Court of King's Bench of Alberta

Citation: Kyambadde v Calgary Police Service, 2024 ABKB 370

Date: 20240621
Docket: 2201 05355
Registry: Calgary

Between:

Benjamin Kyambadde

Applicant/Respondent

- and -

Calgary Police Service, Office of the Chief Constable

Respondents

Reasons for Decision
of the
Honourable Justice G.H. Poelman

I. Introduction

[1] This decision addresses an application by Calgary Police Service ("CPS") officers to set aside a judicial review decision because the originating application was not served on them (as persons directly affected by the judicial review application) or the Minister of Justice, both said to be required under rule 3.15(3) of the *Alberta Rules of Court*, Alta Reg 124/2010.

[2] On March 18, 2021, Mr. Kyambadde (on break from his shift as a Walmart employee) was apprehended by CPS officers and detained for about fifteen minutes. Ultimately, Mr. Kyambadde was released without charges. The officers mistook Mr. Kyambadde for a suspect they were attempting to locate in the store.

[3] On March 29, 2021, Mr. Kyambadde filed a complaint to the chief of police ("Chief") against Csts. Jon Carston, Ryan Goddard and Ryan Johnson.

[4] The Chief disposed of and then dismissed the complaint without referring it to a hearing under section 45(4) of the *Police Act*, RSA 2000, c P-17, implicitly coming to the opinion (1) that the allegations were not of a serious nature and (2) that there was insufficient evidence to prove the alleged misconduct.

[5] Mr. Kyambadde applied for judicial review of the Chief's decision. A hearing was held before me on October 24, 2023. Mr. Kyambadde and the respondents (CPS and Office of the Chief Constable) were represented by counsel. In my written decision of January 8, 2024 (2024 ABKB 13), I found that the Chief's decision must be set aside as unreasonable and directed the matter back to the Chief for reconsideration.

II. Facts

[6] Csts. Carston, Goddard and Johnson were advised by the Chief on December 22, 2021 of his decision dismissing Mr. Kyambadde's complaint without a hearing. Mr. Kyambadde filed his application for judicial review and served it on the Chief, by leaving it with a sergeant, within the six-month deadline imposed by rule 3.15(2). The originating application was not served on the Minister of Justice or Csts. Carston, Goddard and Johnson.

[7] Csts. Carston, Goddard and Johnson submitted affidavits deposing that they were not served or otherwise given notice of the originating application; and that they knew nothing of the application for judicial review until the decision resulting therefrom was reported in the press. Mr. Kyambadde, in his own affidavit, confirmed that his counsel (Calgary Legal Guidance) did not advise him to serve the officers of the Minister of Justice, and that accordingly this was not done. He stated further that he understood the Minister did not take an interest in the proceedings and that "the only result of my judicial review application was that my complaint has been remitted to the chief for reconsideration. The officers are receiving procedural fairness through that process just as they had previously" (affidavit sworn March 7, 2024, para 6).

III. Limitation Period for Judicial Reviews

[8] There are specific rules governing originating applications for judicial review, contained in Part 3, Subdivision 2 of the *Alberta Rules of Court*.

[9] First, there is a limitation period. An originating application for judicial review "must be filed and served within 6 months after the date of the decision": rule 3.15(2). The relevant decision in this case was the Chief's decision issued by a letter dated December 22, 2021, thus making the limitation period six months following. Rule 3.15(2) further provides that rule 13.5, which allows for variation of time periods, does not apply to the six-month limitation period.

[10] Thus, the six-month deadline in rule 3.15 is as absolute as those contained in the *Limitations Act*, RSA 2000, c L-12, and cannot be extended: ***Raczynska v Alberta (Human Rights Commission)***, 2015 ABQB 494 at paras 54, 65 and 76. A firm deadline is important for the rights and responsibilities of those affected by the decision: "all of those people who are directly and indirectly affected by such a decision cannot be left in limbo indefinitely": ***Johannessen v Alberta (Worker's Compensation Board, Appeals Commission)***, 1995 CanLII 9160 (ABQB) at para 34.

[11] Where the six-month time limit for filing and serving an originating application for judicial review is not satisfied, the originating application may be struck: ***Julien v Alberta (Appeal's Commission for Alberta Worker's Compensation)***, 2023 ABCA 81 at paras 3 and 16.

IV. Service Requirements

[12] Rule 3.15(3) sets out specific requirements for service, as follows:

> (3) An originating application for judicial review must be served on
>
> (a) the person or body in respect of whose act or omission a remedy is sought,
>
> (b) the Minister of Justice or the Attorney General for Canada, or both, as the circumstances require, and
>
> (c) every person or body directly affected by the application.

In this case, the rule required service on the Chief, Alberta's Minister of Justice and "every person or body directed affected by the application."

[13] One might be sympathetic with the Minister not being served. Even now, the Minister declines to be involved. How the Minister responds, however, is not determinative. A Crown or statutory body always is implicated in administrative law and thus must be given notice of applications that ask the court to contemplate a judicial review; an order cannot be granted without such notice: ***Peter Lehmann Wines Ltd v Vintage West Wine Marketing Inc***, 2015 ABQB 481 at paras 47 and 48; *ENMAX Corporation v Alberta (Labour Relations Board)*, 2018 ABQB 431 at para 29.

[14] Mr. Kyambadde does not seriously contend that Csts. Carston, Goddard and Johnson are not "directly affected" by the judicial review application, even though his written materials submit that the judicial review concerns the Chief's gatekeeping role to dismiss a complaint without a hearing and thus the Chief's decision-making process. Perhaps it was not necessary for the officers to be named as respondents at the initial stage, but there can be no question of their being directly affected by the judicial review application.

[15] The Chief's decision absolved the officers of the risk of a disciplinary hearing and disciplinary sanctions, regardless of whether the complaint was determined by the Chief or in a hearing. The originating application sought to set aside the Chief's decision and thereby expose the officers once again to the risk of disciplinary sanctions.

[16] Mr. Kyambadde argues, in part, that service on the Chief or CPS was sufficient to encompass service on the officers. That submission has no merit. It is patent from the statutory and regulatory framework that there are many cases in which the Chief and CPS as an organization have interests different from the sworn officers involved in policing. An example of that occurred in this case, where the Chief investigated complaints against the officers and had the authority to impose disciplinary measures if he found the complaints made out.

[17] Further, as submitted on behalf of the officers, the *Police Act* makes plain that an officer is regarded as a public office holder who is independent of the municipality, not its agent or employee, and does not act as a government functionary or agent when investigating a crime or making an arrest: section 38; ***R v Campbell and Shirose***, 1999 CanLII 676 (SCC) at paras 27 and

29-33; and ***Kellie v Calgary (City No.2)***, 1950 CanLII 530 (ABCA). As held in ***MacRae v Feeney***, 2016 ABCA 343, quoting other authority, "police officers can in no respect be regarded as agents or officers of the City. Their duties are of a public nature": at para 15.

[18] Mr. Kyambadde relies on ***Seroya v Calgary (City)***, 2017 ABQB 157, in support of his argument that service on CPS was good service on the officers. That case, however, is inapplicable to this one. It involved service by an individual applicant on the City of Calgary; the question was whether that was effective service on the city administration and the relevant appeal board. It was noted that these were merely internal divisions of the same administrative body, all of which fell under the City of Calgary. That finding cannot be used to include individual police officers as falling within the rubric of a large administrative body such as CPS. The officers and CPS are not the same legal entities.

[19] I conclude, therefore, that Csts. Carston, Goddard and Johnson, as police officers, were legally separate from CPS and the office of the Chief; and were directly affected by the judicial review application. Thus, Mr. Kyambadde was required to serve them with his judicial review application.

[20] There may be cases where actual knowledge of an application may suffice, even where service was not effected: ***Hansraj v AO***, 2004 ABCA 223 at paras 23-37; and ***Poloma Investments v Yuen***, 2016 ABCA 93, *passim.* That possibility does not avail Mr. Kyambadde here: the evidence is that the officers had no knowledge of the proceedings until after the six-month limitation period, when the results were reported in the press.

V. "Fairness" and Judicial Discretion

[21] On Mr. Kyambadde's behalf it is argued that the application to set aside my judicial review decision must be governed by considerations of fairness, and that I have inherent jurisdiction to effect fairness notwithstanding the rules. Mr. Kyambadde relies on rule 1.2 and the rather bald statement in ***Don Reid Upholstery Ltd v Patrie***, 1995 CanLII 9147 (ABQB) at para 4, as follows:

> The appellant suggests that the case law has established "Rules" that must be followed before a default judgment can be set aside. There are no such rules; there is only one rule - the court must do what is fair. The case law merely provides guidance for the exercise of judicial discretion in setting aside judgments.

[22] The ***Don Reid*** case does not ignore the law. It merely makes the point that the court must always exercise its discretion judicially: at para 26. Judicial exercise of discretion means something more than unencumbered notions of fairness.

[23] Using the notion of fairness in the abstract cannot be a foundation for just decisions. What is fair in any case depends on the perspective. I referred earlier to the need for closure in judicial review and the obligation to notify affected parties of proceedings that bear upon their interest. Mr. Kyambadde argues it is not fair, if my decision is set aside and he is out of time to commence a new challenge, that his complaint not be considered on the merits. In response, it might be argued that it is not fair for a court to reopen the officers' jeopardy in judicial review without giving them a right to be heard (as they were in proceedings before the Chief).

[24] More fundamentally, it is illusory to posit a distinction between procedural and substantive fairness. As one learned legal historian and philosopher said, the Western tradition of

legality strikes a balance among rule, precedent and policy and equity: Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, 1983), at 41. Justice does not mean ignoring rules. Our foundational rules (such as 1.2) are an interpretive guide, but cannot be used to subvert rules that specifically address a point such as service requirements and time limitations for judicial review: ***NEP Canada ULC v MEC Op LLC***, 2016 ABCA 201 at para 34; and ***Envision Edmonton Opportunities Society v Edmonton (City)***, 2011 ABQB 29 at para 44.

[25] There are specific procedures and time limitations governing judicial review of administrative decisions. I am not persuaded that there is any legitimate basis on which I can disregard them in this case. Rather, I am bound to observe them.

VI. Conclusion

[26] I conclude that my judicial review decision of January 8, 2024 must be set aside. It followed a hearing that was fully and well argued on behalf of Mr. Kyambadde and the Chief, whose decision was at issue. However, the officers whose conduct was the subject of the complaint were not notified and they had no knowledge of the judicial review application. Alberta's Minister of Justice was not notified. These are strict requirements of a judicial review application and are fatal to Mr. Kyambadde's position.

[27] Further, the strict six-month limitation period for judicial review applications (rule 3.15(2) and (3)) means Mr. Kyambadde's application cannot be heard again. Thus, the action commenced for judicial review is struck, pursuant to rule 3.68.

[28] The parties may arrange a further appearance, if necessary, to address matters arising from this decision.

Heard on the 28th day of May, 2024.
Dated at the City of Calgary, Alberta this 21st day of June, 2024.

G.H. Poelman
J.C.K.B.A.

Appearances:

Gabriel Y.L. Chen
for the Applicant/Respondent on this application

Michael D. Mysak
for the Respondents (Judicial Review Application only) (No Appearance)

James Shymka
for John Carston, Ryan Goddard and Ryan Johnson (Applicants on this application)