

ONTARIO CIVILIAN POLICE COMMISSION



DATE: October 30, 2015
FILE: 2015 ONCPC 22
CASE NAME: Timms-Fryer and Amherstburg Police Service and Challans

IN THE MATTER OF AN APPEAL UNDER SECTION 87 OF THE *POLICE SERVICES ACT*,
R.S.O.

1990, c..P.15, AS AMENDED

BETWEEN:

Justin Brodie Timms-Fryer

Appellant

-and-

Amherstburg Police Service

Respondent

-and-

Constable Andrew Challans

Respondent

-and-

The Independent Police Review Director

Intervener

DECISION

Panel: Jacqueline Castel, Member
Seppo Paivalainen, Member

Hearing Date: September 30, 2015

Hearing Location: Ontario Civilian Police Commission
250 Dundas Street West, Suite 605
Toronto, ON M7A 2T3

Appearances:

Mr. Fred W. Tranquilli, Counsel for the Appellant

Mr. Ian B. Johnstone, Counsel for the Respondent Service

Mr. Andrew J. Bradie, Counsel for the Respondent Officer

Ms Jean C.H. Iu, Counsel for the Intervener

A. Introduction

1. Mr. Justin Brodie Timms-Fryer (the “Appellant” or the “public complainant”) is appealing the dismissal of the disciplinary charges against Constable Andrew Challans (the “Respondent Officer” or “Const. Challans”) by Superintendent (ret.) Terrence Kelly (the “Hearing Officer”) in his decision of May 12, 2014.
2. The grounds for appeal are:
 - (i) The Hearing Officer breached natural justice and procedural fairness by not inviting the public complainant to play a meaningful role in the hearing even though the public complainant was a party to the proceedings;
 - (ii) The prosecutor did not act in the public interest by failing to effectively cross-examine the Respondent Officer on inconsistent statements and to call the Respondent Officer’s supervisor as a witness;
 - (iii) The Hearing Officer failed to provide sufficient reasons for his decision; and

(iv) The Hearing Officer erred when he concluded that the public complainant's previous encounters with police were relevant.

3. The Respondent Service opposes the first two grounds of appeal and takes no position on the last two.
4. The Respondent Officer opposes all four grounds for appeal.
5. The Independent Police Review Director (the "Director") agrees with the first ground for appeal and takes no position on the other grounds for appeal.

B. Background

6. On December 21, 2010, the public complainant was a passenger in a vehicle on a municipal road in Amherstburg, Ontario. The Respondent Officer stopped the vehicle.
7. As a result of events transpiring during this roadside stop, the public complainant was charged with assaulting a police officer and resisting arrest. The public complainant was subsequently acquitted of these charges.
8. The public complainant filed a complaint with the Director in relation to the December 21, 2010 incident. The Respondent Officer was subsequently charged with four counts of misconduct under the *Police Services Act*, R.S.O. 1990, and c.P.15, as amended (the "Act").
9. Four pre-hearing teleconferences took place prior to the hearing into the disciplinary charges. The transcript of the first teleconference, which took place on December 13, 2011, indicates that the Appellant was present for the call, as a party to the proceedings, but the Hearing Officer did not acknowledge his presence. The

Hearing Officer did acknowledge the presence of the Prosecutor, counsel for the Respondent Officer, the Respondent Officer and the Chief of Police.

10. The transcripts do not indicate whether the Appellant attended the pre-hearing teleconferences of January 26 and May 22, 2012. The Appellant was present and acknowledged by the Hearing Officer at the pre-hearing teleconference of May 14, 2012.
11. A disciplinary hearing was conducted into the allegations of misconduct on multiple dates in 2012 and 2013. The Appellant attended the hearing without legal representation.
12. The Hearing Officer acknowledged that the Appellant was a party to the proceedings on several occasions during the hearing. For instance, the Hearing Officer stated on the second day of the hearing:

“Mr. Brodie, as you’re aware, and I have told you in the beginning, and you are also aware that you have standing.”

Transcripts of Proceedings, November 7, 2012 at p. 6.

13. At the start of the Hearing, the Prosecutor brought a motion for an order excluding witnesses. The Hearing Officer invited counsel for the Respondent Officer to make submissions on the motion. The Hearing Officer did not invite the Appellant to make submissions.

14. After the motion on the exclusion of witnesses, the Respondent Officer's counsel made a motion for further disclosure. The Hearing Officer did not invite the Appellant to make submissions or identify his position with respect to the motion.

15. After the examination-in-chief and cross-examination of the Respondent Officer, the Hearing Officer asked the Appellant whether he wished to ask the Respondent Officer any questions. The following exchange occurred:

SUPERINTENDENT KELLY: Do you have any questions?

MR. TIMMS-FRYER: Could we go to lunch and possibly I can consult --

SUPERINTENDENT KELLY: I beg your pardon?

MR. TIMMS-FRYER: Could we go to lunch and possibly I can consult --

SUPERINTENDENT KELLY: No

MR. TIMMS-FRYER: -- with Mr. Cowling?

SUPERINTENDENT KELLY: No

MR. TIMMS FRYER: -- No? I don't have any opportunity then to consult with. I haven't been afforded the opportunity, or been prepared that he would be done at this time.

SUPERINTENDENT KELLY: I'll give you a little time you can speak to [the Prosecutor]".

Transcripts of Proceedings, September 20, 2013 at p. 150.

16. The exchange between the Hearing Officer and the Appellant occurred at 12:15 p.m. The hearing resumed 15 minutes later. The Prosecutor informed the Hearing Officer that he spoke to the Appellant and that the Appellant had no questions for the Respondent Officer. The hearing was then adjourned for the day.
17. The Hearing Officer did not ask the Appellant if he wished to cross-examine any of the other witnesses, nor did the Hearing Officer ask the Appellant if he wished to call any of his own witnesses.
18. At the suggestion of the Prosecutor, after the other parties had made closing submissions, the Hearing Officer asked the public complainant if there was anything he wished to “say at this time”. The Appellant responded in the negative.
19. On the day scheduled for judgment, the Respondent Officer brought a motion to reopen the defence to present evidence on an incident that took place in March 23, 2014. The Hearing Officer asked the public complainant if he had received the notice of motion, and he indicated that he had. The following exchange occurred:

SUPERINTENDENT KELLY: I just want to make sure you're aware of that and you've got copies of these documents.

MR. TIMMS-FRYER: Yes, I have read it.

SUPERINTENDENT KELLY: I wonder if it would be possible then if we could go off the record and I get the opportunity to speak to counsel.

MR. BRADIE: Certainly.

SUPERINTENDENT KELLY: If that would be permissible.

MR. COWLING: And Mr. Timms-Fryer should also ---

SUPERINTENDENT KELLY: Yes, I –

MR. COWLING: -- be present –

SUPERINTENDENT KELLY: Yes, I –

MR. COWLING: -- for those conversations.

SUPERINTENDENT KELLY: When I say counsel, I include Mr. Bradie as well along with you Mr. Cowling.

(Off the Record Discussion)

Transcript of Proceedings, May 12, 2014 at pp. 13-14.

20. Following the off the record discussion and ruling on the motion, counsel for the Respondent Officer advised that he reconsidered his position, in light of the Hearing Officer's ruling, and would not be calling the evidence.
21. In his decision of May 12, 2014, the Hearing Officer found the Respondent Officer not guilty of each of the four counts of misconduct.

C. Decision

22. The Appeal is allowed on the first ground and a new hearing is ordered. The Hearing Officer breached natural justice and procedural fairness.

D. Reasons

24. Subsection 83(3) of the Act provides that “[t]he parties to the hearing are the prosecutor, the police officer who is the subject of the hearing and, if the complaint was made by a member of the public, the complainant.” The Act makes no distinction between the procedural rights of the police officer and those of the complainant.
25. The Ontario Divisional Court made clear in Figueiras v. York (Regional Municipality) Police Services Board [2013] O.J. No. 5911, 2013 ONSC 7419, 317 O.A.C. 179 (Div. Ct.) that where the legislation does not make a distinction between the procedural rights of the police officer, on the one hand, and the complainant, on the other, natural justice and procedural fairness dictates that the public complainant be given the same procedural rights as the respondent officer:

In a statutory regime that has transparency and public accountability as its fundamental purpose and where, in the legislation, there is no distinction between the procedural rights afforded to the officer and the procedural rights afforded to the complainant, natural justice and procedural fairness requires that the complainant be afforded the same opportunities as the officer. (paragraph 43)

26. The Director referred to a number of decisions from the Ontario Court of Appeal and the Ontario Superior Court, where the duty of trial judges or justices of the peace to unrepresented litigants was addressed. The Director submitted that an adjudicator

under Part V of the Act owes the same type of duty to an unrepresented public complainant. See: R v. McGibbon (1988), 45 C.C.C. (3d) 334 (Ont. C.A.); R v. Tran (2001), 55 O.R. (3d) 161 (C.A.); David v. David [1999] O.J. No. 3930; R. v. Zimmerman [2005] O.J. No. 1647; and R. v. Rijal [2010] O.J. 3440.

27. Counsel for the Respondent Officer submitted that the duty a hearing officer owes a public complainant under the Act is lower than the duty a trial judge or justice of the peace owes an unrepresented defendant. He argued that the cases referred to by the Director are distinguishable because in those cases, the unrepresented defendant was accused of an offence or crime and risked losing his liberty, paying a fine, or suffering some other form of penalty.
28. We agree with the submission that a hearing officer owes a different duty to a public complainant and, given the nature of the interest at stake, that duty is lower. However, the public complainant is still owed a duty of procedural fairness. This duty is influenced and shaped by the importance of a civilian oversight regime for police in Ontario. Under that regime, it is open for members of the public to make complaints about police conduct. In the present case, the Hearing Officer failed to meet the duty and thus deprived the complainant of procedural fairness.
30. Although the nature of the duty is different, we do find the jurisprudence of the Court of Appeal on the duties of trial judges to unrepresented litigants to be instructive with respect to the duties owed by adjudicators, presiding over hearings under Part V of the Act, to unrepresented public complainants.
31. The Ontario Court of Appeal has made clear that although a trial judge is not required to become an unrepresented litigant's advocate and has discretion over the amount of assistance to provide, there is a "minimum level of assistance that is

required in order to ensure that the defendant obtains a fair trial.” The trial judge is required to explain the process to the unrepresented litigant, guide him or her throughout the process, and accommodate his or her unfamiliarity with the process. See: R v. McGibbon, *supra*, R v. Tran, *supra*, and Dauids v. Dauids, *supra*.

32. Counsel for the Respondent Service submitted that natural justice and procedural fairness require that the public complainant be given an opportunity to participate and argued that the public complainant was told, on the record, that he had standing at the proceeding and was given an opportunity to participate; however, he chose not to participate.
33. The jurisprudence of the Ontario Court of Appeal requires that an adjudicator go further than simply advising an unrepresented litigant that he has standing and allowing him an opportunity to participate. This alone falls short of the “minimum level of assistance” which would be required to accommodate an unrepresented litigant’s unfamiliarity with the process and ensure a fair hearing.
34. We have reviewed all the transcripts of the four pre-hearing teleconferences and the multi-day hearing and noted several references to the public complainant having standing at the proceedings, but no reference to the Hearing Officer explaining to the public complainant the rights that go with having standing, the roles of the parties to the proceedings, and the process which would be followed. There was also no evidence on the record of the Hearing Officer guiding the public complainant throughout the process.
35. In addition, the Hearing Officer did not treat the public complainant like an equal participant in the proceedings when he failed to acknowledge him at one of the pre-hearing teleconferences and failed to ask him if he wished to call evidence,

questions witnesses (except the Respondent Officer), and make submissions on at least two motions. For the most part, the record indicates that the public complainant was largely ignored. It was only at the urging of the Prosecutor, that the Hearing Officer asked the public complainant if he wished to say anything after the other parties made their closing submissions.

36. The only time in the proceedings that the Hearing Officer asked the public complainant if he wished to cross-examine a witness was in the case of the Respondent Officer. However, the Hearing Officer denied the public complainant the reasonable request of obtaining advice on the matter over the lunch break, notwithstanding that it was just after noon at the time. Instead, the Hearing Officer told the public complainant he could take a little time to consult the Prosecutor.

37. A minimum level of assistance, to ensure meaningful participation by the unrepresented public complainant, would have required the Hearing Officer to do the following, on the record:
 - Confirm whether the public complainant was aware that he was entitled to be represented by legal counsel at the proceedings and whether he was waiving the right to legal representation.

 - Explain the roles of the parties at the proceeding and the process that would be followed. This would include the right of each party, including the public complainant, to call witnesses, introduce evidence, object to evidence adduced, cross-examine witnesses, and make submissions on all motions and at the end of the hearing.

 - Explain the role of the adjudicator in the proceedings, including his role in relation to the unrepresented public complainant.

- Confirm that the public complainant understands the process and his role in it.
- Ask the public complainant, at the appropriate time, if he would like to call any witnesses.
- Ask the public complainant, at the appropriate time, if he would like to question each of the witnesses of the prosecution and the defence.
- Ask the public complainant if he would like to make submissions on all motions and at the end of the hearing.

38. The record reveals that the Hearing Officer failed to provide any of the assistance outlined above except that he asked the public complainant if he wished to say anything at the end of the hearing, and even that was at the behest of the Prosecutor.

39. In failing to provide this minimum level of assistance to the public complainant, the Hearing Officer breached natural justice and denied the public complainant the right to procedural fairness. On this basis alone, the Hearing Officer's decision cannot stand, and it is not necessary for us to address the other grounds of appeal.

41. In light of the denial of natural justice and procedural fairness by the Hearing Officer, the only appropriate remedy is for us to order a new hearing. This is not an order we make lightly, as we are cognizant of the passage of time since the incident giving rise to the charges occurred. We also recognize that the Respondent Officer is not to blame for the denial of natural justice and procedural fairness at the hearing, even though he will be forced to pay a price for it by enduring a second hearing on the

same charges. To confirm the decision, as counsel for the Respondent Officer urged us to do, or to substitute it with findings of guilty, as counsel for the Appellant urged us to do, would necessitate speculation about the outcome of the hearing had the public complainant been afforded the opportunity to participate meaningfully, and such speculation would not be proper.

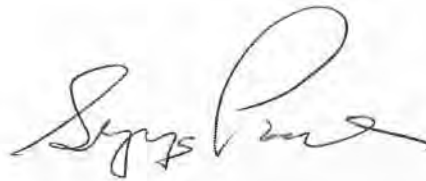
E. Conclusion

42. For the reasons set out above, the appeal is allowed and a new hearing is ordered. We urge that this hearing be convened as expeditiously as possible.

DATED AT TORONTO THIS 30th DAY OF OCTOBER, 2015



Jacqueline Castel
Member



Seppo Paivalainen
Member

