respondent Strang was biased against her and that he felt her complaints against respondent Johnson and respondent Gabora were motivated by a desire for financial compensation. She acknowledged that financial considerations were a concern, but were only one of many concerns that she had, yet respondent Strang only focused on this one aspect. As a result, she argued, it blinded him to the validity of her complaints regarding the sexual assault investigations, as he viewed them simply as an attempt to gain money. According to the appellant, there was little if any evidence in the record to support respondent Strang's belief that the appellant was financially motivated to make sexual assault complaints.

[33] Respondent Strang countered that there was sufficient material in the record to show that the appellant was interested in financial compensation that his having commented on it was entirely reasonable. He also argued that his drawing that conclusion did not rise to the level of misconduct.

[34] The Chief affirmed this position in his decision. He noted that respondent Strang in his voluntary response documented several instances where the appellant mentioned financial compensation to police officers or social workers. Further, respondent Strang provided a summary of respondent Maze's report and he had no reason to believe that it was not accurate.

[35] The Board finds that the decision of the Chief on this point was reasonable. There were, again, documented instances of the appellant mentioning financial compensation. Additionally, the record did not disclose any evidence that would substantiate the appellant's claim that mention by respondent Strang of financial compensation blinded him or impaired his ability to review the investigation. The Chief's conclusion on this allegation was reasonable.

Constable Maze

[36] The complaint against respondent Maze was similarly based upon an allegation that she viewed the appellant's sexual assault complaints as being motivated by financial compensation. The complaint against respondent Maze was dismissed by the Chief on the basis that there was

no evidence to support it. The appellant argued that, since no interview of respondent Maze was conducted nor an explanatory report requested, it was unreasonable to say that no evidence exists. In other words, if respondent Maze had been interviewed or required to provide an explanatory report, evidence of her bias would have emerged. The appellant also argued that, given that the Chief's decision was based upon a negligent and biased investigation, his decision was unreasonable.

[37] Respondent Maze argued that no interview or report was requested, likely because she set out all her evidence in her memorandum of December 8, 2010. Additionally, there was ample evidence in the record to establish that the appellant was concerned about financial compensation.

[38] The Chief in his decision stated:

> When you were asked to provide specific allegations pertaining to Constable Maze, you responded that your concerns were based on a perception that inaccuracies about your psychological and financial well-being were being perpetuated by a number of different officers and you were not sure who you were complaining about and why. Based on the preceding, it is my opinion that there is no evidence with which to proceed any further with allegations of misconduct under the *Police Service Regulation*.[13]

[39] The Board finds that the decision of the Chief with respect to respondent Maze was reasonable. There is no evidence to suggest that her investigation was tainted with bias. There is more than sufficient evidence to suggest that the appellant was concerned about financial compensation, at least in part. Mere mention of financial compensation does not rise to the level of misconduct absent clear, tangible evidence of bias on the part of respondent Maze. The Chief's conclusion was, on the evidence, reasonable.

CONCLUSION

[40] The record in this case does not contain enough evidence that, if believed, could lead a reasonable and properly instructed person to convict the respondents at a disciplinary hearing. The Chief's decision to not refer these allegations to a hearing was, therefore, within the range of reasonable, acceptable outcomes.

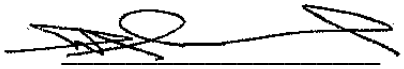
[13] Record, p 9.

[41] For the above reasons, the appeal is dismissed with respect to the Chief's decision that there was no reasonable prospect of a conviction against the police officers.

Edmonton, Alberta

January 7, 2015

David Loukidelis QC
Chair



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